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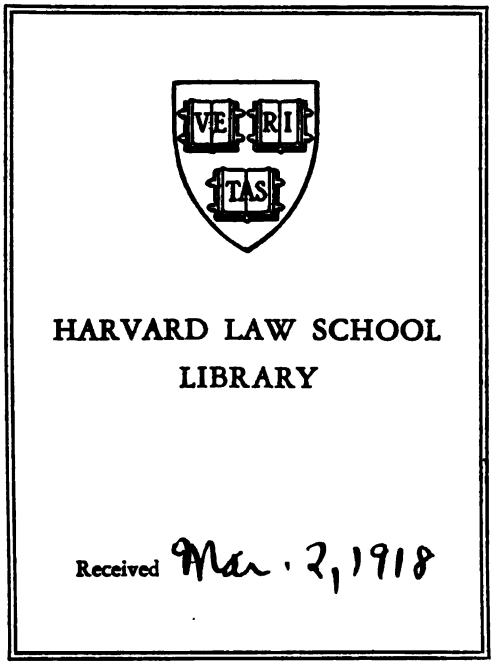

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WITH COMPLETE CITATIONS OF ALL SUBSEQUENT REFERENCES TO THESE DECISIONS IN THE STATE AND FEDERAL REPORTS, AND IN THE NOTES IN THE SEVERAL SERIES OF ANNOTATED REPORTS,

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1824.

BY HENRY WHEATON.

Counselor at law.

VOL. IX.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, Chief Justice.
The Hon. BUSHROD WASHINGTON, Associate Justice.
The Hon. WILLIAM JOHNSON, Associate Justice.
The Hon. THOMAS TODD, Associate Justice.
The Hon. GABRIEL DUVALL, Associate Justice.
The Hon. JOSEPH STORY, Associate Justice.
The HON. SMITH THOMPSON, Associate Justice.
WILLIAM WIRT, Esq., Attorney-General.

MEMORANDUM.—Mr. Justice THOMPSON was appointed the 9th of December, 1823, and took his seat on the bench the 10th of February of the present term. He took no part in the decision of causes argued before that day.

RULES OF COURT.

1. No certiorari for diminution of the record shall be hereafter awarded in any cause unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari shall be made at the first term of the entry of the cause; otherwise the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

2. In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record, as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

3. On Saturday of each week during the sitting of the court, motions, in cases not required by the rules of court to be put upon the docket shall be entitled to preference, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.

MEMORANDUM.

The case of Ogden v. Saunders, and the causes involving the question of the validity of the State bankrupt or insolvent laws, which were argued at the present term by Mr. Clay, Mr. D. B. Ogden and Mr. Haines, for the validity, and by Mr. Webster and Mr. Wheaton, against it, were continued to the next term for advisement. It is the intention of the editor to publish a separate account of these cases, on the rising of the court at the next term, and in anticipation of the annual publication of the reports.

It is also his intention to commence with the next term a new series of the reports, and to reduce the size of the type, so as to give room for the matter produced by the increased business of the court, without swelling the volume to an inconvenient bulk.

REPORTS OF THE DECISIONS

OF THE

Supreme Court of the United States.

FEBRUARY TERM, 1824.

1*] [*Constitutional Law.]

GIBBONS, Appellant, v. OGDEN, Respondent.

The acts of the Legislature of the State of New York, granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the Constitution of the United States which authorizes Congress to regulate commerce, so far as the said acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam.

APPEAL from the Court for the Trial of Impeachments and Correction of Errors of the State of New York.

Aaron Ogden filed his bill in the Court of Chancery of that state, against Thomas Gibbons, setting forth the several acts of the Legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Ful- 2*] ton the *exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by fire or steam, for a term of years which has not yet expired; and authorizing the chancellor to award an injunction, restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the city of New York; and that Gibbons, the defendant below, was in possession of two steamboats called the Stoudinger and the Bellona, which were actually employed in running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York. The injunction having been awarded, the answer of Gibbons was filed, in which he stated that the boats employed by him were duly enrolled and licensed to be employed in carrying on the coasting trade, under the act of Congress, passed the 18th of February, 1793, c. 8, entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the city of New York, the said acts of the legislature of the *state of New York to the contrary not- [*3 withstanding. At the hearing, the chancellor perpetuated the injunction, being of the opinion that the said acts were not repugnant to the constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and

NOTE—The power to regulate commerce, as laid down in this case, is considered and approved in Brown v. State of Maryland, 12 Wheat. 419, 446, 452, and in the Passenger cases, 7 How. 283, 394, 400, 405, 433, 437, 462. In United States v. Peters, 12 Pet. 72, 78, the court say, per Story, J.: "The power to regulate commerce includes the power to regulate navigation as connected with foreign nations and among the states. It was so held and decided by this Court, in the case of Gibbons v. Ogden, 9 Wheat. 189 to 198. It does not stop at the mere boundary line of a State, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land, which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign states and among the States."

This case is also discussed and commented on in regard to the constitutionality of state license laws, in the License Cases, 5 How. 504, 581-584, 588, 600-603.

As to the power of Congress to regulate "commerce among the several States," see as to navigable rivers, obstructions, bridges over same, etc. Smit v. Davenport, 22 How. 227; Haldeman v. Beckwith, 4 McLean, 286; Devoe v. Bridge Co. 3 Am. Law. Reg. 79; Jolly v. Terre Haute Co. 6 McLean, 237; Columbus Ins. Co. v. Peoria Bridge Co. 6 McLean, 70; Willson v. Blackbird C. M. Co. 2 Pet. 245; Pennsylvania v. Wheeling Bridge Co. 18 How. 518; Gilman v. Philadelphia, 3 Wall. 713; Veazie v. Moore, 14 How. 578; Withers v. Buckley, 20 How. 84; U. S. v. The James Morrison, 1 Newb. 241; U. S. v. William Pope, 1 Newb. 256; U. S. v. Railroad Bridge Co. 3 McLean, 517; Woodburn v. Kilburn Co. 1 Abb. U. S. 158; Woodman v. Kilburn Man. Co. 1 Bill. 546; The Vancouver, 18 Int. Rev. Rec. 103; S. C. 2 Sawy. 381; Mason v. Rhinelander, 8 Ben. 163; U. S. v. Coombs, 12 Pet. 72; Heerman v. Beef Man. Co. 1 Fed. Rep. 145; Sinnott v. Davenport, 22 How. 227; U. S. v. Morrison, 4 N. Y. Leg. Obs. 333; Halderman v. Beckwith, 4 McLean, 286; U. S. v. Jackson, 4 N. Y. Leg. Obs. 450.

As to the requirements by State on vessels licensed for coasting trade. Foster v. Davenport, 22 How. 244.

As to conflict between laws of the United States and laws of the States. Amis v. Smith, 16 Pet. 303; Dobbins v. Erie Co. 16 Pet. 435; Barbarie v. Eslava, 9 How. 421; Barbarie v. Mayor of Mobile, 9 How. 451; McGuire v. Commonwealth, 3 Wall. 387.

Correction of Errors, which is the highest court of law and equity in the state, before which the cause could be carried, and it was thereupon brought to this court by appeal.

Mr. Webster, for the appellant, admitted that there was a very respectable weight of authority in favor of the decision, which was sought to be reversed. The laws in question, he knew, had been deliberately re-enacted by the legislature of New York; and they had also received the sanction, at different times, of all her judicial tribunals, than which there were few, if any, in the country, more justly entitled to respect and deference. The disposition of the court would be, undoubtedly, to support, if it could, laws so passed and so sanctioned. He admitted, therefore, that it was justly expected of him that he should make out a clear case; and unless he did so, he did not hope for a reversal. It should be remembered, however, that the whole of this branch of power, as exercised by this court, was a power of revision. The question must be decided by the state courts, and decided in a particular manner, before it could be brought here at all. Such decisions alone gave the court jurisdiction; and therefore, while they are to be 4*] respected *as the judgments of learned judges, they are yet in the condition of all decisions from which the law allows an appeal.

It would not be a waste of time to advert to the existing state of the facts connected with the subject of this litigation. The use of steamboats on the coasts, and in the bays and rivers of the country, had become very general. The intercourse of its different parts essentially depended upon this mode of conveyance and transportation. Rivers and bays, in many cases, form the divisions between states, and thence it was obvious that if the states should make regulations for the navigation of these waters, and such regulations should be repugnant and hostile, embarrassment would necessarily happen to the general intercourse of the community. Such events had actually occurred, and had created the existing state of things.

By the law of New York, no one can navigate the bay of New York, the North River, the Sound, the lakes, or any of the waters of that state, by steam vessels, without a license from the grantees of New York, under penalty of forfeiture of the vessel.

By the law of the neighboring state of Connecticut, no one can enter her waters with a steam vessel having such license.

By the law of New Jersey, if any citizen of that state shall be restrained, under the New York law, from using steamboats between the ancient shores of New Jersey and New York, he shall be entitled to an action for damages, in 5*] *New Jersey, with treble costs against the party who thus restrains or impedes him under the law of New York. This act of New Jersey is called an act of retortion against the illegal and oppressive legislation of New York; and seems to be defended on those grounds of public law which justify reprisals between independent states.

It would hardly be contended that all these acts were consistent with the laws and constitution of the United States. If there were no power in the general government to control this extreme belligerent legislation of the states, the powers of the government were essentially deficient in a most important and interesting particular. The present controversy respected the earliest of these state laws, those of New York. On those, this Court was now to pronounce; and if they should be declared to be valid and operative, he hoped somebody would point out where the state right stopped, and on what grounds the acts of other States were to be held inoperative and void.

It would be necessary to avert more particularly to the laws of New York, as they were stated in the record. The first was passed March 19th, 1787. By this act, a sole and exclusive right was granted to John Fitch, of making and using every kind of boat or vessel impelled by steam, in all creeks, rivers, bays and waters, within the territory and jurisdiction of New York, for fourteen years.

On the 27th of March, 1798, an act was passed, on the suggestion that Fitch was dead, or had withdrawn from the state without having made *any attempt to use his privilege, [*6 repealing the grant to him, and conferring similar privileges on Robert R. Livingston, for the term of twenty years, on a suggestion made by him that he was possessor of a mode of applying the steam-engine to propel a boat, on new and advantageous principles. On the 5th of April, 1803, another act was passed, by which it was declared that the rights and privileges granted to R. R. Livingston, by the last act, should be extended to him and Robert Fulton, for twenty years from the passing of this act. Then there is the act of April 11th, 1808, purporting to extend the monopoly, in point of time, five years for every additional boat, the whole duration, however, not to exceed thirty years; and forbidding any and all persons to navigate the waters of the state, with any steamboat or vessel, without the license of Livingston and Fulton, under penalty of forfeiture of the boat or vessel. And lastly, comes the act of April 9th, 1811, for enforcing the provisions of the last-mentioned act, and declaring that the forfeiture of the boat or vessel found navigating against the provisions of the previous acts, shall be deemed to accrue on the day on which such boat or vessel should navigate the waters of the state; and that Livingston and Fulton might immediately have an action for such boat or vessel, in like manner as if they themselves had been dispossessed thereof by force: and that on bringing any such suit, the defendant therein should be prohibited, by injunction, from removing the boat or vessel out of the state, or using it within the state. There were *one or two other acts mentioned in the [*7 pleadings which principally respected the time allowed for complying with the condition of the grant, and were not material to the discussion of the case.

By these acts, then, an exclusive right is given to Livingston and Fulton, to use steam navigation on all the waters of New York, for thirty years from 1808.

It is not necessary to recite the several conveyances and agreements, stated in the record, by which Ogden, the plaintiff below, derives title under Livingston and Fulton, to the exclusive use of part of these waters.

The appellant being owner of a steamboat, and being found navigating the waters between New Jersey and the city of New York, over

which waters Ogden, the plaintiff below, claimed an exclusive right, under Livingston and Fulton, this bill was filed against him by Ogden, in October, 1818, and an injunction granted, restraining him from such use of his boat. This injunction was made perpetual, on the final hearing of the cause, in the Court of Chancery; and the decree of the chancellor has been duly affirmed in the Court of Errors. The right, therefore, which the plaintiff below asserts to have and maintain his injunction, depends obviously on the general validity of the New York laws, and, especially, on their force and operation as against the right set up by the defendant. This right he states in his answer to be, that he is a citizen of New Jersey, and owner of the steamboat in question; that the boat was a vessel of more than twenty tons 8*] *burden, duly enrolled and licensed for carrying on the coasting trade, and intended to be employed by him, in that trade, between Elizabethtown, in New Jersey, and the city of New York; and was actually employed in navigating between those places, at the time of, and until notice of the injunction from the Court of Chancery was served on him.

On these pleadings the substantial question is raised: Are these laws such as the legislature of New York had a right to pass? If so, do they, secondly, in their operation, interfere with any right enjoyed under the constitution and laws of the United States, and are they, therefore, void as far as such interference extends?

It may be well to state again their general purpose and effect, and the purport and effect of the other state laws which have been enacted by way of retaliation.

A steam vessel, of any description, going to New York, is forfeited to the representatives of Livingston and Fulton, unless she have their license.

Going from New York, or elsewhere, to Connecticut, she is prohibited from entering the waters of that state, if she have such license.

If the representatives of Livingston and Fulton, in New York, carry into effect, by judicial process, the provision of the New York laws against any citizen of New Jersey, they expose themselves to a statute action, in New Jersey, for all damages, and treble costs.

The New York laws extend to all steam ves- 9*] sels; *to steam frigates, steam ferry-boats, and all intermediate classes.

They extend to public as well as private ships; and to vessels employed in foreign commerce as well as to those employed in the coasting trade.

The remedy is as summary as the grant itself is ample; for immediate confiscation, without seizure, trial or judgment, is the penalty of infringement.

In regard to these acts, he should contend, in the first place, that they exceeded the power of the legislature; and second, that if they could be considered valid, for any purpose, they were void still, as against any right enjoyed under the laws of the United States with which they came in collision; and that, in this case, they were found interfering with such rights.

He should contend that the power of Congress to regulate commerce was complete and entire, and to a certain extent necessarily exclusive; that the acts in question were regulations of commerce, in a most important particular; and affecting it in those respects in which it was under the exclusive authority of Congress. He stated this first proposition guardedly. He did not mean to say that all regulations which might, in their operation, affect commerce, were exclusively in the power of Congress; but that such power as had been exercised in this case did not remain with the states. Nothing was more complex than commerce; and in such an age as this, no words embraced a wider field than commercial regulation. Almost all the business and intercourse of *life may be connected, incidentally, [*10 more or less, with commercial regulations. But it was only necessary to apply to this part of the constitution the well-settled rules of construction. Some powers are holden to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the states to exercise similar power; and others, again, from the nature of the powers themselves. It has been by this mode of reasoning that the court has adjudicated on many important questions; and the same mode is proper here. And as some powers have been holden exclusive, and others not so, under the same form of expression, from the nature of the different powers respectively, so, where the power, on any one subject, is given in general words, like the power to regulate commerce, the true method of construction would be to consider on what parts the grant is composed, and which of those, from the nature of the thing, ought to be considered exclusive. The right set up in this case, under the laws of New York, is a monopoly. Now, he thought it very reasonable to say that the constitution never intended to leave with the states the power of granting monopolies, either of trade or of navigation; and therefore, that as to this, the commercial power was exclusive in Congress. It was in vain to look for a precise and exact definition of the powers of Congress, on several subjects. The constitution did not undertake the task of making such exact definitions. In conferring powers, it proceeded in the way of enumeration, *stating the powers con- [*11 ferred, one after another, in few words; and where the power was general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited by, its object, and by the nature of the power.

Few things were better known than the immediate courses which led to the adoption of the present constitution; and he thought nothing clearer than that the prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different states, and to place it under the protection of a uniform law. The great objects were commerce and revenue; and they were objects indissolubly connected. By the confederation, divers restrictions had been imposed on the States; but these had not been found sufficient. No state, it was true, could send or receive an embassy; nor make any treaty; nor enter into any compact with another state, or with a foreign power; nor lay duties interfering with treaties which had been entered into by Congress. But all these were found to be far short

of what the actual condition of the country required. The states could still, each for itself, regulate commerce, and the consequence was a perpetual jarring and hostility of commercial regulation.

In the history of the times, it was accordingly found that the great topic urged on all occasions, as showing the necessity of a new and different government, was the state of trade and commerce. To benefit and improve these was a great object in itself; and it became greater 12*] when it was regarded *as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually labored for its independence. The leading state papers of the time are full of this topic. The New Jersey resolutions[1] complain that the regulation of trade was in the power of the several states, within their separate jurisdiction, in such a degree as to involve many difficulties and embarrassments; and they express an earnest opinion that the sole and exclusive power of regulating trade with foreign states, ought to be in Congress. Mr. Witherspoon's motion in Congress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that Congress ought to possess the sole and exclusive power of regulating trade, as well with foreign nations as between the states.[2] The resolutions of Virginia, in January, 1786, which were the immediate cause of the convention, put forth this same great object. Indeed, it is the only object stated in those resolutions. There is not another idea in the whole document. The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits and its blessings, 13*] it *will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. It would be easy to show, by reference to the discussions in the several state conventions, the prevalence of the same general topics; and if anyone would look to the proceedings of several of the states, especially to those of Massachusetts and New York, he would see very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new constitution had most friends. In the New York convention, the argument arising from this consideration was strongly pressed by the distinguished person whose name is connected with the present question.

We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general concurrent power, in the regulation of foreign and domestic trade, as still residing in the states. The very object intended, more than any other, was to take away such power. If it had not so provided, the constitution would not have been worth accepting.

He contended, therefore, that the people intended, in establishing the constitution, to transfer, from the several states to a general government, those high and important powers over commerce, which, in their exercise, were to maintain an uniform and general system. From the very nature of the case, these powers must be exclusive; *that is, the higher [*14 branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several states, respectively, but the commerce of the United States. Henceforth, the commerce of the states was to be an unit; and the system by which it was to exist, and be governed, must necessarily be complete, entire and uniform. Its character was to be described in the flag which waved over it, E Pluribus Unum. Now, how could individual states assert a right of concurrent legislation, in a case of this sort, without manifest encroachment and confusion? It should be repeated, that the words used in the constitution, "to regulate commerce," are so very general and extensive that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires. And he insisted that the nature of the case, and of the power, did imperiously require that such important authority as that of granting monopolies of trade and navigation should not be considered as still retained by the states.

It is apparent, from the prohibitions on the power of the states, that the general concurrent power was not supposed to be left with them. And the exception, out of these prohibitions, of the inspection laws, proves this still more clearly. Which most concerns the commerce of this country, *that New York and Virginia [*15 should have an uncontrolled power to establish their inspection for flour and tobacco, or that they should have an uncontrolled power of granting either a monopoly of trade in their own ports, or a monopoly of navigation over all the waters leading to those ports? Yet the argument on the other side must be, that although the constitution has sedulously guarded and limited the first of these powers, it has left the last wholly unlimited and uncontrolled.

But, although much had been said, in the discussion on former occasions, about this supposed concurrent power in the states, he found great difficulty in understanding what was meant by it. It was generally qualified by saying that it was a power by which the states could pass laws on the subjects of commercial regulation, which would be valid, until Congress should pass other laws controlling them, or inconsistent with them, and that then the state laws must yield. What sort of concurrent powers were these, which could not exist together? Indeed, the very reading of the clause in the constitution must put to flight this notion of a general concurrent power. The constitution was formed for all the states; and Congress was to have power to regulate commerce. Now, what is the import of this, but

1.—1 Laws U. S. p. 28.

2.—*Id* 50.

that Congress is to give the rule; to establish the system; to exercise the control over the subject? And can more than one power, in cases of this sort, give the rule, establish the system, or exercise the control? As it is not contended that the power of Congress is to be 16*] exercised by a supervision *of state legislation; and as it is clear that Congress is to give the general rule, he contended that this power of giving the general rule was transferred, by the constitution, from the states to Congress, to be exercised as that body might see fit. And, consequently, that all those high exercises of power, which might be considered as giving the rule, or establishing the system, in regard to great commercial interests, were necessarily left with Congress alone. Of this character he considered monopolies of trade or navigation; embargoes; the system of navigation laws; the countervailing laws, as against foreign states; and other important enactments respecting our connection with such states. It appeared to him a most reasonable construction to say, that in these respects, the power of Congress is exclusive, from the nature of the power. If it be not so, where is the limit, or who shall fix a boundary for the exercise of the power of the states? Can a state grant a monopoly of trade? Can New York shut her ports to all but her own citizens? Can she refuse admission to ships of particular nations? The argument on the other side is, and must be, that she might do all these things, until Congress should revoke her enactments. And this is called concurrent legislation. What confusion such notions lead to, is obvious enough. A power in the states to do anything and everything, in regard to commerce, till Congress shall undo it, would suppose a state of things at least as bad as that which existed before the present constitution. It is the true 17*] wisdom of these governments *to keep their action as distinct as possible. The general government should not seek to operate where the states can operate with more advantage to the community; nor should the states encroach on ground which the public good, as well as the constitution, refers to the exclusive control of Congress.

If the present state of things—these laws of New York, the laws of Connecticut, and the laws of New Jersey—had been all presented, in the convention of New York, to the eminent person whose name is on this record, and who acted, on that occasion, so important a part; if he had been told that after all he had said in favor of the new government, and of its salutary effects on commercial regulations, the time should yet come when the North River would be shut up by a monopoly from New York; the Sound interdicted by a penal law of Connecticut; reprisals authorized by New Jersey against citizens of New York; and when one could not cross a ferry, without transhipment; does anyone suppose he would have admitted all this as compatible with the government which he was recommending?

This doctrine of a general concurrent power in the states is insidious and dangerous. If it be admitted, no one can say where it will stop. The states may legislate, it is said, wherever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the states now to do whatever *Congress has left undone? [*18 Congress makes such rule as, in its judgment, the case requires; and those rules, whatever they are, constitute the system.

All useful regulation does not consist in restraint; and that which Congress sees fit to leave free, is a part of its regulation, as much as the rest.

He thought the practice under the constitution sufficiently evinced, that this portion of the commercial power was exclusive in Congress. When, before this instance, have the states granted monopolies? When, until now, have they interfered with the navigation of the country? The pilot laws, the health laws, or quarantine laws, and various regulations of that class which have been recognized by Congress, are no arguments to prove, even if they are to be called commercial regulations (which they are not), that other regulations, more directly and strictly commercial, are not solely within the power of Congress. There was a singular fallacy, as he humbly ventured to think, in the argument of very learned and most respectable persons, on this subject. That argument alleges that the states have a concurrent power with Congress, of regulating commerce; and its proof of this question is, that the states have, without any question of their right, passed acts respecting turnpike roads, toll bridges, and ferries. These are declared to be acts of commercial regulation, affecting not only the interior commerce of the state itself, but also commerce between different states. Therefore, *as all these are commercial [*19 regulations, and are yet acknowledged to be rightfully established by the states, it follows, as is supposed, that the states must have a concurrent power to regulate commerce.

Now, what was the inevitable consequence of this mode of reasoning? Does it admit the power of Congress, at once, upon all these minor objects of legislation? If all these be regulations of commerce, within the meaning of the constitution, then, certainly, Congress, having a concurrent power to regulate commerce, may establish ferries, turnpikes, bridges, etc., and provide for all this detail of interior legislation. To sustain the interference of the state, in a high concern of maritime commerce, the argument adopts a principle which acknowledges the right of Congress over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers. But this is not all; for it is admitted that when Congress and the states have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the state power; and therefore the consequences would seem to follow, from the argument, that all state legislation, over such subjects as have been mentioned, is, at all times, liable to the superior power of Congress; a consequence which no one would admit for a moment. The truth was, he thought, that all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term. A road, indeed, *might be a matter of great commercial [*20 concern. In many cases it is so; and when it

is so, he thought there was no doubt of the power of Congress to make it. But generally speaking, roads, and bridges, and ferries, though of course they affect commerce and intercourse, do not obtain that importance and elevation, as to be deemed commercial regulations. A reasonable construction must be given to the constitution; and such construction is as necessary to the just power of the states as to the authority of Congress. Quarantine laws, for example, may be considered as affecting commerce; yet they are, in their nature, health laws. In England, we speak of the power of regulating commerce, as in parliament, or the King, as arbiter of commerce; yet the city of London enacts health laws. Would anyone infer from that circumstance, that the city of London had concurrent power with parliament or the Crown to regulate commerce? or that it might grant a monopoly of the navigation of the Thames? While a health law is reasonable, it is a health law; but if, under color of it, enactments should be made for other purposes, such enactments might be void.

In the discussion in the New York courts, no small reliance was placed on the law of that state prohibiting the importation of slaves, as an example of a commercial regulation, enacted by state authority. That law may or may not be constitutional and valid. It has been referred to generally, but its particular provisions 21*] have not *been stated. When they are more clearly seen, its character may be better determined.

It might further be argued that the power of Congress over these high branches of commerce was exclusive, from the consideration that Congress possessed an exclusive admiralty jurisdiction. That it did possess such exclusive jurisdiction, would hardly be contested. No state pretended to exercise any jurisdiction of that kind. The states had abolished their courts of admiralty, when the constitution went into operation. Over these waters, therefore, or at least some of them, which are the subject of this monopoly, New York has no jurisdiction whatever. They are a part of the high sea, and not within the body of any county. The authorities of that state could not punish for a murder committed on board one of these boats, in some places within the range of this exclusive grant. This restraining of the states from all jurisdiction, out of the bodies of their own counties, shows plainly enough that navigation on the high seas was understood to be a matter to be regulated only by Congress. It is not unreasonable to say that what are called the waters of New York are, to purposes of navigation and commercial regulation, the waters of the United States. There is no cession, indeed, of the waters themselves, but their use, for those purposes, seemed to be entrusted to the exclusive power of Congress. Several states have enacted laws which would appear to imply their conviction of the power of Congress, over navigable waters, to a greater extent.

22*] *If there be a concurrent power of regulating commerce on the high seas, there must be a concurrent admiralty jurisdiction, and a concurrent control of the waters. It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, so far as navigation is concerned. Their use is navigation. The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters. If it be admitted, that for purposes of trade and navigation, the North River, and its bay, are the river and bay of New York, and the Chesapeake the bay of Virginia, very great inconveniences and much confusion might be the result.

It might now be well to take a nearer view of these laws, to see more exactly what their provisions were, what consequences have followed from them, and what would and might follow from other similar laws.

The first grant to John Fitch, gave him the sole and exclusive right of making, employing, and navigating all boats impelled by fire or steam, "all creeks, rivers, bays and waters within the territory and jurisdiction of the state." Any other person, navigating such boat, was to forfeit it, and to pay a penalty of a hundred pounds. The subsequent acts repeal this, and grant similar privileges to Livingston and Fulton; and the act of 1811 provides the extraordinary and summary remedy which has been already stated. The river, the bay, and the marine league along the shore, are all within the scope of this grant. *Any vessel, [*23 therefore, of this description, coming into any of those waters, without a license, whether from another state, or from abroad, whether it be a public or a private vessel, is instantly forfeited to the grantees of the monopoly.

Now, it must remembered that this grant is made as an exercise of sovereign political power. It is not an inspection law, nor a health law, nor passed by any derivative authority; it is professedly an act of sovereign power. Of course, there is no limit to the power to be derived from the purpose for which it is exercised. If exercised for one purpose, it may be also for another. No one can inquire into the motives which influence sovereign authority. It is enough that such power manifests its will. The motive alleged in this case is, to remunerate the grantees for a benefit conferred by them on the public. But there is no necessary connection between that benefit and this mode of rewarding it; and if the state could grant this monopoly for that purpose, it could also grant it for any other purpose. It could make the grant for money; and so make the monopoly of navigation over those waters a direct source of revenue. When this monopoly shall expire, in 1838, the state may continue it for any pecuniary consideration which the holders may see fit to offer and the state to receive.

If the state may grant this monopoly, it may also grant another for other descriptions of vessels; for instance, for all sloops.

If it can grant these exclusive privileges to a few, it may grant them to many; that is, it may *grant them to all its own citizens, to the [*24 exclusion of everybody else.

But the waters of New York are no more the subject of exclusive grants by that state, than the waters of other states are subjects of such grants by those other states. Virginia may well exercise, over the entrance of the Chesapeake, all the power that New York can exercise over the bay of New York, and the waters on the shore. The Chesapeake, therefore, upon the principle of these laws, may be the

subject of state monopoly; and so may the bay of Massachusetts. But this is not all. It requires no greater power to grant a monopoly of trade, than a monopoly of navigation. Of course, New York, if these acts can be maintained, may give an exclusive right of entry of vessels into her ports. And the other states may do the same. These are not extreme cases. We have only to suppose that other states should do what New York has already done, and that the power should be carried to its full extent.

To all this, there is no answer to be given except this, that the concurrent power of the states, concurrent though it be, is yet subordinate to the legislation of Congress; and that, therefore, Congress may, when it pleases, annul the state legislation; but until it does so annul it, the state legislation is valid and effectual. What is there to recommend a construction which leads to a result like this? Here would be a perpetual hostility; one legislature enacting laws, till another legislature should repeal them; one sovereign power giving the rule, till another sovereign power should 25*] *abrogate it; and all this under the idea of concurrent legislation.

But further; under this concurrent power the state does that which Congress cannot do; that is, it gives preferences to the citizens of some states over those of others. I do not mean here the advantages conferred by the grant on the grantees, but the disadvantages to which it subjects all the other citizens of New York. To impose an extraordinary tax on steam navigation visiting the ports of New York, and leaving it free everywhere else, is giving a preference to the citizens of other states over those of New York. This Congress could not do, and yet the State does it; so that this power, at first subordinate, then concurrent, now becomes paramount.

The people of New York have a right to be protected against this monopoly. It is one of the objects for which they agreed to this constitution, that they should stand on an equality in commercial regulations; and if the government should not insure them that, the promises made to them, in its behalf, would not be performed.

He contended, therefore, in conclusion on this point, that the power of Congress over these high branches of commercial regulation, was shown to be exclusive, by considering what was wished and intended to be done, when the convention for forming the constitution was called; by what was understood, in the state conventions, to have been accomplished by the instrument; by the prohibitions on the states, and the express exception relative to inspection laws, by the nature of the 26*] *power itself; by the terms used, as connected with the nature of the power; by the subsequent understanding and practice, both of Congress and the states; by the grant of exclusive admiralty jurisdiction to the federal government; by the manifest danger of the opposite doctrine, and the ruinous consequences to which it directly leads.

It required little now to be said, to prove that this exclusive grant is a law regulating commerce; although, in some of the discussions elsewhere, it had been called a law of police. 6 L. ed.

If it be not a regulation of commerce, then it follows, against the constant admission on the other side, that Congress, even by an express act, could not annul or control it. For if it be not a regulation of commerce, Congress has no concern with it. But the granting of monopolies of this kind is always referred to the power over commerce. It was as arbiter of commerce that the King formerly granted such monopolies.[1] This is a law regulating commerce, inasmuch as it imposes new conditions and terms on the coasting trade, on foreign trade generally, and on foreign trade as regulated by treaties; and inasmuch as it interferes with the free navigation of navigable waters.

If, then, the power of commercial regulation, possessed by Congress, be, in regard to the great branches of it, exclusive; and if this grant of New York be a commercial regulation, affecting commerce, in respect to these great branches, then *the grant is void, whether [*27 any case of actual collision had happened or not.

But he contended, in the second place, that whether the grant were to be regarded as wholly void or not, it must, at least, be inoperative when the rights claimed under it came in collision with other rights, enjoyed and secured under the laws of the United States; and such collision, he maintained, clearly existed in this case. It would not be denied that the law of Congress was paramount. The constitution has expressly provided for that. So that the only question in this part of the case is, whether the two rights be inconsistent with each other. The appellant had a right to go from New Jersey to New York in a vessel owned by himself, of the proper legal description, and enrolled and licensed according to law. This right belonged to him as a citizen of the United States. It was derived under the laws of the United States, and no act of the legislature of New York can deprive him of it, any more than such act could deprive him of the right of holding lands in that State, or of suing in its courts. It appears from the record, that the boat in question was regularly enrolled at Perth Amboy, and properly licensed for carrying on the coasting trade. Under this enrollment, and with this license, she was proceeding to New York, when she was stopped by the injunction of the chancellor, on the application of the New York grantees. There can be no doubt that here is a collision, in fact; that which the appellant claimed as a right, the respondent resisted; and there remains nothing *now but to determine whether [*28 the appellant had, as he contends, a right to navigate these waters; because, if he had such right, it must prevail. Now, this right was expressly conferred by the laws of the United States. The first section of the act of February, 1793, c. 8, regulating the coasting trade and fisheries, declares that all ships and vessels, enrolled and licensed as that act provides, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries." The fourth section of the same declares "that in order to the licensing of any ship or vessel, for carrying on the coasting trade or fisheries," bond shall be given, etc., according

1.—1 Bl. Com. 273; 4 Bl. Com. 160.

to the provisions of the act. And the same section declares that the owner having complied with the requisites of the law, "it shall be the duty of the collector to grant a license for carrying on the coasting trade;" and the act proceeds to give the form and words of the license, which is therefore, of course, to be received as a part of the act; and the words of the license, after the necessary recitals, are, "license is hereby granted for the said vessel to be employed in carrying on the coasting trade."

Words could not make this authority more express.

The court below seemed to him, with great deference, to have mistaken the object and nature of the license. It seemed to have been of opinion that the license had on other intent or effect than to ascertain the ownership and [*29 character of the *vessel. But this was the peculiar office and object of the enrollment. That document ascertains that the regular proof of ownership and character has been given; and the license is given, to confer the right to which the party has shown himself entitled. It is the authority which the master carries with him, to prove his right to navigate freely the waters of the United States, and to carry on the coasting trade.

In some of the discussions which had been had on this question, it had been said that Congress had only provided for ascertaining the ownership and property of vessels, but had not prescribed to what use they might be applied. But this he thought an obvious error; the whole object of the act regulating the coasting trade, was to declare what vessels shall enjoy the benefit of being used in the coasting trade. To secure this use to certain vessels, and to deny it to others, was precisely the purpose for which the act was passed. The error, or what he humbly supposed to be the error, in the judgment of the court below, consisted in that court's having thought that although Congress might act, it had not yet acted in such a way as to confer a right on the appellant; whereas, if a right was not given by this law, it never could be given; no law could be more express. It had been admitted, that supposing there was a provision in the act of Congress that all vessels duly licensed should be at liberty to navigate, for the purpose of trade and commerce, over all the navigable harbors, bays, rivers and [*30 lakes, within the several states, any *law of the states creating particular privileges as to any particular class of vessels to the contrary notwithstanding, the only question that could arise, in such a case, would be, whether the law was constitutional; and that if that was to be granted or decided, it would certainly, in all courts and places, overrule and set aside the state grant.

Now, he did not see that such supposed case could be distinguished from the present. We show a provision in an act of Congress, that all vessels, duly licensed, may carry on the coasting trade; nobody doubts the constitutional validity of that law; and we show that this vessel was duly licensed according to its provisions. This is all that is essential in the case supposed. The presence or absence of a non-obstante clause, cannot affect the extent or operation of the act of Congress. Congress has no power of revoking state laws, as a distinct power. It legislates over subjects; and over those subjects which are within its power its legislation is supreme, and necessarily overrules all inconsistent or repugnant state legislation. If Congress were to pass an act expressly revoking or annulling, in whole or in part, this New York grant, such an act would be wholly useless and inoperative. If the New York grant be opposed to, or inconsistent with, any constitutional power which Congress has exercised, then, so far as the incompatibility exists, the grant is nugatory and void, necessarily and by reason of the supremacy of the law of Congress. But if the grant be not inconsistent with any exercise of the powers of Congress, then, certainly, Congress *has no author- [*31 ity to revoke or annul it. Such an act of Congress, therefore, would be either unconstitutional or supererogatory. The laws of Congress need no non-obstante clause. The constitution makes them supreme, when State laws come into opposition to them; so that in these cases there is no question except this, whether there be, or be not, a repugnancy or hostility between the law of Congress and the law of the state. Nor is it at all material, in this view, whether the law of the state be a law regulating commerce, or a law of police, or by whatever other name or character it may be designated. If its provisions be inconsistent with an act of Congress, they are void, so far as that inconsistency extends. The whole argument, therefore, is substantially and effectually given up, when it is admitted that Congress might, by express terms, abrogate the State grant, or declare that it should not stand in the way of its own legislation; because such express terms would add nothing to the effect and operation of an act of Congress.

He contended, therefore, upon the whole of this point, that a case of actual collision had been made out, in this case, between the state grant and the act of Congress; and as the act of Congress was entirely unexceptionable, and clearly in pursuance of its constitutional powers, the state grant must yield.

There were other provisions of the constitution of the United States which had more or less bearing on this question: "No state shall, without the consent of Congress, lay any duty of tonnage." *Under color of grants like [*32 this, that prohibition might be wholly evaded. This grant authorizes Messrs. Livingston and Fulton to license navigation in the waters of New York. They, of course, license it on their own terms. They may require a pecuniary consideration, ascertained by the tonnage of the vessel, or in any other manner. Probably, in fact, they govern themselves, in this respect, by the size or tonnage of the vessels, to which they grant licenses. Now, what is this but substantially a tonnage duty, under the law of the state? Or does it make any difference, whether the receipts go directly to her own treasury, or to the hands of those to whom she has made the grant?

There was, lastly, that provision of the constitution which gives Congress power to promote the progress of science and the useful arts, by securing to authors and inventors, for a limited time, an exclusive right to their own writings and discoveries. Congress had ex-

ercised this power, and made all the provisions which it deemed useful or necessary. The states might, indeed, like munificient individuals, exercise their own bounty towards authors and inventors, at their own discretion. But to confer reward by exclusive grants, even if it were but a part of the use of the writing or invention was not supposed to be a power properly to be exercised by the states. Much less could they, under the notion of conferring rewards in such cases, grant monopolies, the enjoyment of which should be essentially incompatible with the exercise of rights holden under 33*] the laws *of the United States. He should insist, however, the less on these points, as they were open to counsel who would come after him, on the same side, and as he had said so much upon what appeared to him the more important and interesting part of the argument.

Mr. Oakley, for the respondent, stated that there were some general principles applicable to this subject, which might be assumed, or which had been settled by the decisions of this court, and which had acquired the force of maxims of political law. Among these was the principle that the states do not derive their independence and sovereignty from the grant or concession of the British Crown, but from their own act in the declaration of independence. By this act they become "free and independent states," and as such, "have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. The state of New York, having thus become sovereign and independent, formed a constitution, by which the "supreme legislative power" was vested in its legislature; and there are no restrictions on that power which in any manner relate to the present controversy. On the other hand, the constitution of the United States is one of limited and expressly delegated powers, which can only be exercised as granted, or in the cases enumerated.[1] This prin- 34*] ciple, *which distinguishes a national from the state governments, is derived from the nature of the constitution itself, as being a delegation of power, and not a restriction of power previously possessed; and from the express stipulation in the tenth amendment, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The national constitution must therefore be construed strictly, as regards the powers expressly granted, and the objects to which those powers are to be applied. As it is a grant of power in derogation of state sovereignty, every portion of power, not granted, must remain in the state legislature.[2]

These principles are all founded on the doctrine that a strict rule of construction must be applied in ascertaining the extent and object of those powers which are expressly delegated. The powers delegated are of two classes: Such as are expressly granted, and such as are implied, as "necessary and proper" to carry into execution the powers expressly enumerated. As to these implied powers, the constitution must be construed liberally, as respects their nature and extent; because the constitution implies that rule, by not undertaking to enumerate these powers, and because the grant of these powers is general and unlimited. But this rule has one exception: When the means of executing any expressly granted *power are [*35 particularly enumerated, then no other mode of executing that power can be implied or used by Congress, since the constitution itself determines what powers are "necessary and proper" in that given case.

These delegated powers, whether express or implied, are, (1) Those which are exclusively vested in the United States; and, (2) Those which are concurrent in the United States and the respective states.

It is perfectly settled that an affirmative grant of power to the United States does not, of itself, devest the states of a like power.[3] The authorities cited settle this question, and it is no longer open for discussion in his Court.

The powers vested exclusively in Congress are, (1) Those which are granted in express terms. (2) Those which are granted to the United States, and expressly prohibited to the States. (3) Those which are exclusive in their nature.

All powers exclusive in their nature may be included under two heads: (1) Those which have their origin in the constitution, and where the object of them did not exist previous to the Union. These may be called strictly national powers. (2) Those powers which, by other provisions in the constitution, have an effect and operation, when exercised by a state, without or beyond the territorial limits of the State.

*As examples of the first class, may be [*36 mentioned the "power to borrow money on the credit of the United States." Here the object of the power (to borrow money for the use of the United States), and the means of executing it (by pledging their credit), have their origin in the Union, and did not previously exist. So, as to the power "to establish tribunals inferior to the Supreme Court," the same remark will apply.

Of the second class, the power "to establish an uniform rule of naturalization" is an instance. This power was originally in the States, and was extensively exercised by them, and would now be concurrent, except for another provision in the constitution, that "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."[4] It is not held to be exclusive, from the use of the term "uniform rule." This court has held that the use of an analogous term, "uniform laws," in respect to the associated subject of bankruptcy, does not imply an exclusive power in Congress over that subject.[5] The true reason why the power of establishing an uniform rule of naturalization is exclusive, must be that a person becoming a citizen in

1.—M'Culloch v. Maryland, 4 Wheat. Rep. 405, per Marshall, C. J.; Houston v. Moore, 5 Wheat. Rep. 48, per Story, J.

2.—The Federalist, No. 82; Houston v. Moore, 5 Wheat. Rep. 48, per Story, J.

3.—Sturges v. Crowninshield, 4 Wheat. Rep. 193, per Marshall, C. J.; Houston v. Moore, 5 Wheat. Rep. 15, 17, per Washington, J.; Id. 45, per Johnson, J.; Id. 48, per Story, J.

4.—Chirac v. Chirac, 2 Wheat. Rep. 268, 269.

5.—Sturges v. Crowninshield, 4 Wheat. Rep. 193.

one state, would thereby become a citizen of another, perhaps even contrary to its laws, and the power thus exercised would operate beyond the limits of the state.

As to concurrent powers, it is highly import-37*] ant *to hold all powers concurrent, where it can be done without violating the plain letter of the constitution. All these powers are essential to state sovereignty, and are constantly exercised for the good of the state. These powers can be best exercised by the state, in relation to all its internal concerns, connected with the objects of the power. All powers, therefore, not expressly exclusive, or clearly exclusive in their nature, ought to be deemed concurrent. All implied powers are, of course, concurrent. It has never yet been contended that powers implied as necessary and proper to carry into effect an exclusive power, are themselves exclusive. Such a doctrine would deprive the states almost entirely of sovereignty, as these implied powers must inevitably be very numerous, and must embrace a wide field of legislation. So, also, all enumerated powers are to be considered concurrent, unless they clearly fall under the head of exclusive; either as being granted, in terms, exclusively to the United States, or as expressly prohibited to the states, or as being exclusive in their nature, as before explained.

A power exclusive in its nature, is said to be repugnant and contradictory to a like power in the states. This repugnancy exists only in cases where a state cannot legislate, in any manner, or under any circumstances, under a given power, without conflicting with some existing act of Congress, or with some provision of the constitution. Thus it is laid down by the commentators on the constitution, that "the power granted to the Union is exclusive, when the existence of a similar power 38*] *in the states would be absolutely and totally contradictory and repugnant."[1] "Or where an authority is granted to the Union, with which a similar authority in the state would be utterly incompatible."[2] And again: "It is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty."[3] These strong expressions show that the repugnancy of power to power must be such as to produce actual interference and conflict, under all circumstances, and in all cases, in which the power is exercised by the two governments; or, in other words, must be such that the states can pass no law on the subject-matter of the power, without contravening the express provisions of the constitution, or without actually interfering with the operation of some statute of Congress. These terms are used by the author of the papers from which they are quoted, to distinguish those cases of absolute repugnancy from others, "where the exercise of a concurrent jurisdiction might be productive of occasional interference in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority."[4] The same principle has been adopted by this court on several occasions.[5]

*It appears, then, that the repugnancy [*39 which makes a power exclusive, must be clear, direct, positive and entire. It cannot be a matter of speculation or theory, but must be practical; not a repugnancy that may arise in some exercise of the power by both governments, but one that must arise in any exercise of such power which is attempted by the states. To ascertain, then, whether any given power be concurrent, we must inquire, (1) Whether it was possessed by the states, previous to the constitution, as appertaining to their sovereignty; (2) Whether it is granted, in exclusive terms, to the Union; (3) Whether it is granted to the Union, and prohibited in express terms to the states; (4) Whether it is exclusive in its nature, either as operating, when exercised by the states, without their territorial limits, and upon other parts of the Union; or as having its origin and creation in the Union itself; or as being so entirely repugnant, that no exercise of it can take place by the States, without actual conflict with the constitution of the Union, in its practical operation and effects.

All concurrent powers may be divided into two classes: (1) Those where, from their nature, when Congress has acted on the subject-matter, the states cannot legislate at all in any degree. (2) Those where the states may legislate, though Congress has previously legislated on the same subject-matter.

The first class includes those instances where any act of Congress covers the whole ground of legislation, and exhausts the subjects on which it *acts. Such is the power to fix the [*40 standard of weights and measures. Here, when the standard of any particular weight or measure is fixed by Congress, the whole power is executed as to that particular; and so far the power of the states is at an end. But until Congress does this, it cannot be doubted that a state may act on the subject; and if the laws of Congress apply only to some weights and measures, all others are subject to state regulation. Thus, New York has long had a law to regulate weights and measures, which establishes the English standard for that state, "until Congress shall establish the standard for the United States."[6] So, also, the power to regulate the value of foreign coin. An act fixing the value of any species of coin, necessarily disposes of the whole power as to that species. They are both instances in which, when Congress had acted at all, there immediately arises that entire and absolute repugnancy, and that utter incompatibility, which exclude the states from all power over the subject.

The second class of concurrent powers contains those in which, from their nature, various regulations may be made without any actual collision in practice. These are those where the power may be exercised on different subjects; or on the same subject, in different

1.—The Federalist, No. 32.

2.—Id. No. 82.

3.—McCulloch v. Maryland, 4 Wheat. Rep. 425, per Marshall, C. J.; Houston v. Moore, 5 Wheat. Rep. 49, per Story, J.

4.—1 R. L. c. 30, s. 36.

modes; or where the object of the power admits of various independent regulations, which may operate together. In all these cases, the state 41*] may legislate, though Congress *has legislated under the same power. This results from the very nature of concurrent power. Each party possessing the power, may of course use it. Each being sovereign as to the power, may use it in any form, and in relation to any subject; and to guard against a conflict in practice, the law of Congress is made supreme.

The provision that the law of Congress shall be the supreme law in such cases, is the ground of a conclusive inference, not only that there are concurrent powers, but that those powers may be exercised by both governments at the same time. One law cannot be said to be superior to another, and to control it, unless it acts in a manner inconsistent with and repugnant to that other. The question of supremacy, therefore, can never arise, unless in cases of actual conflict or interference. If the mere exercise of a power by Congress takes away all right from the state to act under that power, then any state law, under such a power, would be void; not as conflicting with the supreme law of Congress, but as being repugnant to the provisions of the constitution itself, and as being passed by the state, in the first instance, without authority. If this doctrine were true, then the provision that the laws of Congress should be supreme, was entirely idle. It would have been sufficient to have said merely that the constitution should be supreme.[1] These 42*] positions *are all supported by the judgments of this court, and of other courts whose authority deserves to be respected.

From this mass of authority, and the reasons on which it is founded, it results, (1) That a state may legislate in all cases of concurrent power, though Congress has acted under the same power and upon the same subject-matter. (2) That the question of supremacy cannot arise, except in a case of actual and practical collision. (3) That such collision must be direct and positive, and the state law must operate to limit, restrict or defeat the effect of a statute of Congress. (4) That in such a case, the state law yields in those particulars, in which such actual collision arises, but remains valid in all other respects.

The states have, accordingly, acted upon this construction to a great extent. Thus, the power to lay and collect taxes, is admitted on all hands to be concurrent. It is constantly exercised by the states, in every form, and both real and personal estate have frequently been taxed by the national and local governments, at the same time. So, under the power to lay and collect excises, the same article has frequently been taxed by both governments. And the power to lay imposts, or duties on exports, and imports, and tonnage, is also concurrent, except that no state can lay any duty on imports and exports, or duty of tonnage, unless such as are absolutely necessary for executing its inspection laws. So, also, the power to provide for the punishment of counterfeiting the securities and current coin of the United States, is a power *which may be exercised by the [*43 states. A state may make it an offense to counterfeit the coin of any foreign country within its territory. Thus New York has provided for the punishment of counterfeiting "any of the species of gold or silver coins, now current, or hereafter to be current in this state."[2] And Congress has provided for the punishment of counterfeiting "any gold or silver coin, of the United States," or of any "foreign gold or silver coins, which, by law, now are or hereafter shall be made current, or be in actual use and circulation as money, within the United States."[3] New York has punished the counterfeiting of "any promissory note, for the payment of money," including notes made by any body corporate;[4] and under this the counterfeiting of the note of the Bank of the United States is punished. Congress has punished the same offense in the law incorporating the Bank of the United States.[5] In all these acts of Congress, relating to coins and bank notes, it is provided, "that nothing in them contained shall be so construed as to deprive the courts of the individual states of jurisdiction, under the laws of the several states, over any offense made punishable by these acts." This shows that Congress considered the power to punish these offenses as concurrent, but that it could be exercised by the states on the *ground of [*44 their own inherent authority, as it is held that Congress cannot delegate any part of the criminal jurisdiction of the United States to the state tribunals.[6] Again. The power to provide for organizing, arming and disciplining the militia, is a concurrent power, according to the same principles.[7] But the states have been in the constant habit of superadding to the regulations of Congress, additional provisions, suited to their own views and local circumstances.[8] These instances, which might be greatly multiplied, show the practical construction put, both by Congress and the state legislatures, upon these concurrent powers.

The learned counsel here recapitulated the principles laid down, and proceeded to apply them to the discussion of the cause, which he divided into two branches. (1) The supposed repugnancy of the laws of New York to the power of Congress on the subject of patents and copy-rights. (2) Their supposed conflict with the power of Congress to regulate commerce.

As to the first, the words of the constitution are, "Congress shall have power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

*This power is concurrent, according [*45 to all the principles before laid down. It is clearly a power appertaining to sovereignty, and as such, vested in the legislature of New

1.—Sturges v. Crowninshield, 4 Wheat. Rep. 195, 196, per Marshall, C. J.; Houston v. Moore, 5 Wheat. Rep. 34, 45, per Johnson, J.; Id. 49, 50, 55, per Story, J.; Livingston v. Van Ingen, 9 Johns. Rep. 575, 576, per Thompson, J.

2.—1 R. L. p. 406, s. 5, 6.

3.—4 L. U. S. 67.

4.—1 R. L. 404.

5.—4 L. U. S. 91; 6 Id. 47.

6.—Houston v. Moore, 5 Wheat. Rep. 69, per Story, J.

7.—Id. 51.

8.—1 R. L. of N. Y. 216; Laws of Georgia, 468; 6 Laws of Pennsylvania, 320.

York, before the formation of the United tates constitution. A power to promote science and the useful arts is highly important to every civilized society. It embraces all the means of education, and all kinds of mechanical labor and improvements. It is constantly exercised by all governments as a sovereign authority, by laws for the promotion of education in all its branches, by bounties for the encouragement of discoveries and new methods of business, and by the grant of exclusive rights and privileges for the same end. It has frequently been exercised by the state of New York, and by other states, before the adoption of the constitution. It is not granted exclusively to Congress. No exclusive terms are used. The grant is affirmative and general, like all the other powers. There is no express prohibition upon the states against the exercise of it. Nor is it exclusive in its nature. It does not owe its existence or creation to the Union. When exercised by a state, it does not operate in any manner beyond the territorial jurisdiction of that state. From its nature, it admits of a great variety of regulations, both by local and general laws, which may exist harmoniously together. Being thus a concurrent power, it follows, according to the principles already established, that the state may exercise it at all times, and in every mode, until an actual and practical conflict arises between a right exer- [*46 cised *under a statute of Congress, and the same right claimed to be exercised under the state.

The power, as granted in the constitution, is a limited power. It is a clear principle that when the means of executing any given power are specified in a grant, Congress cannot take, by implication, any other means, as being necessary and proper to carry that power into execution, this power, then, is limited: (1) As to the persons and the objects in regard to which it may be exercised. These are "authors and inventors, writings and discoveries." This enumeration excludes all right in Congress to legislate on the subject of any improvement which is not an "invention," either domestic or foreign. It excludes also all right to legislate for the benefit of any person who is not himself the "inventor." (2) As to the means of executing the power, and the time during which those means may be exercised. They are by "securing the exclusive right for limited times."

The power, considered in itself, is supreme, unlimited and plenary. No part of any sovereign power can be annihilated. Whatever portion, then, of this power, was not granted to Congress, remains in the states. Consequently the states have exclusive authority to promote science and the arts, by all other modes than those specified in the constitution, without limitation as to time, person or object; and the legislature is the sole judge of the expediency of any law on the subject.

But this power, though limited in Congress, [*47 *is still (as has been seen) concurrent in the states. It follows, then, from all the principles before laid down relative to the exercise of concurrent powers, that a state may exercise it by the same means, and towards the same persons and objects with Congress. A state may therefore grant patents and copy-rights, which would secure to the inventors and authors the benefit of their discoveries and writings, within the limits of the state. In such cases, the citizens of other states might use the invention, or publish the book at pleasure. But if a patent or copy-right should be obtained under the law of Congress, the right under the state grant would cease as against that of the United States. Suppose the author or inventor does not apply for a patent or copy-right from the United States, or is willing to secure the exclusive right within any one state only, and leave the invention common in every other part of the Union; may not that one state secure the right within its own territory? This question may be answered by seeing how far Congress has exercised the power. An examination of the different patent laws will show that Congress has, in various particulars, omitted to exercise the entire power given to them by the constitution. Thus, by several of these laws, the right of obtaining a patent is confined to citizens, and consequently, the power of granting patents to aliens, is left to the states. The whole power is inoperative, until Congress acts under it by legislating; and the law itself is inoperative until some person obtains a patent. In every case, therefore, the power is *unexecuted until a patent is ac- [*48 tually granted. The state may consequently act in all cases.

But Congress has confined its statutes to cases of invention, as the constitution directs. Where, then, is the power to reward or encourage the introduction of useful machines or inventions from abroad? or the establishment of any art, when invented at home, and the discoverer does not apply for a patent? or where the invention is given to the public, and great expense must be incurred to put it into use? All these things appertain to sovereignty. Congress has no power over them. The power, being sovereign, must exist somewhere, and is therefore exclusively in the states. If the nature of the power which is given to Congress be examined, it will be found that it confers no authority to create or grant any right or property. It is clearly founded on the presumption that the right or property may exist, independent of the power. Thus one of the commentators on the constitution says: "The copyright of authors has been solemnly adjudged, in Great Britain, to be a right at common law. The right to useful inventions seems, with equal reason, to belong to the inventor."[1] The adjudication here referred to, is that of Millar v. Taylor,[2] where it was held that the author of any book has the sole right of first printing and publishing it, but that the right was controlled by the provisions of the stat. 8 Ann, relative to copy-rights. *But the [*49 common law of England was the law of New York, at the adoption of the national constitution. There was no statute of New York similar to that of Ann, and of course the right existed there, without the security for its enjoyment provided by that statute. The right, also, was local, and confined to the territorial jurisdiction of the state. The policy and object of the constitution was to secure the right co-ex-

1.—The Federalist, No. 43.

2.—4 Burr. 2408.

tensively with the Union. Its exercise in any one state might be affected in its operation by the pirating of books and inventions in the adjoining states, and that evil could only be corrected by the national legislature. The right, therefore, in any one state, was imperfect only as to the security and the means of enjoyment.

It appears, then, that the power is founded on the basis of a pre-existing right of property, from the nature and origin of the right, as before stated, and from the terms in which the power itself is granted. The word "secure," implies the existence of something to be secured. It does not purport to create or give any new right, but only to secure and provide remedies to enforce a pre-existing right throughout the Union. This power differs essentially from the sovereign power to create and grant an exclusive right. It has been adjudged, under the English stat. 21 Jack. I. c. 3, that a grant may be made for any invention which is new in England, and though known abroad.[1] That statute, therefore, authorizes the creation 50*] of a right *of property in a thing imported, in which no right of property, under the laws of England, before existed. But the patent laws of the United States merely extend to inventions actually made in the United States, and not to any imported invention. The whole extent of the sovereign power exercised by the British Parliament, on this subject, was vested in the legislature of New York. A part only was given to Congress, and all the residue remains in the state exclusively.

What, then, is the effect of a patent? It creates no new right. It secures the patentee, for a limited time, the exclusive right to his invention; so that he has the same exclusive right in it that he has in any other kind of property. His right, however, is secured more extensively than any state law could secure it. But, within the limits of a state, a patent under the local law would be just as effectual. What is the situation of the right, after the expiration of a patent? The right under the common law of the state may be considered as perpetual. It was so ruled by the judges in Millar v. Taylor; but it was determined in the House of Lords that the perpetuity of the right was controlled and limited by the statute of Ann. There is no such statute in New York, and therefore, the right remains as at common law. The act of Congress cannot destroy the perpetuity of a right held under the law of New York, and which the act of Congress has only secured for a certain time, to a greater extent, and by means of more effectual remedies. The right, then, remains, at the expiration of 51*] the *patent, in the same condition as at its commencement, so far as regards the laws of New York, and within the territorial limits of that state, but cannot be asserted in other states. Even if this were not so, and it should be considered that the right becomes common, at the expiration of the patent, then it is like all other common rights, subject to the control of the municipal laws of the state. It is of the essence of sovereignty to control and regulate all common rights. The legislature, possessing "supreme legislative power," may destroy a common right, either by abolishing it and prohibiting the use of it altogether, or by converting it into an exclusive right. Thus a right of way may be common, either by land or water, and it may be shut up by law and the use of it prohibited. So a right of fishery, in navigable waters, is common, and it may be prohibited altogether, or converted into a several fishery. In the same manner as to patent-rights and literary productions; if, after a patent of copy-right has expired, the right to use or publish becomes common, it may be controlled by law, and turned into a private right. So that a state law may continue or extend a patent-right at pleasure.

Thus it follows that whether the right of the patentee remains in him, after the expiration of his patent, at common law, or whether its use becomes common to all, it is subject to the state law, in the same manner, and to the same extent, as all other rights, and may, consequently, be controlled, limited, extended, or prohibited, at the pleasure of the legislature.

*But the state may control or prohibit [*52 the use of any patented thing during the existence of the patent. If an inventor do not apply for a patent for the invention, no other man can. The right of the inventor, in such a case, remains as at common law. Every right or kind of property, created by the laws of the state, is subject to be controlled and regulated by the supreme legislative power of the state. It cannot, then, be doubted, that before a patent is obtained, the state may prohibit the use of the thing invented; either on the ground that it is mischievous in itself, or from motives of general policy, that it is inexpedient to permit it. As, if it interferes with any general interest, as a labor-saving machine, which might deprive great numbers of their ordinary means of subsistence; or if it should effect any great change in the course of business, which the legislature might deem injurious, as it relates to the community. Of these questions of general policy, and of the expediency of any such prohibition, the legislature must, of course, be the sole judge. Thus, in the act of New York, to incorporate the North River Steamboat Company, the corporation is prohibited from using any of its boats for the purpose of carrying freight. This was done to protect the great shipping interest employed in the navigation of the Hudson River. Would this exercise of power be affected by the obtaining of a patent? The object and effect of a patent is (as we have seen) to secure a pre-existing right, imperfect as to its means of enjoyment and its extent. The patentee obtains nothing by his grant, except an *exclusive right, as it [*53 relates to the Union, instead of a right limited to the state, together with more complete and certain remedies to protect and enforce that right. If, therefore, he could not use the thing invented, against the state law, before it is patented, neither can he thus use it after it is patented, for his grant conveys no greater right than before existed. It is the undoubted attribute of all sovereignty, to regulate and control the use of all property. A thing patented, when made and put in use, is nothing more than property; and, like all other property, is subject to the control of the sovereign power as to the right to use it. There can be no doubt that it may sometimes become important or

1.—3 Wheat. Rep. App. p. 315.

necessary to the welfare of society to regulate or prohibit the use of a thing patented. Congress cannot do this, or at least, it has not done it. After the patent is granted, the power of Congress over the subject-matter is exhausted. Patented things may be dangerous or noxious, either universally so in every part of the country, or locally; or they may be useful at one time, and mischievous and noxious at another. Patented manufactures may be injurious to the public health, though highly useful as manufacturers; or they may be nuisances to private individuals and neighborhoods, though extremely useful to the public. Can Congress provide by its laws for the abatement of a public nuisance? or give a right of action to an individual for a private nuisance? If not, these powers must reside in the state. The right to use all property must be subject to modifica-
54*] tion by municipal law. Sic *utere tuo ut alienum non lædas, is a fundamental maxim. It belongs exclusively to the local state legislatures to determine how a man may use his own, without injuring his neighbor. Can a patent give rights, by which a patentee may infringe the vested rights of others? Can a patented boat be used on a ferry, the exclusive use of which has been granted by a state law?

This argument may be illustrated by the power to secure to authors the exclusive right to their works. This power is founded on the same reasons with the other, and gives the author the same rights as the inventor. Can the author, by virtue of his copy-right, publish against the prohibition of state law? A book may be libelous, or blasphemous, or obscene. Cannot the author be indicted and punished for it? May not a citizen maintain an action for the libel? If so, it cannot be lawful by virtue of the copy-right. If the state can punish the act of publishing, it may entirely prohibit the publication. It may regulate and restrain the press, so far as it is not prohibited by its own constitution.

The laws of Congress are framed on the supposition that the power to prohibit remains in the states. By the existing statute, they have not provided that any inquiry shall be made as to the utility of the supposed invention, when the patent is applied for. There is no authority to refuse a patent on the ground of the inutility of the invention, and in practice, no inquiry is ever made, and patents issue, of course, on making the oaths and paying the fees, even for
55*] things the most *trifling, absurd and injurious. There is no provision for the repeal of a patent on the ground of its noxious or useless character. The law does not purport, in its terms, to give a right to use the thing patented, against the provisions of any state law. The act provides (s. 1) that if any person shall present a petition, "signifying a desire of obtaining an exclusive property," etc., then a patent shall issue, granting to the petitioner, "the full and exclusive right and liberty of making, constructing, using and vending to others to be used," the thing patented. The "exclusive property" spoken of, is only the same property that exists in anything else, and, of itself, gives no right to use the thing against the state law, any more than in the case of any other property. The words "using, and vending to others to be used," are inserted to make the description of that "exclusive property" complete. The words, "making, constructing and vending," would not have constituted entire property in the thing, as one might make and vend, and all the world might use. The patentee's right of property might thus be greatly invaded, and he would be left without remedy, except against the "maker." The word "using," in the act, must receive this limited construction, or the law of Congress goes beyond the power in the constitution. That was only to "secure" a right, and meant nothing more than that a patentee should enjoy it alone, if anybody was permitted to enjoy it. But it was never intended that the patentee should set the state laws at defiance. The acts relative to copy-rights, strongly *support this position. These [*56 acts contain no provision to ascertain the character of the books or engravings to be published, and whether they be such as may be safely permitted, consistently with the good order of society and public morals. They grant the same right to the author as the patent grants to the inventor. In both cases they depend on the same constitutional right, and only convey a right to prevent others from using or publishing without his consent, but not to enable him to use or publish without restraint.

If a state can thus control a right to use a thing patented, directly, it may do it indirectly. If by a positive law, then, through the agency of the courts, by injunction or otherwise. Or, the right to prohibit the use of it may be delegated to individuals, either acting as public agents, or in their own behalf, to protect some other right vested in them; and may forbid the use of the thing patented, or the publication of the book, the copy-right of which has been secured, without their license. So that if an exclusive grant be made by a state law to an individual, with a provision that the thing granted shall not be used in the state without license of the grantee, and there be a patent under the act of Congress for the same thing, the consequence would be that the state grantee could not use it, because it would be a violation of the patent, and the patentee could not, without the license of the state grantee, because the state law prohibited him. Thus, the state law would be inoperative so far as it granted the exclusive right; but valid so far as it prohibited the use of the thing patented. *These [*57 principles may be applied to the law now in question, which gives an exclusive right, and forbids any person to use the thing which is the subject of the right, without the license of the persons in whom it is vested. It contains a granting clause and a prohibiting clause. The injunction is founded on the prohibition, and may be enforced, though the grantees might not use their right. Let it be supposed that, from reasons of public policy, the laws of New York had prohibited the use of steamboats entirely, and had directed the Court of Chancery to restrain them by injunction, would not the prohibition have been a valid one? and if so, may not the state determine that it is against the public interest, that steamboats should be built or navigated, unless under the direction, or with the license, of an individual who may be thought particularly skillful in that business? It might, therefore, be contended that

this injunction is to be sustained, whatever might become of the respondent's exclusive right.

A state may prohibit the use of a thing patented, by virtue of its power over the public domain. A patented thing cannot be used on the private property of an individual, without his consent. The power of the state over the public property is, at least, equal to that of an individual over his own; and particularly so, as to the navigable rivers in the state, which are, emphatically, the property of the people of the state, and subject to their authority, acting through the local legislature.

The question has hitherto been discussed, as 58*] if *the exclusive right claimed by the respondents was the right to an invention for which a patent may have been, or may yet be obtained. But in truth, his right is not to the use of any invention, or of anything for which a patent can be granted. Livingston and Fulton do not, on the face of the acts granting or securing the right, claim to be the inventors of anything. In the act of 1798, c. 55, s. 21, it is recited that R. R. L. "is the possessor of a mode of applying the steam-engine to the propelling of vessels, on new and advantageous principles." It is not alleged or pretended that he was the discoverer of that mode, or of the principles of its application; or that the mode, or the principles, were secret or unknown to the rest of the world. His right, therefore, is to the use of an improvement, introduced (perhaps) from a foreign country, and, consequently, not the subject of a patent, and in respect to which Congress had no power to legislate at all. On the other hand, it does not appear that the appellant has a patent for anything connected with the subject of steamboats, or for anything belonging to the steam-engine, which can be used in navigation by steam. He can therefore claim no right in this case, under the patent laws; and there is no question as to any actual conflict between the state right and a patent-right. He is, consequently, compelled to rely upon the broad ground that the state has no power to legislate at all for the encouragement of any art or science, or for any improvement connected therewith, because Congress has legislated under a power which is partial in its extent, both as to objects and 59*] time. *The result of all that has been said, tends to establish that the power in the constitution is strictly a concurrent power. That it is also a limited power in Congress to promote science and the arts, by particular means, and in regard to particular objects, and for limited times. That all the residue of the power, to promote science and the arts, by all other means, and toward all persons and objects, and for unlimited times, remains exclusively in the states. That the states may legislate, in pursuance of this concurrent power, in all cases, and can grant exclusive rights to anything which may be the subject of a patent, which will be valid within their own territory until a patent is actually issued under the authority of the Union. That when a patent issues, the state has full power to prohibit or control the use of it within its territory, though it cannot grant the right to use the patented thing to others. That it may exercise the power of prohibition, partially or totally, by direct legislative acts, or through the medium of its courts, and may delegate the right to prohibit to any of its citizens. That in the present case, the right of prohibition has been delegated to Livingston and Fulton, and the mode of exercising that right, is by injunction out of chancery. That this right of prohibition may be valid, even though the grant of the exclusive right to use, etc., might be invalid. That the state laws are, therefore, valid, even on the supposition that the right granted by them was to an invention which might be patented; and that they would be valid, as to their prohibitions, even were a patent issued for the same *object. But that, in [*60 truth, the right in question has no connection with anything that can be the subject of a patent; and if it has, that no patent has, in fact, issued to the appellant, nor does he, in any mode, claim a right under a patent. That the question, therefore, on this branch of the cause, is reduced to the inquiry, whether the state may legislate under a power, confessedly concurrent, when Congress has not acted at all, or when no person sets up a right under any act of Congress.

But the laws of New York, now in question, are supposed to be in conflict with the constitutional power of Congress, "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

That is a concurrent power, according to all the principles before laid down. It was fully possessed by the states, after the declaration of independence, and constantly exercised. It is one of the attributes of sovereignty, specially designated in that instrument, "to establish commerce." It is not granted, in exclusive terms, to Congress. It is not prohibited, generally, to the states. The only express restraints upon the power of the states, in this respect, are against laying any impost or duty on imports or exports (except for the execution of their own inspection laws), or of tonnage; against making any agreement or compact with a foreign power; and against entering into any treaty. All these prohibitions, being partial, are founded on the supposition that the whole power resided in the states. They are, accordingly, all in restraint of state power. It is a clear *principle of interpretation that [*61 where a general power is given, but not in exclusive terms, and the states are restrained, in express terms, from exercising that power in particular cases, that in all other cases the power remains in the states as a concurrent power. Thus, the commentators on the constitution, speaking of the taxing power, say, "this restriction implies an admission that, if it were not inserted, the states would possess the power it excludes. And it implies a further admission that, as to all other taxes, the authority of the states remain undiminished."[1] And again: "In all cases in which the restriction does not apply, the states would have a concurrent power with the Union." This doctrine applies precisely to the power to regulate commerce. Laying imposts or duties of tonnage is a part of the power to regulate commerce; and the making of a compact or agreement with other states or nations is the only method by which a state could make any commercial regulation, which, as it regards its own citizens,

1.—The Federalist, No. 32.

would operate beyond its territorial limits. These restrictions imply that the general power to regulate commerce is concurrently in the states, and that it may be exercised by the states in all cases to which these prohibitions do not extend. But the same implication is still stronger from the nature and terms of those prohibitory clauses. The state may lay duties on imports and exports, to execute its 62*] inspection laws. That class of laws *are, or may be, essential regulations of commerce, and they derive their authority altogether from state power. The existence of a power to pass them is, therefore, expressly recognized by the constitution. So, also, a state may lay any duty upon imports or exports, or of tonnage, with the consent of Congress. This provision implies that the power to lay all duties remains essentially in the states; that the exercise of the power is suspended until Congress consent; and that, when the consent is given, the state law acts of itself, and by state authority alone. The states nowhere derive any powers from the constitution. All its provisions are in restraint of their authority, and the consent of Congress, in this instance only removes the restraint. A state may not enter into any treaty; but with the consent of Congress, may enter into an agreement or compact with another state, or with a foreign power. A treaty is made with a view to the public welfare, either in perpetuity, or for a considerable length of time, and binds the whole Union. A compact or agreement is generally temporary in its nature and operation, and is executed by a single act, and binds only the state that makes it. In this sense the constitution must be understood, when it speaks of treaties as distinguished from compacts. It follows that general and permanent commercial regulations with foreign powers must be made by treaty, but that particular and temporary regulations of commerce may be made by an agreement of a state with another, or with a foreign power, by the consent of 63*] Congress. But *in this case, the compact would derive all its efficacy from the original inherent power of the state, not from the act of consent by Congress, which would merely remove an existing restraint.

There is nothing in the nature of this power which renders it exclusive in Congress. The power itself does not grow out of the Union, like the power "to borrow money on the credit of the United States." It does not operate, when exercised by a state beyond its territorial limits, like the power of naturalization. There is no necessary repugnancy between the acts of the two governments under this power, since it clearly admits of a great variety of regulations, which may operate together, without direct interference. The restraints specially imposed on the powers of the state, relating to commerce, would have been unnecessary, if it were not considered as a concurrent power.

The practice of the states shows that the power has always been considered as concurrent. Thus, the state of New York has passed numerous laws, which are regulations of commerce with foreign nations, with other states, and with the Indian tribes.[1] As to that part of the power which relates to trade with the Indian tribes, the people here referred to may be within the limits of a state. Thus, the commentators on the constitution consider it in that light, and contrast the power with that relating to the same subject in the *old confedera- [*64 tion, which was qualified so as "not to infringe the legislative rights of any state within its own limits."[2] Thus, Congress has legislated on that basis. By the act to regulate trade and intercourse with the Indian tribes, it is provided (s. 19) "that nothing contained in the act shall be so construed as to prevent any trade with Indians, on lands surrounded by settlements of citizens, and being within the ordinary jurisdiction of any of the individual states." But the state of New York has also legislated on the same subject, and by the "act relative to the different tribes and nations of Indians within this state," prohibits the purchase of land from any Indian, without the authority of the legislature; prohibits the sale of various articles to any Indian or tribe; makes numerous other regulations as to trade and intercourse with them, by the citizens who surround them, so as to cover the whole ground over which Congress has declared its act should not extend. An examination of the laws of other states will show that many of them have legislated, under every part of this power, to the same extent, and in some cases, to a greater extent than New York; and will show the havoc which must be made in the state laws, if this power is not to be considered concurrent.

This power is not only concurrent, but is limited in Congress. It does not extend to the regulation of the internal commerce of any state. This results from the terms used in the grant of power, *"among the several states." It [*65 results also from the effects of a contrary doctrine, on the whole mass of state power. Internal commerce must be that which is wholly carried on within the limits of a state; as where the commencement, progress, and termination of the voyage, are wholly confined to the territory of the state. This branch of power includes a vast range of state legislation, such as turnpike roads, toll-bridges, exclusive rights to run stage-wagons, auction licenses, licenses to retailers, and to hawkers and peddlers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers by land or water. All such laws must necessarily affect, to a great extent, the foreign trade, and that between the states, as well as the trade among the citizens of the same state. But, although these laws do thus affect trade and commerce with other states, Congress cannot interfere, as its power does not reach the regulation of internal trade, which resides exclusively in the states.

It has thus been seen that this power is concurrent; and as such, may be exercised by the states, subject, like all other concurrent powers, to the power of Congress, when actually exercised; and that it is limited, not extending to the internal trade of a state. We contend that the exclusive right claimed by the respondent is valid, considered either as a regulation of intercourse and trade among the several states, or as a regulation of the internal navigation of the state.

Considering it, then, as a regulation of trade

1.—These laws will be found specifically enumerated and stated in a note to Mr. Emmett's argument.

2.—The Federalist, No. 42.

66*] *among the states, it becomes necessary to inquire into the foundation of the right of intercourse among the states, either for the purposes of commerce, or residence and traveling. From the declaration of independence, in 1776, until the establishment of the confederation, in 1781, the states were entirely and absolutely sovereign, and foreign to each other as regarded their respective rights and powers as separate societies of men. During that period, the right of intercourse among them rested solely on the jus commune of nations. By the law of nations, the right of commerce has its foundation in the obligation resting upon all men, mutually to assist each other, and to contribute to the happiness of their fellow-creatures. Right on one side springs from obligation on the other. The right to purchase springs from the obligation to sell. "One nation has, therefore, a natural right to purchase of another the things which it wants, and which the other does not need." The law of nations being only the application of the law of nature, as regulating the rights and obligations of individuals, to nations and sovereign states, this is the foundation of the right of buying. But the right of selling does not impose any obligation on another nation to buy, as that other may not want, and must be the sole judge of its own necessities.[1] It follows, then, that any state has a natural right to purchase of any other the articles which it needs, and to open a commercial intercourse for that purpose; but 67*] that every *state, being under no obligation to purchase of another, may, at its pleasure, prohibit the introduction of any foreign merchandise. These rights of purchasing are not perfect rights, and of course cannot be enforced by one nation against another; and being thus imperfect, it depends upon the will of each nation, whether it will carry on any commerce with another, or upon what terms and under what regulations. These imperfect rights, like all other imperfect rights between nations, can become perfect only by treaty; the effect of which is to secure to a nation rights of commerce or intercourse which it before enjoyed at the will of another. The right of traveling, or of entering into and residing in one nation, by the citizens or subjects of another, depends on the same principles of international law. But the sovereign may forbid the entrance into his territory, either to foreigners in general, or in particular cases, and under particular circumstances, or as to particular individuals, and for particular purposes.[2] And as he may prohibit the entrance altogether, he may annex what conditions he pleases to the permission to enter. In the absence of any treaty stipulation, and of any prohibitory regulations, the natural right would exist and might be exercised and enjoyed.

This being the relation subsisting between sovereign states, it follows that before the confederation, each state enjoyed the right of intercourse with all the others, at the will of those others, both as respects the transit and 68*] residence of persons, *and the introduction and sale of property. The confederation was a treaty between the sovereign states, and "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states," stipulated that the free inhabitants of each state should have "free ingress and egress to and from any other state," and should enjoy in each state "all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the owner is an inhabitant." This article, then, secured the right of passing from one state to another, but gave no new right of commerce as to the introduction of any goods, and not even the right of removing from the state any property purchased in it. The rights of commerce, therefore, as between the states, remained as before, subject to all the municipal laws of the state, except that those laws must be general and impartial in their application. Under the confederation, then, the states retained the whole power of regulating foreign commerce, and that between the states, except as stipulated in the treaty of confederation itself. Under it, all the trade and intercourse between any state and any foreign nation, was carried on by the law of nature and nations alone. All trade between any state and another state, as to the right of importation, etc., was carried on in the same manner. No state could make any treaty of commerce *with a foreign power, or [*69 with another state.

The inconveniences resulting from these powers of the states gave rise to the new constitution. These inconveniences consisted principally in the impositions and taxes levied on property imported and exported by one state through another. There was no inconvenience as to the right of passing from state to state, as that was secured by the articles of confederation. The constitution applied the remedy to these evils in two ways: (1) By express prohibitions on the states, in those particulars in which the evils had been most sensibly felt, preventing them from levying any impost or duty of tonnage without the consent of Congress. (2) By vesting Congress with a general power to regulate commerce with foreign nations and among the states. The constitution does not profess to give, in terms, the right of ingress and egress for commercial and any other purposes, or the right of transporting articles for trade from one state to another. It only protects the personal rights of the citizens of one state, when within the jurisdiction of another, by securing to them "all the privileges and immunities of a citizen" of that other, which they hold subject to the laws of the state as its own citizens; and it protects their property against any duty to be imposed on its introduction. The right, then, of intercourse with a state, by the subjects of a foreign power, or by the citizens of another state, still rests on the original right, as derived from the law of nations. Suppose there *was no treaty with [*70 a foreign power, and no act of Congress regulating intercourse with that power, but barely a state of peace; that power would enjoy the right of trade and intercourse with New York, by the law of nations alone. But that right might be restrained, or regulated, or abolished by the law

1.—Vattel, Droit des Gens, liv. 1, c. 8, l. 2, c. 2.

2.—Vattel, l. 2, c. 8, s. 180.

of New York alone. Such was the situation of New York before the adoption of the constitution, both as to foreign nations and the other states. The constitution has not abridged the power of the state in this respect. It has only subjected it to the superior power of Congress when actually exercised.

An examination of the acts of Congress on this subject will show that, as the constitution has not given the right of intercourse and trade, so neither has Congress, in the exercise of its constitutional powers, by any law, given that right. [Here the learned counsel entered into an elaborate examination of the statutes, for the purpose of establishing this position.]

It would seem to follow, from this view of the constitution and the acts of Congress, that the right of transit from state to state, by land or water, for commercial or other purposes, is founded on the jus commune of nations; that the constitution does not affect that right, except in specified cases; and as to all others, leaves the right as before, with a general power in Congress to regulate and control it so far as it may be connected with commerce; that the state has the concurrent power also to regulate and control it so far as it may be connected 71*] with commerce; that the state has *the concurrent power also to regulate and control it in all cases where its regulations do not actually conflict with those of Congress; that Congress has made no regulations which alter or affect the right at all, by giving any other right than was before enjoyed; that all the regulations of the state, therefore, which operate within its own limits, are binding upon all who come within its jurisdiction; and that if Congress deems such regulations to be injurious, it may control them by express provisions, operating directly upon the case.

The case has heretofore been considered as if the steamboat laws were regulations of commerce among the states, in the ordinary acceptation of those terms. But is the law in question anything more than a regulation of the internal navigation of the waters of the state? In terms, it applies only to the waters within the state. It does not deny the right of entry into its waters to any vessel navigated by steam; it only forbids such vessel, when within its waters and jurisdiction, to be moved by steam; but that vessel may still navigate by all other means; and it leaves the people of other states, or of New York, in the full possession of the right of navigation, by all the means known or used at the time of the passage of the law. It is, therefore, strictly a regulation of internal trade and navigation, which belongs to the state. This may, indeed, indirectly affect the right of commercial intercourse between the states. But so do all other laws regulating internal trade, or the right of transit from one part to another of the same state: such as quar- 72*] antine laws, inspection *laws, duties on auctions, licenses to sell goods, etc. All these laws are acknowledged to be valid. They are passed, not with a view or design to regulate commerce, but to promote some great object of public interest, within the acknowledged scope of state legislation: such as the public health, agriculture, revenue, or the encouragement of some public improvement. Being passed for these legitimate objects, they are valid as internal regulations, though they may incidentally restrict or regulate foreign trade, or that between the states. So of the laws now in question; they were passed to introduce and promote a great public improvement, clearly within the power of the state to encourage. They operate entirely within the limits of the state. They put no restraint on the right of entry into the state; but they exclude from the right of navigation on its waters in a particular mode, because they deem that mode injurious to the public interest, unless used by particular persons. How can they be distinguished in principle from all the other laws which have been referred to? If steamboats had been pernicious in themselves, or had been deemed so as affecting injuriously other great public interests, could Congress have prohibited them on the waters of New York, by any exercise of the power to regulate commerce? Could not the state have done it, by virtue of its general power, on its navigable waters? Suppose that steamboats were found to be unsafe, and destructive to property or lives, unless built or navigated by persons particularly skillful, could not the state prohibit the *use of them, [*73 unless thus built and navigated? If, under any circumstances, the state may restrict the use of them to particular persons, it may do so in its own discretion, for reasons of which it alone is the judge.

All this shows that the restraint imposed by these laws, on the navigation of the waters of the state, is merely an internal regulation of the right of transit, or passage from one part of the state to another; that it is a regulation which, if even indispensable to the public safety, Congress could not make; and that the power to make it must therefore be in the state.

The right of a state to regulate its internal trade, applies as well to its navigable waters as to its other territory. Its rivers are its territory and domain, as much as the land, and equally subject to its laws in all respects. The power of Congress to regulate commerce applies as well to the land as to the water. Commerce between the states, and with foreign powers, is very extensively carried on by land. Congress has accordingly adapted its revenue laws to the land, by imposing duties on goods imported in carriages, etc. When goods are brought into the state in a carriage or wagon, cannot the state prohibit the transportation of those goods from one part of the state to another, except in a particular manner, or by a particular road, or in vehicles of a particular description? Where is the difference between an exclusive right to navigate vessels by steam on the water, and an exclusive right to move carriages by steam on the land? Cannot a *state grant an exclusive privilege to car- [*74 ry goods as well as passengers, in carriages or vessels, by water or by land? May it not convert all its roads leading into other states, into turnpikes, levy tolls upon them, and alter and abolish them at pleasure? All these are regulations of the internal trade of the state, but they may, and, indeed, must affect, to a great degree, the trade between the states. By virtue of the right of a state over its navigable waters, it establishes ferries, which are exclusive rights to use parts of navigable waters for particular purposes and in a particular manner; and

bridges, which interrupt and sometimes destroy the navigation of rivers. It grants the land under the water at pleasure, builds public piers, erects dams and other obstructions, and diverts the course of the waters for any purpose whatsoever. By its power over its land territory, a state establishes roads and canals, regulates the carrying of goods, and the amount of tolls upon them, grants exclusive privileges to stage-wagons and others, for the carriage of goods and passengers, and performs all other acts of sovereignty in regard to these public highways.

It appears, then, that a state may exercise the same control in these respects, over both land and water, within its own jurisdiction; that the right, as to both, rests on the same foundation—that of a sovereign over his domain; and that it has uniformly been exercised over both in the same manner. What, then, is the right under which the respondent claims? It is only an internal regulation of the use of [*75] the waters of the state. This *is clearly the case when it applies to the case of the conveyance of passengers or goods, on the waters of the state, where the whole journey or transit is within the state, as from New York to Albany. Is it in truth anything more than an exclusive right of ferry over the waters of Hudson's river? It is, in substance and effect, an exclusive right to carry passengers in boats navigated in a particular mode, on the navigable waters of the state. These waters are a public highway, like any other public road on land, and as such, are completely subject to the control of the state laws. There are various acts of Congress which recognize the power of the states to control their navigable waters. Thus, in the act enabling the people of Louisiana to form a constitution, there is a provision that the state convention shall "pass an ordinance providing that the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state, as to other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state."[2] And in the act for the admission of that state, the above provisions, as to the navigation of the Mississippi, are made one of the fundamental conditions of the admission.[2] Similar conditions were also imposed upon the admission of the states of Mississippi, Missouri, [76*] *and Alabama,[3] which strongly imply that the new states would have had a right to control the navigation of their waters, if these provisions had not been inserted; that there is nothing in the constitution which could prevent them from doing so, when they should once have been admitted as equal members of the Union; and that Congress could pass no law, under the constitution, to prevent them from doing it.

But the power of Congress is "to regulate commerce." The correct definition of commerce is, the transportation and sale of commodities. It is so considered in all the regulations made by the laws of Congress. They speak generally of vessels and their cargoes, and whatever rights are given by the laws of commerce, apply to commerce strictly and properly speaking. Any person claiming to navigate the waters of the state of New York against the state laws, under any right derived from the laws of Congress relative to commerce, must show himself qualified according to these laws, and actually exercising that right under their provisions. Now, if the license here set up gives any right, it is to carry on the coasting trade, which consists in transporting goods from one state to another. It is not pretended that the appellant was engaged in this trade, when stopped by the injunction. It appears by the pleadings, that his boat was employed in the transportation of persons or passengers for hire, and it is notorious that this is a distinct business. *It is often entirely dis- [*77 connected from any commercial object, though sometimes indirectly connected with trade. So it has been considered by some of the states. New York once laid a tax upon passengers traveling in the steamboats; and Delaware taxed passengers traveling through that state in carriages. But these states could have laid no tax on property thus transported. If, then, the appellant's boat was engaged bona fide, in the coasting trade, the question might arise as to its rights and privileges under the enrollment and license. But, when no trade is carried on, or intended to be carried on, under the license, it is clear that the license is a fraud upon the state law, if that law is in other respects valid. An examination of the provisions of the statutes relating to the coasting trade will show that they all relate exclusively to the coasting trade as before defined, and do not contemplate the carrying of passengers as distinguished from commerce. Every vessel engaged in it must not only have a license, but must comply with various regulations, at every departure she takes from one district to another; and unless it is shown that such regulations have been complied with, the vessel can claim no right (in any case) to navigate under the laws of the United States. It does not appear that the appellant's boat has ever done this, or pretended to do it, or, in fact, to be engaged in trade at all.

It has thus been attempted to be shown that our exclusive right is valid, even if the law granting it is to be considered as a regulation or restriction *of the right of commercial [*78 intercourse between the states, on the ground, (1) That the power to regulate commerce is strictly a concurrent power. (2) That the state may act in any manner, in the exercise of that power, so long as its laws do not interfere with any right exercised under the constitution or laws of the United States. (3) That the appellant, in this case, has shown no right under that constitution or these laws, and, therefore, cannot contest the validity of the exclusive grant. (4) That even if the enrollment and license relied on, give a right, it is not the right of intercourse for any other purpose than for the coasting trade; and the appellant does not show that he was carrying on, or intended to carry on, that trade. But that the state law, in fact, is only a regulation of the internal trade and right of navigation, within the territorial limits of the state; that the power to regulate this is exclusively in the state; that the

1.—Ingersoll's Dig. 586.
2.—Id. 583.
3.—Ingersoll's Dig. 506, 612, 617.

state has exercised it in the same manner, both by land and water; and that the law is valid, although incidentally it may affect the right of intercourse between the states.

To which it may be added that the state law may be valid in part, or as enforced under particular circumstances, though it may be void under other circumstances. Thus, the law may be held void so far as it restrains the right of navigation between state and state, either for commercial purposes, strictly speaking, or for all purposes, including the transportation of passengers. And it may, at the same time, be valid so far as it restrains the right of internal 79*] navigation, strictly *speaking, either in the whole extent of the right, or as a mere exclusive right to carry passengers in steamboats. Thus, the state law may be suffered to operate, in whole or in part, so far as it may, without actual conflict with the constitution of laws of the United States.

Mr. Emmett, on the same side, stated that the question sought to be presented was the complete invalidity of these laws of New York, as being repugnant to the constitution of the United States. If the invalidity be not total and absolute (and that might well be the case with statutes, which are often void in part, and good for the residue), the appellant must further show that he himself stands in that situation which entitles him to allege their partial invalidity; that his case is such as that the part of the law which is void, is calculated, if enforced, to affect or injure his rights.

In addition to the general prima facie presumption in favor of the constitutionality of every act of a state legislature, this series of laws derives a peculiar claim to that presumption, from the history of the circumstances attendant on their enactment. On the 19th of March, 1787, a short time before the meeting of the Federal convention, the legislature of the state of New York made its grant to John Fitch, for fourteen years. From motives, of the correctness of which this Court can take no cognizance, the legislature, on the 27th of March, 1798, thought fit to repeal that law, on the suggestion that Fitch was either dead, or 80*] had withdrawn *himself, and that Robert R. Livingston was possessed of a mode of applying the steam-engine to propel boats, etc. At this time, all the laws of Congress regulating commerce and patents had been for above five years in operation, and their provisions familiarly known. The Council of Revision, consisting of Mr. Jay, as Governor, Chief Justice Lansing, Judge Lewis, and Judge Benson, notwithstanding the personal regard they might well be supposed to have entertained for Chancellor Livingston (who was also a member, but did not sit), thought it their duty to object to this bill, on the ground that the facts from which Fitch's forfeiture was to arise, had not been found by some due course of law. The act, however, passed the legislature by a constitutional majority. But he would here ask, who made this objection, and what were the inferences it afforded as to the constitutionality of the law? Mr. Jay's is a name of peculiar authority; Chief Justice Lansing had been a member of the federal convention; and both the Judges were perfectly conversant with the political proceedings of the day. They were adverse to this act on principle, and must be presumed to have presented all the objections against it which they thought well founded. They not only did not think that the adoption of the constitution and the enacting by Congress of her revenue and patent laws, had made Fitch's privileges cease, but neither the constitution nor those laws appeared to furnish any objection against a similar grant to Robert R. Livingston. On the 29th of March, 1799, an act was passed, extending *the former [*81 act for twenty years from its date, and giving two years for making the experiment. That passed the Council of Revision without any objection, none of the judges having dreamed that it was unconstitutional. The time for making the experiment having run out, without a boat having been made, and Mr. Fulton having associated himself to Mr. Livingston in the investigation, on the 5th of April, 1803, the Legislature made the grant anew to Messrs. Livingston and Fulton. And that law was again approved by the Council of Revision, consisting almost entirely of new members, and differing from the first. The time granted by this law for constructing a boat, again ran out; and on the 6th of April, 1807, it was again extended for two years, and that act also approved by the Council of Revision. In the course of that year, the experiment was successfully made; and on the 11th of April, 1808. the Legislature, by an act, which also passed the Council of Revision, made a contract with Messrs. Livingston and Fulton, by which they hoped to gain, and did gain, unequalled accommodations for persons traveling in the state.

The success of those gentlemen awoke the cupidity of others, and doubts of the constitutionality of those laws were, for the first time, raised. But after these questions were first broached, and while opposition boats were actually building, on the 9th of April, 1811, the Legislature passed another act, which also received the sanction of the Council of Revision. These were not judicial decisions; but they were six consecutive and deliberative *acts of [*82 judges, equally bound, by their duty and oath of office, to examine, decide, and act upon this objection, if it had sufficient force; they so nearly resembled judicial decisions that they might well be cited as authorities. They also showed that the laws not objected to had not grown out of any temporary effervescence, or excitement, or party intrigues. The grant began in 1798, and had been universally ratified down to 1811.

But the constitutionality of those laws had been the subject of a judicial decision of the mose respectable character. The act of 1811 had a proviso, that nothing therein contained should extend to the three opposition boats actually built and launched. With regard to two of them, Livingston and Fulton filed a bill for an injunction to prevent their navigating. The then Chancellor thought the question too important to grant an injunction, in the first instance, and refused it; from that decision an appeal was made to the Court of Errors of that state; there the constitutionality of those laws was very ably disputed, but supported by the unanimous decree of that court, and the very elaborate opinions of the judges, which, for

sound constitutional reasoning, can scarcely be surpassed.[1]

New York is not the only state which has passed such laws. Massachusetts, February 7, 1815, granted to J. L. Sullivan a similar grant for steam tow-boats, on Connecticut River, for 83*] *twenty-eight years, after the expiration of his patent, which, on February 11, 1819, was enlarged for two years. New Hampshire, in June, 1816, gave him a similar privilege on the Merrimac. Pennsylvania, on the 26th of March, 1813, gave a similar right to James Barnes, from Wilkesbarre to Tioga Point, the borders of our state. Georgia, on the 14th November, 1814, gave a similar right to S. Howard, for all the waters of the state, with steam tow-boats; and by another act, 19th December, 1817, granted to a company (probably deriving under Howard) a similar right for steamboats for twenty years. Tennessee has lately given a similar right on the Tennessee River.

What are the provisions of the constitution alleged against the validity of those laws? They are to be found in the powers given to Congress (art. 1, s. 8), to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; and also to promote the progress of science and of the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

If the constitution had not contained either of the provisions referred to, the right of the states to grant exclusive privileges would be unquestionable. At any rate, no point could be presented to this court, by which it could have jurisdiction to consider the validity of their grants. In free countries, which reject the pretentions of prerogative, it is (unless constitu-84*] tionally forbidden) a *part of the right of legislation; and whether wisely exercised or not, is a question between the government and the people, with which this Court have nothing to do.[2] Those are the only provisions on the subject; for it is clear that the 2d sec. of the 4th art. (which, however, has sometimes been mentioned) would not have prevented the exercise of this right. That is only intended to secure to all citizens of the United States, when coming into any state, the same immunities and privileges that are enjoyed by the citizens of that state, and subject to the same laws and regulations; and, unquestionably, those laws do not place the citizens of other states on a different footing than the citizens of the state of New York.

Those provisions, before specified, cannot apply to interfere with the state laws, unless where a case is presented, the facts of which bring it within one or other of those provisions.[3] Now, the case presented contains nothing to make either of the provisions of the constitution applicable to it. Certainly no patent is here presented touching the same subject-matter, and with which the state grants are pretended to interfere. On this point the appellant has no right to ask for the decision of this court, or to claim the benefit of its jurisdiction.

Neither does the case present any ground on *which the application of the cause [*85 respecting commerce can be made; the vessels not having been engaged in trade or commerce, but in carrying passengers for hire. But if either of those provisions can be applicable, what is the general rule for their construction, as to the extent and conclusiveness of the powers they confer? In the delegation of authority of Congress itself by the constitution, the phraseology does not imply exclusive power. It is remarkable that even the definite article "the" is omitted, and it is only provided that Congress shall have power, etc. And this omission was not accidental, but studiously made. By referring to the journals of the federal convention,[4] it will be found, that the sixth article of Mr. Charles Pinkney's draft has the words "shall have the power," etc. In the draft reported by the committee of five (art. 7) the definite article is still preserved.[5] In the draft as reported by Mr. Brearly the word "the" is left out, clearly by design.[6] Notwithstanding that, Mr. Patrick Henry and Mr. George Mason, and, indeed, the opposers of the constitution generally, thought that by that instrument, as originally presented to the people, all the powers given to Congress would be considered as given to them exclusively of the states.[7] Mr. Henry said, "The right interpretation of the delegation of those *powers [*86 was, that when power was given, it was exclusively given." And Mr. George Mason[8] asks, "will powers remain to the states, which are not expressly guarded and reserved?" This construction, which was the general foundation of the opposition to the constitution, was strenuously disavowed and reasoned against in the Federalist,[9] and actually produced the tenth article of the amendment. The same doctrine was, nevertheless, maintained by one of the counsel in the case of Sturges v. Crowninshield.[10] He says, "every power given to the constitution, unless limited, is entire, exclusive and supreme." But the court held differently; that the grant of a power to Congress does not imply a prohibition on a state to exercise the same right.[11] And the doctrine is very fully enlarged upon by Mr. Justice Story, in Houston v. Moore.[12] It is also very clearly laid down in the case already cited, by Thompson, J., and by Kent, Ch. J.[13] But the rule is more strongly, and perhaps not less justly, laid down by Judge Tucker, in his edition of Blackstone's Commentaries.[14] After alluding to the clauses restraining the powers given, he says, "the sum of all which appears to be that the powers delegat-

1.—Livingston v. Van Ingen, 9 Johns. Rep. 507.

2.—6 Johns. Rep. 559, 560, per Yates, J.; 563, per Thompson, J.; 573, 574, per Kent, Ch. J.

3.—Houston v. Moore, 5 Wheat. Rep. 1, per Johnson, J. p. 33.

4.—p. 75.

5.—p. 222.

6.—p. 323, 324.

7.—Virginia Debates, 300.

8.—Virginia Debates, 313.

9.—Nos. 32, 82.

10.—4 Wheat. Rep. 124.

11.—Id. 193.

12.—5 Wheat. Rep. 48, 54.

13.—Livingston v. Van Ingen, 9 Johns. Rep. 565, 571.

14.—Tucker's Bl. Com. Part 1. App. D. p. 154.

ed to the federal government are, in all cases, to 87*] receive the *most strict construction that the instrument will bear, where the rights of a state, or of the people, either collectively or individually, may be drawn in question." This rule of construction must be correct; for the constitution gives nothing to the states or to the people. Their rights existed before it was formed, and are derived from the nature of sovereignty and the principles of freedom. The constitution gives only to the general government, and so far as it operates on states or popular rights, it takes away a portion, which it gives to the general government. In respect to extent and range, this delegation of powers ought, perhaps, to be liberally construed; but the states or the people must not be thereby excluded from the exercise of any part of the sovereign or popular rights held by them before the adoption of the constitution, except where that instrument has given it exclusively to the general government. The 10th amendment of the constitution was adopted to secure that construction, and it is conformable to the rules of reason and law, in construing every similar instrument. The truth of this rule has, however, been sometimes controverted, by referring to the power of naturalization as exclusive, and reasoning from that to the others. Naturalization is decided by this court to be an exclusive power; but it must be so considered, not from the grant of it in the 7th article, but from the force and necessary effect of the 2d sec. of the 4th article. It is, therefore, an exception, and does not shake the general rule.

It is of very little importance, whether the 88*] power *to regulate commerce be exclusive or concurrent, since this state grant does not, in fact, interfere with any congressional regulation of commerce. But as the exclusive nature of that power has been always insisted on, and used as an argument against this grant, it may be right to consider the solidity of the assertion.

The expression, concurrent powers, is objected to, as if it implied equality in the rights vested in Congress and the states. It is only a verbal criticism that it would be more correct if the term used was co-ordinate. The term, concurrent, is adopted by the Federalist, and has constantly been used to express those powers. It is always understood, when so applied, that the exercise by the states must be subordinate, and never can be in collision with that by Congress. It has been said, commerce is an unit; the meaning of that expression does not very clearly appear, nor its force and application to the argument. If it be an unit, the constitution has broken it into fractions, and given to the states the exclusive control of one of the fractions. But further, the regulations relating to that unit, are many and various; some acting on one part, and some on another, and operating on it in different ways. It is with these regulations that this discussion has to do; and the question still remains, whether some of those regulations may not, subordinately emanate from the states.

As Congress has no power to regulate the internal commerce of any state, none of its regulations can affect so much of the exclusive grant, 89*] as *restrains vessels which are only used within the states; nor can it give to any man a permission to carry on any steamboat navigation, which, in its beginning, and ending, of course, is entirely confined within the waters of the state; for instance, between New York and Albany; on Cayuga Lake, on Lake Ontario, and the St. Lawrence, from Niagara to Ogdensburg. The only question can be, as to navigation between foreign countries, or another state and New York; and even there, the power of Congress could only be extended to fair cases of trading, within the purview of the constitution, and not to the mere transportation of passengers; nor to any colorable pretense of trading as a cover for carrying passengers, and defeating the grant. This distinction is, in itself, of great consequence, and peculiarly applicable to the case before the court, in which the complainant states, and the defendant admits, the vessels to have been employed in the transportation of passengers.. The power given to Congress to regulate commerce with foreign nations, and between the several states, relates to commerce, in the proper acceptation of the term: "the exchange of one thing for another; the interchange of commodities; trade or traffic." This is the direct subject of the power; and by force of the auxiliary power, "to make all laws which shall be necessary for carrying into execution the foregoing powers," Congress has passed laws for erecting ports of entry and delivery, for the collection of duties, regulation of seamen and ships employed in foreign commerce, or that between the states. Ports, duties, seamen *and ships, afford [*90 the means of regulating commerce, and therefore, so far as they are used in such commerce, they come within the powers of Congress. It has an incidental power, indeed, to regulate navigation, but only so far as that navigation is, or may be, subservient to the commerce, it has a direct power to regulate. It has no right to interfere with the navigation of the navigable waters of any state, or even where they are common to two states, except so far as that navigation is used for, or applicable to, the purposes of the commerce it has the power to regulate; and it is a proposition unequivocally false, when asserted generally, that Congress has power to interfere with or regulate the navigation of the navigable waters of any state or states. The proposition can only be made true, by adding the qualification, "in so far as that navigation is used in foreign commerce, or commerce between the states." It is contended that the navigable waters belong peculiarly to the federal government, and not to the states within which they are. This position, combined with some others made by the appellant's counsel, leads to alarming results. We have canals of which we are proud, and from their tolls the state anticipates large profits; one is laying out from Sharon, in Connecticut, to the Hudson; and another contemplated through New Jersey, from the Delaware to the Hudson. Those already in operation, run from navigable waters to navigable waters; from Lake Erie or Champlain to the Hudson; those projected, are to be from one state to another. Their utility and profit must *re- [*91 sult from transporting the produce of Canada, or other states, to New York, principally for exportation and foreign trade; and bearing back, in return, the products of foreign commerce to those places. They are, then, instru-

ments of foreign commerce, and of that among the states, and mere channels of communication between navigable waters, or different states. Now, where a power is given to Congress, all the means which are appropriate and plainly adapted to the execution of that power are also given.[1] It is contended that it belongs exclusively to Congress to regulate the navigation and vessels that are the medium of foreign trade, and that between the states; this commerce is an unit, and cannot be divided; the navigable waters belong to the general government, and not to the states; no state has a right to collect revenue from foreign trade, or that between the states. If these positions be considered together, what becomes of the state control over our canals, the craft on them, or the tolls from them? the pier at Black Rock, or the basin at Albany? If the power of Congress over commerce be exclusive, it must also have exclusive control over the means of carrying it on. No state, then, should be mad enough to make another canal, susceptible of being used for intercourse between the states, or foreign commerce.

But there is no grant in the constitution giving the navigable waters peculiarly to the fed *92*] eral government, *and not to the states within which they may be; nor is it traced to any grant, but to some mystical consequence of the Union itself. The position is entirely denied, and met by another, of which the strictest examination is solicited. It is this: The federal government can do no act on the navigable waters within the limits of the United States, which, or a corresponding act to which, it cannot do on the land, within the same limits. If it can, let the act be named. Then the navigable waters belong no more to the federal government, and are no otherwise affected by the Union, than the land itself. Both are equally subject to the jurisdiction of the general government for the exercise of all powers delegated to it by the constitution, and both equally subject to state jurisdiction for the exercise of all powers connected with state sovereignty. It is said that admiralty and maritime jurisdiction belongs exclusively to the federal government; but this court has decided that the grant to the United States in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same; and that the general jurisdiction over the place, subject to this grant, adheres to the territory as a portion not yet given away, and that the residuary powers of legislation still remain in the state.[2] Besides, admiralty and maritime jurisdiction depends either on the place where *93*] the act is done, or the nature of *the act itself. The place gives no jurisdiction, where the navigable waters in which the tide ebbs and flows are within the body of a county or a state, or of two states.[3] Accordingly, the laws giving jurisdiction of crimes to the district and circuit courts, confine it to "places out of the jurisdiction of any particular state." If the Admiralty Court has cognizance of any matter done on navigable waters within a state, it is derived, not from the locus, but from the causa litis, which gives jurisdiction, though it should arise on land; for instance, seaman's wages, founded on shipping articles made on land, have always, and charter-parties and policies of insurance, have lately, been held to be of admiralty jurisdiction.[4]

But it is further said, to prove the exclusive control of the general government over those navigable waters, that they are regarded and treated as the high seas, since this admiralty and maritime jurisdiction includes "all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." The seizures alluded to are for breaches of commercial laws, coming under the constitutional powers of Congress, and the authority of the United States over the place, or that account, is equal, whether the offense *be [*94 committed on land or water; and the very next sentence gives to the same District Court "exclusive original cognizance of all seizures on land, or other waters, than as aforesaid made." In fact, analogous provisions for regulating foreign commerce by land, are made by the act of the 2d of March, 1821, "further to regulate the entry of merchandise imported into the United States from any adjacent territory." It directs every conductor of any carriage or sleigh, and every other person coming from any adjacent foreign territory into the United States with merchandise subject to duty, immediately on arrival within the United States, to deliver a manifest, etc., at the office of the nearest collector, or deputy-collector, to be verified on oath; for non-compliance, the carriage or sleigh shall be forfeited. The duties to be paid or secured by bond; and all penalties or forfeitures to be sued for and recovered in the manner prescribed by the general collection law. Clearly, then, Congress has no more power over the navigable waters than over the land; nor over the ships than it has over the carriages and sleighs engaged in the same kind of commerce. It might register, enroll and license the latter, if it thought fit, as well as ships. Nor is there any greater control acquired by the general government, in virtue of the existence of the Union, over navigable waters or shipping than over land and land carriages. The power it possesses as to ships or vessels, is only in so far as they are instruments of foreign commerce, or of that between the different states; but in so far *as [*95 the employment of a ship or vessel in navigating the waters of any state or states, has no connection with the commerce which Congress has power to regulate; neither that employment, nor its regulation or prohibition, falls within the purview of the federal constitution. It could not, I think, be seriously contended that Congress can regulate the carrying of passengers from any part of the Union, who are traveling to Ballston, Saratoga, or any other place, for health or pleasure; and even if the object of their passing were to trade, that would

1.—United States v. Fisher, 2 Cranch, 358; M'Culloch v. Maryland, 4 Wheat. Rep. 316.

2.—United States v. Bevans, 3 Wheat. Rep. 336.

3.—4 Inst. 137, 138, 139, 140; 12 Co. 129; Moore, 122, 891, 892.

4.—De Lorio v. Bolt, 2 Gallis. Rep. 308.

not legalize the interference of Congress as to the mode of their conveyance from place to place. That naturally falls within the sphere of state legislation; and we must keep in memory the rule of construction laid down by Judge Tucker, and already cited, "that the powers delegated to the federal government are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively or individually, may be drawn in question." Those who contend that navigating by steamboats between different states, falls within the powers of Congress, must admit that it would have the power to prohibit the carrying of goods, wares or merchandise in a steamboat from any foreign place, or different state, to another. Now, would Congress have the power to prohibit the carrying of passengers in steamboats from Norfolk or Elizabethtown Point to New York? Certainly such a power could not 96*] be contended for; and why not? *only because the powers of Congress have nothing to say to the carrying of passengers.

It may be urged against this train of reasoning, that Congress has actually legislated on the subject of passengers. But the act of the 2d of March, 1819, regulating passenger ships and vessels, the fact is admitted; but though the humane motives which suggested the law and its provisions are laudable, its constitutionality may well be doubted. If Congress has the power to regulate the conveyance of mere passengers, coming by water from foreign countries, it has an equal power to regulate those coming by land, or passing from one state to another. If that law be constitutional, or if a steamboat, only employed in carrying passengers between New Jersey and New York, can come within the jurisdiction of Congress, it must necessarily follow that Congress has a right (and, indeed, according to the doctrine of our adversaries, is exclusively authorized) to regulate the number of passengers to be received into every ordinary stage-coach, though it does not carry the mail, and the size, shape, description and kind of diligence, and the kind and number of horses, to be employed in conveying passengers between New Brunswick and Maine, Vermont and New York, and through the state of New Jersey, between New York and Philadelphia. If this legislation falls under the power to regulate commerce, and that power is exclusive, it must be contended that none of the states in which these diligences may travel, have a right to pass any law respecting them. Neither this Court, nor the people of the *United States, are, probably, prepared [*97 for the assertion of that claim. The states have always legislated on a different principle, whether the conveyance of passengers was to be by land or water. Every state has probably made numerous provisions on this subject; but want of time and opportunity has confined research to the statutes of New York and Georgia.[1]

*It is, however, contended, that the [*98 power of regulating commerce is concurrent. This position, indeed, is by no means universally acceded *to. Judge Tucker, in his [*99 edition of Blackstone,[2] ranks among the powers exclusively granted to the federal government, the power to regulate *commerce, etc., [*100 the commerce between the individuals of the same state being reserved to the state governments. And he repeats the doctrine,[3] on the very untenable ground that the regulation of commerce is not susceptible of a concurrent exercise; a doctrine which a review of state laws will show to be contrary to fact and experience. The opposite doctrine is strongly supported by Kent, Ch. J., in Livingston v. Van Ingen,[4] as the only safe and practicable rule

2.—Vol. I, part 1, App. D. p. 180.
3.—p. 309.
4.—9 Johns. Rep. 577, 578.

1.—In those States, 1st, as to ferries and bridges: In the laws of New York (3d vol. Webster's ed. p 321), an act passed 19th March, 1803, grants to John Ransom the exclusive right, for ten years, to keep a ferry across Lake Champlain, from his landing, at Cumberland Head, to Grand Isle, in Vermont, with a prohibition and penalty against any other person's keeping a ferry, or transporting any persons, goods or chattels, for hire or pay, across the lake, between the point of Cumberland Head and the north point, called Gravelly Point, on said Cumberland Head. An act passed May 16th, 1810 (6th vol. Websters & Skinner's ed. p. 16), makes the same grant for ten years more, with the same prohibition and penalties, to Russel Ransom. An act passed May 28th, 1812 (Id. 394), grants, in the same way, to Peter Deall, and his assigns, to keep a ferry across Lake Champlain, from Ticonderoga to the town of Shoreham, in Vermont, for sixteen years, with a like prohibition and penalties for carrying, etc., from any place on the west shore, within half a mile north or south of Deall's dwelling-house. An act, passed March 28th, 1805 (4th Vol., same ed. 66), gives to David Mayo the same right, from his landing, in the said town of Champlain, to Windmill Point, in Vermont, for ten years, with a like prohibition and penalty. An act passed February 20th, 1807 (5th vol. same ed. p. 11), gives to Peter Steenberg the same right to keep, etc., a ferry between the south-west point of Carlton Island and the outlet of Lake Ontario (the high road to Canada), with the same prohibition and penalty.

In Georgia, by an act of the 14th December, 1809, an exclusive right is given to Joseph Hill, etc., for one hundred years, to erect three toll-bridges across the Savannah and its branches (dividing South Carolina and Georgia), a little above the city of Savannah, on the road between it and Charleston; and it prohibits any person's erecting a toll-bridge across the said river Savannah, up or down it, within five miles of the city. An act of December 6th, 1813, authorized John Hill to establish a ferry from Savannah to Proctor's Point, till he has built his bridges. An act of 15th of December, 1809, gives to William Garritt and Le Roy Hammond a right to make a toll-bridge, and exact toll, across the Savannah River, from a place on the Georgia side, opposite Campbletown; and to Walter Leigh and Edward Rowell a similar bridge, etc., over the Savannah River, at Augusta. An act of December 5th, 1800, gives to commissioners the right to establish a ferry over the river Savannah, at Augusta; the tolls to be for the benefit of the academy of Richmond county; which, perhaps, the appellant's counsel may think at variance with his position, that no state has a right to derive revenue by tolls on the trade or intercourse between two States.

The same law prohibits any other ferry or bridge between William's ferry, opposite Fort Moore's bluff and Ray's ferry, opposite Campbelltown. An act of 6th of December, 1813, gives a ferry across the Savannah, to Ezekiel Dubze; and another is given to Zachariah Bowman and Daniel Tucker. An act, passed 9th of November, 1814, on the express ground of facilitating intercourse with South Carolina, gives to John M'Kinne and Henry Shultz, for twenty years, an exclusive right to a toll bridge over the Savannah, from Augusta, or within four miles thereof; and prohibits the establishing of any other toll-bridge over the Savannah, from Augusta, or within four miles above or below the city.

2. As to stages. In the laws of New York, an act, passed March 30th, 1798 (4th vol. Loring & Andrews ed. p. 399), grants to Alexander J. Turner and Adonijah Skinner, an exclusive right for five

of conduct, and the true constitutional rule, arising from the federal system. And it is the 101*] only safe *and practicable rule; it is one which the extent of our territory would indicate, even if the government were despotic. In China, the mandarins of provinces must be intrusted with some subordinate authority, to make commercial regulations adapted to local circumstances. With us, the peculiar nature and principles of our free and federative government, make the existence of such sobordinate legislation more prudent and politic. There must be, even in respect to foreign commerce, local interests and details, which cannot well be presented to the view of Congress, and can be, at least, better provided for by the state legislatures, emanating from the very people to whom they relate. This must have been perceived by the framers of the constitution, and they must have felt the difficulty of designating the limits of what ought to be permitted to state authority. They did not, therefore, attempt the limitation, except in some plain cases which they marked by restrictions and prohibitions; but they guarded against any practical abuse of the permission, by securing to Congress the paramount and controlling power over the whole matter. This view of the subject is exceedingly strengthened, when we contemplate the probable future increase and extent of this confederacy. The thirteen original states were a band of brothers, who suffered, fought, bled and triumphed together; they might, perhaps, have safely confided each his separate interest to the general will; but if ever the day should come, when representatives from beyond the Rocky Mountains shall sit in 102*] this capitol; *if ever a numerous and inland delegation shall wield the exclusive power of making regulations for our foreign commerce, without community of interest or knowledge of our local circumstances, the Union will not stand; it cannot stand; it cannot be the ordinance of God or nature that it should stand. It has been said by very high authority, that the power of Congress to regulate commerce "sweeps away the whole subject-matter." If so, it makes a wreck of state legislation, leaving only a few standing ruins that mark the extent of the desolation. The position, however, is not correct. A power of regulating commerce is impliedly acknowledged to be in the states, by the 10th section of the 1st article; for that section makes specific limitations on its exercise by them, which would be unnecessary, if the power were not possessed by them; and tacitly admits (what is true as to all the state powers) that it is possessed in all other matters not expressly restrained. Congress can lay no tax or duty on any articles exported from any state. If the word exports were not in the 10th section, what would be the consequence? that the states, and they only, could lay duties on exports; and as it is, what is the construction? that, although Congress can, under no circumstances, impose a duty on exports, any state can, with the consent of Congress, to any amount; and without asking the consent of Congress, to an amount and extent necessary for executing its inspection laws; possessing, in that respect, a power of regulating external commerce, which is directly withheld from Congress. And *from [*103 whence is derived the power to make inspection laws, but from the existing and more extensive right of making laws to regulate commerce? It seems, also, that the 9th section of the same article, paragraph 1, in like manner admits the power to be in the states. The importation of slaves is, and has always been, considered as a branch of commerce; and it is in that point of view only that Congress has authority to legislate on the subject. When, then, that paragraph speaks of any of the states thinking proper to allow that importation, it surely admits in them a right to permit or prohibit; and thus

years, of running stages between Lansingburgh and the town of Hampton, in the county of Washington (i. e., to Vermont, or the road through it to Canada). An act passed February 26th, 1803 (3d vol. Webster's ed. p. 322), grants to T. Donally and others, the exclusive right, for seven years, of the same kind, from the city of Albany to the north boundary line of the state of New Jersey. An act passed April 6th, 1807 (5th vol. Webster's & Skinner's ed. p. 186), grants to John Metcalf the exclusive right, for seven years, of running stagewagons between the village of Canandaigua and the village of Buffalo (i. e., the road by Lake Erie to Pennsylvania, Ohio and Michigan).

In Georgia, an act of November 25th, 1802, gives to Nathaniel Twining, &c., for ten years, the sole and exclusive right of running a line of stage-carriages between the city of Savannah and town of St. Mary's (on the borders of Florida). Section two gives to him an exclusive right of conveying passengers and their baggage, by water, between Darien and St. Marys (a coasting trade between two ports of entry, if carrying passengers be a branch of trade), till a post-road is established. An act of December 7th, 1812, gives to William Dunham the right of running stage-carriages as above. Add to these, the decision of Perrins v. Sikes, in 1802 (Day' Conn. Rep. in Err., p. 19), that a grant by the General Assembly, of an exclusive privilege to carry passengers by the stage, on the post-road leading to Boston, as far as the Massachusetts line, was valid, which may be added as another legal decision on the constitutionality of those laws. Indeed, as to the regulation of passengers arriving in ships from foreign parts, some of the states have exercised, at least, a concurrent power. Of that kind is the act of the state of New York (2 N. R. L. 440), and New Jersey has passed a similar law on 10th of February, 1819. Justice's ed. N. J. Laws, 655. So also in Massachusetts (2 Mass. Laws, 629), by an act of February, 1794, masters of vessels coming from abroad, are required to report passengers, etc. And in Delaware (2 Laws of Del. ed. 1797, by S. & J. Adams, c. 134, p. 1354), an act to prevent infectious diseases, passed 24th of January, 1797, sec. 5, enacts that no master, etc., of any ship bound to any port of that state, shall bring or import any greater number of passengers and servants than shall be well provided and supplied with good and wholesome meat, drink, and other necessaries, particularly vinegar, as well to wash and cleanse the vessel, as for the use of the persons on board, during the voyage; and it directs the size of each berth, etc.; and that if any master shall offend, etc., he shall forfeit $600 for every such offense. Sec. 7 enacts that every master, etc., shall pay to the physician who boards his ship, six cents for every person he shall import or land in that state, which he is thereby authorized to recover from such passengers and servants respectively; and the physician shall pay over the moneys so received to the treasurer of the trustees of the poor in his county. Here is another instance inconsistent with the position of the appellant's counsel (if carrying passengers be trading), that a state has no right to raise a tax or revenue by foreign trade. By another act of that state, passed February 3d, 1802, the master or owner is required to give bond that the person so imported and landed shall not become chargeable. If the regulation of passengers belong to commerce, and that exclusively (as it must, if the power to regulate commerce be exclusive), by what authority can a state court issue a ne exeat against a trader or merchant about to leave the state?

6 L. ed.

to legislate on what is undoubtedly a branch of commerce with foreign nations, or among the several states.

Indeed, it seems susceptible of demonstration that Congress did not intend to ask, nor the states to give to that body, the exclusive power of regulating foreign commerce, or that between the states. In Colvin's edition of the laws of the United States,[1] we find the proceedings which led to the formation of the general convention. The appellant's counsel has selected, as one of these, the representation from New Jersey, to be found in pages 22, 23, art. 2d. But that can scarcely be said to have led to the convention. It was made in 1778, during the revolutionary war, and to meet objectionable parts of the old articles of confederation. At any rate, it appears from page 25, that the proposed alterations were rejected in Congress. In 1781,[2] Mr. Wither-
104*] spoon *proposed in Congress a modified change of the power of regulating commerce, which was also negatived. None of the other states made any proposition similar to that from New Jersey, in 1778. The following, more nearly approaching the time of the convention, better shows the extent of what Congress asked, and the states appeared willing to concede:[3] "In Congress, Wednesday, July 13th, 1785. The committee, consisting of Mr. Monroe, Mr. Spaight, Mr. Houston, Mr. Johnson and Mr. King, to whom was referred the motion of Mr. Monroe, submit the following report: 'That the 1st paragraph of the 9th of the articles of confederation, be altered, so as to read thus, viz.: The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in cases mentioned in the 6th article; of sending and receiving ambassadors; entering into treaties and alliances; of regulating the trade of the states, as well with foreign nations as with each other; and of laying such imposts and duties upon imports and exports, as may be necessary for the purpose. Provided, that the citizens of the states shall, in no instance, be subjected to pay higher imposts or duties than those imposed on the subjects of foreign powers. Provided, also, that the legislative power of the several states shall not be restrained from prohibiting the importation or exportation of any species of goods or commodities whatsoever.'" This is what the Congress
105*] *itself asked for and required. The state of Virginia was among the first to meet its views; and Mr. Madison, is the legislature of that state, proposed a resolution, which will be found in the same book,[4] as follows:

"Virginia, to wit, in the House of Delegates, Wednesday, November 30th, 1785."

[Mr. Madison's resolution for empowering Congress to regulate trade.]

"Mr. Alexander White reported, according to order, a resolution agreed to by the committee of the whole House, on Monday last, respecting commerce," etc.

"Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States; for preventing animosities, which cannot fail to arise among the several states, from the interference of partial and separate regulations; and whereas, such uniformity can be best concerted and carried into effect by the federal councils, which, having been instituted for the purpose of managing the interests of the states, in cases which cannot so well be provided for by measures individually pursued, ought to be invested with authority in this case, as being within the reason and policy of their institution;

*"Resolved, That it is the opinion of [*106 this committee that the delegates representing this commonwealth in Congress, be instructed to propose in Congress a recommendation to the states in the Union, to authorize that assembly to regulate their trade on the following principles, and under the following qualifications: (1st) Giving power to Congress to prohibit foreign vessels from entering any port, or to impose duties on them and their cargoes; such duties to be uniform, and carried into the treasury of the state. (2d) That no state be at liberty to impose duties on any goods, wares, or merchandise imported, by land or by water, from any other state; but may altogether prohibit the importation from any state, of any particular species or description of goods, wares or merchandise, of which the importation is, at the same time, prohibited from all other places whatsoever." In each of those proceedings, it was clearly contemplated that the individual states should at least retain the power of absolutely prohibiting the importation of any article they thought fit, within their own respective limits. How far was this intention subsequently departed from? Where is the power of prohibiting the exportation or importation of any article taken from the states by the constitution? They are indeed qualifiedly restrained from laying imposts or duties on exports or imports, but not from entirely prohibiting their exportation or importation; and they are also restrained from laying any duty on tonnage; and it is, perhaps, the fair construction of the instrument, that even their prohibitory legislation is under *the control of Congress, [*107 as having the paramount authority to regulate commerce, but valid until Congress shall have made regulations inconsistent with their laws. A review of some of the laws of different states will show that they have always exercised the power of making very material regulations respecting commerce. This review must be abridged; but it is of extreme importance, and if it were possible to spread out in detail the immense mass of state laws regulating and affecting foreign commerce, and that among the states, it would be conclusively seen that they have always considered themselves as possessing, and have, accordingly, exercised a concurrent power over both those branches of trade; and that the power of Congress cannot be decided to be exclusive, without declaring to be unconstitutional an appalling body of state legislation.

To begin with the laws respecting slaves. The appellant's counsel has questioned their constitutionality, and called them of doubtful author-

1.—1st vol.
2.—Ib. p. 28.
3.—1 L. U. S. p. 49, 50.
4.—p. 53.

ity. That expression showed he felt their application and important bearing, if their constitutionality be admitted; and it has never before been called in question. The constitution most clearly admits the right of the states to legislate on this subject, not merely till 1808, but always, unless Congress should prohibit the trade; and yet, as has been already suggested, slaves are treated in that very paragraph itself as an article of commerce or trade. Congress, renouncing for a time the paramount right to prohibit their importation, claims the right to lay a tax or duty on it. So, also, they are treat- [*108] ed *as an article of commerce in the laws of Congress; for it is only under the power to regulate foreign commerce, that, before 1808, they could forbid and make penal the trade by our citizens to foreign nations, and since 1808, prohibit it entirely. In this point of view it was also considered, and the right of the states to prohibit it asserted, in the debates of the Virginia convention. On this article, Mr. George Mason observed: "Should the government be amended, still this detestable kind of commerce cannot be discontinued till after the expiration of twenty years." To which Mr. Madison, in reply, says:[1] "We are not in a worse situation than before. That traffic is prohibited by our laws, and we may continue the prohibition. The Union, in general, is not in a worse situation. Under the articles of the confederation it might be continued forever." And again:[2] "As to the restriction in the clause under consideration, it was a restraint on the exercise of a power expressly delegated to Congress, namely, that of regulating commerce with foreign nations." Mr. George Nicholas also, alluding to both objections, says:[4] "Virginia might continue the prohibition of such importation during the intermediate period." And to obviate the objection that the restriction of Congress was a proof that they would have power not *given to them, he remarked, [*109] "that they would only have had a general superintendency of trade, if the restriction had not been inserted. But the southern states insisted on this exception to that general superintendency for twenty years. It could not, therefore, have been a power by implication, as the restriction was an exception to a delegated power." And finally, Governor Randolph says:[5] "The power respecting the importation of negroes is an exception from the power given to Congress to regulate commerce." The same doctrine is also maintained in the Federalist.[6] Let us, then, see the laws that have been made by some of the different states respecting this branch of trade.[7]

*Indeed, Congress itself has recog- [*110] nized and acted on the power of the states to prohibit this trade. The constitution restrained Congress (as *has been already seen) [*111] from prohibiting the importation of negroes, etc., before 1808. But in 1803 it passed "an act to prevent the importation *of cer- [*112]

1.—p. 321.
2.—p. 322.
3.—p. 323.
4.—p. 324.
5.—p. 330.
6.—No. 42.

7.—New York, as well as many other states, prohibited the importation and exportation of slaves before the adoption of the constitution. The first law was passed in February, 1788 (2 Greenleaf, 35); it prohibits the selling of an imported slave, and the buying of a slave with intent to export him; and subsequent laws have confirmed and increased the prohibition of exporting and importing slaves. It may be proper here to observe, as applicable to this, as well as to many other laws of the States respecting commerce, that if, after the adoption of the constitution, the individual states had not a right to make them, they, and all other previously made similar laws, would, by force of that disqualification, have become inoperative.

In 1792, the state of Virginia passed a law prohibiting the importation or selling of imported slaves. 1 Pleasants & Pace's ed. p. 186, sec. 13. In Delaware (Laws of Del. ed. of 1797, by S. & J. Adams, p. 942), an act passed February 3d, 1789, enacts that if any owner, master, etc., shall fit out, equip, man or otherwise prepare any ship or vessel, within any port or place in that state, or shall cause any vessel to sail from any port or place in that state for the purpose of carrying on a trade or traffic in slaves, to, or from, or between Europe, Asia, Africa or America, or any places or countries whatsoever, or of transporting slaves to or from one port or place to another, in any part of the world, such ship, etc., her tackle, etc., shall be forfeited to the state, and shall be liable to be seized and prosecuted by any officer of the customs, by information, etc. And, moreover, every person so fitting out, etc., shall severally forfeit and pay the sum of £500, one-half to the use of the state, the other half to the informer. It further enacts that if any person shall export, or sell, with intention to export or carry out for sale, any negro or mulatto slave, from that state to Maryland, Virginia, either of the Carolinas, Georgia or the West Indies, without license or permit of five justices, etc., he shall pay, for every slave so exported £100, and for every attempt so to do, £20, one-half to the use of the state, and one-half to the informer. Here is a state law minutely controlling a branch of foreign trade, and of that between the states, and operating explicitly by the officers of the customs. It was passed, indeed, a few weeks before the present constitution went into operation, but long after it had been accepted by Delaware; at all events, it is referred to, and confirmed, by an act passed June 24th, 1793 (c. 22, p. 1094), requiring bail as to those offenses.

In Pennsylvania (Bioren's ed. vol. 2, p. 443), an act was passed, March, 1788, also prohibiting the trade; but, before examining it, let it be remembered that the first law Congress passed on that subject was in 1794, and that Pennsylvania had accepted the constitution in December, 1787, which, at the time of passing this act, she had recently studied and discussed. Her legislation, then, was not founded on, and did not rely on, any law of Congress in pari materia. She not only prohibited the exportation and importation of slaves, but, by sec. 5, of that act, prohibits the building, fitting out, etc., of any vessel for the slave trade, or to sail from the port for that trade, under the penalty of forfeiture of the vessel, etc., and £1,000 by qui tam. At that time, Congress absolutely permitted the slave trade; but would not that law have been valid to prohibit it from that port?

New Jersey passed a law to the same purport, in March, 1798 (Patterson's ed. p. 307; Justice's ed. pp. 371, 372, 373), when Congress had only prohibited, and could only prohibit, the trade as a foreign trade. Sec. 12, 13, prohibit the importation of slaves for sale. Sec. 17, 18, 19, prohibit the slave trade, and the fitting out of vessels, for the purpose of transporting slaves from one place to another, clearly including from one State to another, which Congress then could not do.

Connecticut, in October, 1788, after she and nine states had ratified the constitution (Hudson & Goodwin's ed. p. 626), forbade any citizen or inhabitant of that state, either as master, factor, supercargo, owner or hirer of any vessel, directly or indirectly, to transport, or buy, or sell, or receive on board his vessel, with intent to cause to be transported or imported, any of the inhabitants of Africa, or slaves, with qui tam penalties; and made all insurances on them void. And, in 1792 (p. 628), let it be still remembered, when Congress had no such power, she enacted that no citizen or inhabitant of that state should transport out of the state, for the purpose of selling into any other state, country or kingdom, or buy, or sell, with intent to transport out of that state, or should sell, if trans-

tain persons into certain states, where, by the laws thereof, their importation is prohibited.[1] Proceeding upon the right of the several states to prohibit, and acting under its general power to regulate commerce, it imposes additional penalties on the importing or landing of any negro, mulatto, or person of color, etc., in any state which, by law, has prohibited, or shall prohibit, their admission or importation. And it makes it the duty of the officers of the customs to notice and be governed by the provisions of the laws of the several states prohibiting their importation or admission; and enjoins it on them vigilantly to carry into effect the said laws of such states, any law of the United States to the contrary notwithstanding. How could Congress do this, if the power of prohibiting the trade were not unquestionably possessed by the states, in their sovereign capacity?

The quarantine laws further illustrate our position. The appellant's counsel says, these are to be considered merely as laws of police; they are laws of police, but they are also laws of commerce; for such is the nature of that commerce, which we are told must be regulated exclusively by Congress, that it enters into, and mixes itself with, almost all the concerns of life. But surely that furnishes an argument, 118*] showing the necessity *that the states should have a concurrent power over it. Judge Tucker considers them as laws of commerce, when he says,[2] "another consequence of the right of regulating foreign commerce seems to be the power of compelling vessels infected with any contagious disease, or arriving from places usually infected with them, to perform their quarantine. The laws of the respective states upon this subject, were, by some persons, supposed to have been virtually repealed by the constitution of the United States;" (and why must not that be the case, if the power of Congress regulating commerce be exclusive?) "but Congress have manifested a different interpretation of that instrument, and have passed several acts for giving aid and effect to the execution of the laws of the several states respecting quarantine." It will be recollected that the first recognition by Congress of the quarantine laws was in 1796; and that only directs the officers of the government to obey them, but does not pretend, or attempt, to legalize them. And, indeed, it could not do so, if the states had no concurrent power, and the regulation of commerce was exclusively delegated to Congress; for the power which is exclusively delegated to Congress can only be exercised by Congress itself, and cannot be sub-delegated by it. It is therefore no reply to the force of the argument drawn from those laws, to say that they have been ratified by Congress. Another answer to that observation is, that the supposed ratification by Congress *did not take place until 1796; and [*114 that many of those laws were in active operation several years before. For instance, as few out of many: New Hampshire passed her quarantine laws first, February 3d, 1789,[3] and again on the 25th of September, 1792.[4] Connecticut passed hers in May, 1795.[5] The laws of Maryland[6] shows the temporary continuation of those laws in that state, from 1784 to 1785, from 1785 to 1792, from 1792 to 1799, and so down to 1810; and the 2d vol.[7] contains a law passed in November, 1793, giving to the Governor the strongest powers on the subject. The state of Virginia passed, 26th of December, 1792,[8] "an act reducing into one the several acts to oblige vessels coming from foreign parts, to perform quarantine;" which act was amended on the 5th of December, 1793,[9] and further amended on the 19th of December, 1795.[10] Georgia passed her quarantine law December 17th, 1793.[11] Undoubtedly those laws derive their efficacy from the sovereign authority of the states; and they expressly restrain, and indeed prohibit, the entry of vessels into part of the waters and ports of the states. They are all so similar, that one or two *may suffice as examples. The quar- [*115 antine law of Georgia (s. 1) prohibits the landing of persons or goods coming in any vessel from an infected place, without permission from the proper authority, and enacts that the said vessel or boats, and the persons and goods coming and imported in, or going on board during the time of quarantine; and all ships, vessels, boats, and persons, receiving any person or goods under quarantine, shall be subject to such orders, rules and directions, touching quarantine, as shall be made by the authority directing the same. The law of Delaware, passed the 24th of January, 1797,[12] s. 1, provides that "no master of a ship bound to any part of that state, having on board any greater number of passengers than forty, or any person with an infectious disease, or coming from a sickly port, shall bring his ship, or suffer it to be brought, nearer than one mile to any port or place of landing; nor land such persons or their goods till he shall have obtained a permit." The law of Massachusetts, passed June 22d, 1797,[13] s. 6, enacts that "vessels passing the castle, in Boston harbor, may be questioned

ported, etc. In Massachusetts (1 Laws of Mass., 407, 408), an act passed March 26th, 1788, reciting the evils of the African trade, enacts that no citizen of that commonwealth, or other person residing within the same, shall, for himself or any other person, as master, factor, supercargo, owner or hirer, in whole or in part, of any vessel, directly or indirectly, import or transport, or buy, or sell, or receive on board his or their vessels, with intent to cause to be imported or transported, any of the inhabitants of any state or kingdom, in that part of the world called Africa, as slaves, etc., under a penalty for every vessel fitted out with such intent, and actually employed, etc. Doubtless, the laws of other states might be produced to the same purpose, if the means of examination had been convenient; those already cited, however, are sufficient to show that the individual states regulated the slave trade, as a trade, both with foreign nations and between the states, by virtue of their own sovereign authority, after the adoption of the constitution; but before congress did, and before they could do it.

1.—3 U. S. L. p. 529.
2.—Tuck. Black. part 1st, Appen. D. p. 251.
3.—Melcher's ed. p. 302.
4.—p. 304.
5.—p. 611.
6.—1 vol. p. 270.
7.—p. 200.
8.—1 vol. p. 244.
9.—p. 313.
10.—p. 349.
11.—Marbury & Crawford's Dig. p. 393.
12.—2 Del. Laws, ed. 1797, cap. 134, p. 1354.
13.—2 Mass. Laws, p. 788.

and detained (s. 12); that vessels at any other port than Boston may be prevented from coming up, and brought to anchor where the selectmen shall direct (s. 4); empowers the selectmen of any town, bordering on either of the neighboring states, to appoint persons to attend at ferries and other proper places, by or 116*] over which passengers *may pass from such infected places, which persons have power to examine, stop and restrain such passengers from traveling, until licensed by a justice of the peace, or the selectmen; and a fine of £100 is enacted on the passenger presuming to travel onward (s. 5); gives power to seize and detain suspected goods coming from any other state," etc. By an act of June 20th, 1799, s. 10,[1] "any master, etc., who shall enter the harbor of Boston after notice of a quarantine, for all vessels coming from the same place, etc., or who shall land, or suffer to be landed, any passenger or goods, without permission of the board of health, is subject to fine and imprisonment." These are all obviously direct regulations of trade, and so is the whole of every quarantine system.

The regulation of pilots in sea-ports, flows from the power of regulating external commerce. This power, like that of making quarantine regulations, has hitherto been exclusively exercised by the several states; Congress having only made one law on the subject, and that seems explicitly to recognize the concurrent power of the states, and to place over it the true constitutional control. By the fourth section of the act of August 7th, 1789, c. 9,[2] it is enacted that "all pilots in the bays, inlets, rivers, harbors and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be; or with such 117*] laws as the states *may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." Now, it is a principle which cannot be too often brought into view or enforced, that Congress cannot delegate to state legislatures the exercise of powers which are given to it exclusively; and the very act of referring to those laws is a recognition that the power to legislate on the subject is concurrent.[3]

In like manner, the laws regulating light-houses, buoys, etc., are all exercises of the implied powers derived from that of regulating commerce. They have hitherto been generally left to Congress; but it does not follow from thence that they are exclusive. Can it be doubted that any state has a right to establish a light-house or buoys at its own expense, in one of its harbors? That a state has such a power cannot be questioned, if it be shown that individuals have. Some time in 1798, a number of the inhabitants of New Bedford, Massachusetts, raised a fund by subscription, for building and maintaining a light-house at Clark's Point, at the entrance of the harbor of New Bedford. They maintained it, and kept it regularly lighted for about a year; and the act of Congress admits their right to do so. On the 29th of April, 1800, Congress enacted that the light-house lately erected at Clark's Point, etc., shall and may be supported at the expense of the United States, etc. Provided, that the property and jurisdiction of the said light-house, and sufficient territory for the accommodation *thereof, shall be fully [*118 ceded and legally vested in the United States.

The laws of Congress on this subject, recognize the right of the states to maintain light-houses, if they please. The first act, passed August 7th, 1789,[4] directs that their expenses, after the 15th of August, 1789, shall be defrayed out of the treasury of the United States. Provided, nevertheless, that none of the said expenses shall continue to be so defrayed by the United States, after the expiration of one year, unless such light-houses shall, in the meantime, be ceded, etc. Few states did make the requisite cession; and by the act of July, 1790,[5] the time was extended to the 1st of July, 1791, and so, from time to time, for five or six years, till all the states came in; during which the light-houses in several of the states were kept up by their authority, without the control of Congress.

The inspection laws are very important regulations of trade. Tucker says, "there seems to be one class of laws, which respects foreign commerce, over which the states still retain an absolute authority; those I mean which relate to the inspection of their own produce, for the execution of which they may even lay an impost or duty, as far as may be absolutely necessary for that purpose. Of this necessity, it seems presumable they are to be regarded as the sole judges." The extent *and importance [*119 of this system of regulations does not strike the mind at the first view; nor do the powerful inferences it affords, to show the concurrent right in the states to regulate commerce. Judge Tucker has very imperfectly stated their extent. They do, indeed, regulate, in almost every state, the foreign trade, so far as it is connected with our produce to be exported; but they do not confine themselves to produce to be exported, they relate to imports also. They act by restraining, and sometimes prohibiting, the exportation and importation of certain articles. Before examining those laws, it may be asked, from whence is the right of restraining derived, but from the more extended right of prohibiting? The difference between regulation or restraining and interdiction, is only a difference of degree in the exercise of the same right, and not a difference of right. The article in the constitution (art. 1, sec. 10) impliedly allows that right to be in the several states, and the right to enforce their laws by any other means than imposts and duties, and, therefore, by prohibitions of exports or imports. The right does not depend on the idea that the thing prohibited or restrained from being exported or imported is dangerous or noxious; even if that could, ex necessitate, create a right, and give it to the state, instead of the congressional jurisdiction; on the contrary, the rules and enactments seem arbitrary.[6]

1.—p. 872.

2.—2 U. S. L. p. 34.

3.—3 U. S. L. p. 366, c. 193, s. 3.

4.—2 U. S. L. p. 34.

5.—2 U. S. L. p. 121.

6.—For instance, as to the number of hoops on, and size of barrels or casks (2 N. R. L. of N. Y. p. 321, s. 5, p. 325, s. 3, p. 330, s. 3, 4; 1 Laws of Maryland, Maxey's ed. 218; 1 Vir. Laws, Pace & 51

120*] *As to trade with the Indian tribes, without stopping to enter into details, it is sufficient to say it must stand on the same foot-
121*] ing as foreign commerce *and that among the states, as they are all given in the same sentence. If the power of regulating the two latter be exclusive, so must it be
122*] *with the former. And yet every state, whose situation places it in communication or contiguity with Indian tribes, has thought fit,
123*] and, indeed, *found it necessary, by acts of their own Legislatures, to regulate their trade with the Indians, the laws of Congress not only not exhausting, but not even adequately reaching the subject.

It now seems incontrovertibly established, that the states have a concurrent right to legislate on matters of foreign trade, or of that between the states; and a concurrent right to prohibit the exportation or importation of articles of merchandise. If they can do that, even as to the articles themselves, to which the power of Congress expressly relates, and if the right to regulate shipping be only impliedly given to Congress, by the general power to regulate commerce, and only so far as they are instruments of that commerce, why cannot a state, that has a concurrent right within its own sphere (and that not by implication, but directly, and as the result of its sovereign power, unabridged and unaltered by the constitution), over all ships or vessels within, or coming within, its jurisdiction, prohibit the entry of any particular kind of vessels within
124*] its waters, subject *always to be controlled by the contradictory and paramount regulations of Congress, made within the sphere of its powers.

This leads to the consideration of an argument that has been frequently urged on this subject. It is said that if a state has a right to prohibit the navigation of its waters to steamboats, it has an equal right to prohibit the same navigation to row-boats or sailing vessels; and the extravagance of this position, it is supposed, sufficiently refutes the assertion of a more limited right. First, there is an error in the statement of our claim. We do not prohibit the navigation of our waters to steamboats; we only prohibit them, while in our waters, from using steam as the means of their propulsion. Every steamboat which ventures on the ocean, carries and uses sails; and they can, without difficulty be adapted to every steamboat. Such a vessel, therefore, may, without objection, load in a different state, or foreign port, and come, by means of steam, to the verge of our waters; there is no difficulty opposed to its coming up, with its full cargo, to our custom-house, entering, discharging, reloading, and departing, provided that, for the short space of time while it may be in our waters, it employs the only things that any other vessel can employ for entering and departing, and with which it is or may be amply provided—sails and oars. That is the extent of what is very inconsiderately called our extravagant claim. Let us now examine the argument itself, and to test its soundness, let us apply it to other cases. A state has no right to prohibit the use of narrow wheeled *wagons for [*125 the transportation of merchandise on any of its roads; for if it can do that, it can prohibit the use of any kind of wagons, and, indeed, all transportation of merchandise on any of its roads, and thus affect the commerce between different states. A state has no right to regulate the assize of bread; for if it can do that, it can prohibit all baking of bread, and thus starve the community. Is there any one act of legislation against which the same reasoning, drawn from an excessive and tyrannical exercise of legislative authority, may not be urged? And if the argument be unsound, when applied to all those instances, what makes it sound in its application to the present ques-

Pleasant's ed. p. 352, s. 8, p. 350, s. 3; Laws of Conn., Hudson & Goodwin's ed. p. 394, s. 1, 2, 5, 6, 8, 9), as to quantity as well as quality or kind, of their contents. What pieces of beef or pork (2 N. R. L. of N. Y., p. 326, s. 4, p. 326, s. 5, 9, p. 327, s. 11), or quantity and size of nails should be in one cask (Laws of N. H. Melcher's ed. 386; Laws of Conn., p. 394, s. 2, p. 256, s. 2), or the length, breadth and thickness of staves and heading, lumber, boards, shingles, etc. 2 N. R. L. of N. Y., p. 336, s. 1; 1 Laws of Vir. 237; Laws of Conn., p. 397, s. 21. These regulations have no object but to improve our foreign trade, and raise the character and reputation of the articles in a foreign market; and if the states have no right to pass laws prohibiting exportation, what can prevent a person having an inferior article, from exporting it, in its uninspected state, and taking his chance for the price it might bring in a foreign market?

These laws are much too numerous and complicated to be detailed; but a very slight examination of some of them will show the very extensive powers for regulating commerce, possessed by the Legislatures from which they emanate. Some operate by the forfeiture of the uninspected article, as in the New York act for inspecting pot and pearl ashes. 2 N. R. L. p. 335, s. 8. It gives the liberty of entering on board of any ship, etc., to search for any pot or pearl ashes, shipped or shipping for exportation; and if any unbranded be discovered, it is forfeited, and the captain subject to a pecuniary fine. A similar forfeiture is given in the same state (p. 339, s. 8), and the penalty on the master. P. 339, 340, s. 10. In Kentucky, a similar forfeiture is given for attempting to export unbranded flour. Ky. Laws, Toulman's ed. 440. In New Hampshire, a like forfeiture is given of unpacked beef or pork shipped for exportation. Laws of N. H. p. 387, 388. And in Connecticut, a forfeiture is given of unbranded nails. Laws of Conn. p. 527, s. 5. Virginia has enacted a forfeiture of unbranded fish, and a penalty on the master. 1 Laws of Va. p. 353, s. 6. She has not only done the same in respect to lumber, but she has gone much farther, and acted on the collector and officers of the customs. 1 Laws of Va. p. 238, s. 4. The collector, or other proper officer of the customs, is thereby charged and directed not to suffer any vessel to clear from his office, unless the master, etc., shall produce inspection notes or certificates, etc., and make oath that he has no lumber on board, but what is entered on his manifest. To this exercise of power, equal to that of Congress itself, I probably shall be told that Congress has, in the collection laws, directed the collectors to pay regard to the inspection laws of the respective states. That is at least an admission that they are rightfully made: but the answer is entirely insufficient; for the first act of the United States, directing this, was passed the 2d of March, 1799, and the act of Virginia, that I have last referred to, was passed the 26th of December, 1792. In like manner, the laws of the same state give a forfeiture of uninspected tobacco, about to be exported, and similar duties are imposed on the master and collector. 1 Laws of Va. p. 263, s 27, p. 269, s. 45, p. 271, s. 49. This law was also passed in November, 1792. Connecticut, too, gives a forfeiture of unsurveyed tobacco (1 Laws of Conn. p. 395, s. 13); and as to provisions, it also enacts a penalty against the master, and imposes a duty on the collector. P. 397, s. 20, p. 303, s. 11, p. 407, s. 3.

Several of those inspection acts regulate as to the importation of articles, equally with their exportation. The New York act, relative to the inspection of sole leather, expressly says: "Whether

tion? The answer to it is found in the rights of a free people, which make every act of tyranny void. But either the right entirely to prohibit the use of row boats, sailing vessels, and steamboats, belongs to some of the constituted authorities that govern those states, or it does not. If it does not belong to any of them, then, clearly, this boasted argument falls to the ground. If it does belong to some of them, to whom does it belong? Has Congress the power to make such a prohibition of all modes of commercial intercourse, by virtue of its limited authority to regulate commerce with foreign powers, and between the different States? In answering no, the embargo laws are fully remembered, and their constitutionality admitted; but it is not derived from the power to regulate commerce. The embargo was a measure of state policy, nearly approaching to war; it may sometimes be of such a character 126*] as *to derive a legitimate origin from the war-making power; but the embargo of 1807 rests for its constitutionality on the power in Congress of providing for the common defense and general welfare of the United States. If, then, the power of entirely prohibiting trade, as a commercial measure, exists in some of the governing powers of those states, and does not exist in Congress, where does it exist? Assuredly in the state legislatures. If its exercise should ever become void, it will not be because it is contrary to the constitution of the United States, but because it is oppressive to the people it affects to bind; not because it is unconstitutional, but because it is tyrannical.

Congress itself seems to acknowledge that the constitution does not deprive the states of this prohibitory power; for, if it did, as it binds all the citizens of the United States, it would necessarily bind the territorial governments, and all states admitted into the Union subsequent to its adoption. Yet, in the ordinance of the 13th of July, 1787, for the government of the territory of the United States north-west of the river Ohio,[1] by art. 4, for the government of the said territory, and the states which may be formed therein, it is provided, among other matters, that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory *as to the citizens of the United States [*127 and those of any ohter states that may be admitted into the confederacy, without any tax, impost or duty thereon." It is made a fundamental provision of the different acts erecting portions of this territory into states, that their constitutions shall not be repugnant to this ordinance. In the act also for erecting the state of Louisiana (sec. 3), it is enacted that the convention for making the constitution shall provide by an ordinance, irrevocable without the consent of the United States, among other things, "that the river Mississippi, and the navigable waters leading into the same, or into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said state." The same was also done with regard to the states of Mississippi and Missouri. Now, this provision, so studiously introduced into all those new compacts, which Congress had a right to make with new states, as the condition of their admittance into the Union, would be very singular, and very useless, if, by an effect of the Union itself, all navigable waters belonged exclusively to the general government; or if the federal constitution, which each state adopted, contained in itself an equivalent restraint on the states. The appellant's counsel has alluded to and denied a position, stated to

1.—1 L. U. S. p. 475, ed. 1815.

such leather be manufactured within the same, or imported or brought into it from any place whatsoever." 2 N. R. L. p. 340, s. 2. In Maryland, the act for the inspection of salted provisions, exported and imported from and to Baltimore, relates to beef, pork and fish "imported into the said town, from any part of the state, or any one of the United States, or from any foreign port whatever." 2 Laws of Maryland, p. 3, s. 5. Sec. 6 relates to the size, quality and make of all imported beef and pork barrels. This act, it is true, was passed in 1786, before the adoption of the constitution. If the power of Congress, however, was exclusive, it should then have ceased to operate. But the argument does not stop there. In 1796, it was extended to Havre de Grace (p. 335, s. 9), and in 1797 to Chester (p. 369, s. 9). The act of the same state, for the gauge of barrels for pork, beef, pitch, tar and turpentine, and tare of barrels for flour and bread, continued by several statutes down to 1810, and probably to the present time, prohibits the importation, by land or water, of those articles, except in barrels of certain dimensions and contents. In Virginia, the act for the inspection of fish, passed in December, 1795, sec. 6, provides for the inspection of imported fish, as well as of that packed for exportation; and it also enacts a forfeiture of the article, and a penalty on the master. 1 Laws of Va. p. 352, s. 3. In Pennsylvania, the act providing for the inspection of gunpowder, relates to the inspection of imported as well as manufactured; and gives a forfeiture of the article for selling imported gunpowder without inspection. 3 Laws of Penn. p. 240. And an antecedent law of March, 1787, directs the captain of every vessel, importing gunpowder into the port of Philadelphia, under a penalty and forfeiture of the article, if it be his own property, to deliver it at a magazine, and directs the health officer to give strangers notice of the act, and also enjoins the custom-house and naval officers, and their deputies, to do the same." 2 Laws of Penn. p. 402, s. 3. In New Hampshire (Laws of N. H. ed. of 1815, p. 460), by the act relating to gunpowder (sec. 2), it is enacted that every master of any merchant-vessel bringing gunpowder into Portsmouth, shall, within forty-eight hours, deposit it in a magazine, and on neglect, shall pay a fine of £30 to the poor of Portsmouth. Sec. 13 directs a keeper of the magazine to be chosen, who shall be entitled to a fee on all he shall receive and deliver out; another instance of what the appellant's counsel has delared to be unconstitutional, the raising of revenue by a state law from foreign commerce. In Massachusetts (2 Mass. Laws, p. 37), the act of June 19, 1801, sec. 1, directs imported gunpowder, landed at the port of Boston, to be deposited in a magazine. And by sec. 3, no gunpowder shall be kept on board any ship or other vessel, lying to or grounded at any wharf in Boston, under pain of confiscation and pecuniary penalty.

More extensive examinations would produce a much greater variety of regulations of foreign commerce and that between the states, made by state legislatures; but only one more instance need be added, not, indeed, coming under any of the preceding heads. In Virginia, the act laying taxes for the support of government, passed in January, 1799, prohibits unlicensed merchants from selling, by wholesale or retail, goods of foreign growth or manufacture, on land, or on board of any vessel. 1 Laws of Va. p. 386, s. 2. The same law has been renewed, from time to time, and it probably exists at this day.

have been used by counsel in arguing the case of Livingston v. Van Ingen before the Court of Errors, that the Legislature might, if it thought 128*] fit, stop up the mouth of the *Hudson. It is of very little importance to defend what fell, on that occasion, from counsel, and has not been adopted by the Court; still, the learned counsel may be asked, by what authority the state of Rhode Island has erected a bridge over the Seakonnet branch of Taunton River, essentially impairing, if not destroying, its navigation from the sea, and far below where the tide ebbs and flows? By what authority his native state of New Hampshire has erected a bridge from Portsmouth over the Piscataqua River? By what authority his adopted state of Massachusetts has built two bridges over Charles River, on its tide waters, one near Boston, and the other higher up? And by what authority the state of Pennsylvania has built a dam over the Skuylkill, near Philadelphia, and three miles below where the tide used previously to ebb and flow?

There, however, is, in fact, no regulation of commerce made by Congress, with which this exclusive right does or can interfere. What is that degree or kind of interference, which is sufficient to invalidate a state law?

The Federalist,[1] discussing the cases where powers are exclusively delegated to the United States, makes one of the classes (and, perhaps, unnecessarily, if not incorrectly), where the constitution granted an authority to the Union, to which a similar authority in the states would be, absolutely and totally, contradictory and repugnant; and then goes on: "I used these terms to distinguish this last case from another, 129*] which might appear *to resemble it; but which would, in fact, be essentially different. I mean, where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy, in point of constitutional authority." And again: "It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty."

That the third class of cases, as arranged by the Federalist, is unnecessary in its application to any of the powers, and that it is derived from an erroneous notion, as to the possibility of repugnancy and its consequences, seem to follow from the principles laid down by Thompson, J., in Livingston v. Van Ingen,[2] "There are subjects upon which the United States and the individual states must, of necessity, have concurrent jurisdiction; and all fears and apprehensions of collision in the exercise of these powers, which have been urged in argument, are unfounded. The constitution has guarded against such an event, by providing that the laws of the United States shall be the supreme law of the land, anything in the constitution of any state to the contrary notwithstanding. In the case of collision, therefore, the state laws must yield to the superior authority of the United States." The same doctrine is very ably maintained by Kent, Ch. J.,[3] who gives, as a safe rule of construction *and of action, "that if any given power [*130 was originally vested in this state, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the states, we may then go on in the exercise of the power, until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the state authority will so far be controlled; but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law."

The same doctrine is very briefly, but very clearly laid down by Mr. Chief Justice Marshall, in the case of Sturges v. Crowninshield:[4] "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." In Houston v. Moore,[5] Mr. Justice Story, however, adopts the arrangement of the Federalist, and goes on: "In all other cases, not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, not only upon the letter and spirit of the 11th amendment of the constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union being the supreme law of the land, are of paramount authority; and the state *laws, so far, and so far [*131 only as such incompatability exists, must necessarily yield."

Although those authorities show that nothing but a direct and absolute collision can produce such an interference as will render the state grants invalid, yet a license is relied on by our adversaries, as creating this interference. There is a leading and fundamental error growing out of the nature and form of that instrument, and one which has induced the supposition that a license gives a right to trade, or a right to enter, or a right to navigate the waters of the United States, to any vessel possessing it. It, indeed, uses the words, "license is hereby granted for the said vessel to be employed in carrying on the coasting trade for one year, from the date hereof, and no longer;" but those words must necessarily be understood in reference to the extent of the authority granting the permission. Equivalent words are to be found in every license to distill or to sell, or to do any act, the right to do which existed prior to and independent of the authority by which it may be regulated; and they only mean license is granted to do the act, notwithstanding the regulations made on that subject by the licensing authority, and which, without this instrument, would restrain the act. So far as those rights to trade, to enter, or to navigate, exist unmodified, they rest on the common law, independently of any gift from or right conferred by Congress; which, in truth, has no power whereby it might be enabled to make such gift, its authority being

1.—The Federalist, No. 32.
2.—9 Johns. Rep. p. 568.
3.—9 Johns. Rep. p. 575, 576.
4.—4 Wheat. Rep. 196.
5.—5 Wheat. Rep. 49.

only to regulate commerce. These rights are, 132*] all three, portions of the *jus commune, and so far as the competent legislatures have thought fit to let them remain, the right to them, and their efficacy, depend on that jus commune and the common law. The right to trade is regulated by the state legislatures and laws on Congress; the right to enter is modified principally by the laws of Congress; and the right to navigate the waters, almost exclusively by the state legislatures. The license has nothing to do with any of those rights; it only gives some privileges as to payment of tonnage duties, and less frequent entries at the custom-houses; and it exempts the licensed vessel from being included within a restriction of the jus commune as to trading, by which Congress prohibits certain vessels from carrying foreign articles and distilled spirits from state to state; even there not giving to the licensed vessel the right of doing so, but only exempting them from the prohibition. A review of the acts of Congress upon the subject will show the truth of these positions.

By the now repealed act of July 20th, 1789,[1] imposing duties on tonnage, different rates were fixed: (1st) Six cents per ton on vessels built in the United States, etc., and belonging to a citizen or citizens of the United States. (2d) Thirty cents on vessels built in the United States, and belonging to foreigners. (3d) Forty cents on all other ships and vessels. But it was provided that no United States built vessel, owned by a citizen, or citizens, while employed in the coasting trade, or on the fisheries, should pay tonnage more than once 133*] a year; and that every *ship employed in transporting the produce and manufactures of the United States, unless United States built, and owned by a citizen or citizens, should, on every entry, pay fifty cents per ton. The only advantages, then, to American built and owned ships, were a less tonnage duty; and, if on the coasting trade, paying it only once a year; but let it be well remembered, that they had no exclusive or peculiar right to trade anywhere. By the collection law of July 31, 1789,[2] which established ports of entry and delivery, it was enacted that no ship or vessel from a foreign port, not wholly belonging to a citizen or citizens, should be permitted to unload at any port or place, except those there specified.

Neither this, nor any other act, gives the right of entering into the designated ports. It proceeds on the supposition and the truth that by some other code, distinct from the laws of Congress, the entry into all places had been antecedently lawful, and then restrains it as to all other places but those named.

The registering, recording and enrolling of vessels, were enacted by the act on that subject, passed September 1st, 1789.[3] They were for the purpose of describing the vessel, her build, tonnage, and ownership; and neither they, nor their certificates, give, nor purport to give, any right to trade. The enrollment, and certificate of enrollment, is to entitle unregis- 134*] tered vessels of twenty *tons and upwards, American built and property, and destined from district to district, or to the fisheries, to the privileges of a ship belonging to the United States, employed in the coasting trade or fisheries. These I have already mentioned to be a less tonnage duty, and paying it only once a year; but no exclusive or peculiar right to trade anywhere.[4] Registered or enrolled vessels, on application to the collector where they belonged, were entitled to receive a license to trade between the different districts in the United States, or carry on the bank or whale fishery for one year.[5] The meaning of that license, notwithstanding the generality of its language, was only to certify that the proper tonnage duty for that year had been paid; and that the vessel was licensed, for that year, to trade without paying any tonnage duty. That such is its object appears from the twenty-second section,[6] enacting that the master, etc., "shall annually procure a license from the collector of the district to which such vessel belongs, who is hereby authorized to give the same, purporting that such vessel is exempt from clearing and entering for the term of one year from the date thereof." Every vessel had a right to carry on the trade (between district and district) without a license, on paying the prescribed tonnage duties, suited to the case. That further appears, by a provision in the same section (s. 23), that if any vessel of twenty tons or *upwards, not having a certifi- [*135 cate of registry, or enrollment, and a license, should be found trading between different districts, or be employed in the bank or whale fisheries, it should be subject to the same tonnage and fees as foreign ships or vessels.

The act, already cited, for tonnage and duties, was repealed by the act of July 20th, 1790;[7] but the substituted clauses do not affect this argument. A ship having a license to trade between different districts, or to carry on the fisheries, while employed therein, is only to pay the six cents per ton once a year (i. e., on getting the license), and "upon every ship, etc., not of the United States, which shall be entered in one district from another, having on board goods, etc., taken in one district to be delivered in another, there shall be paid at the rate of fifty cents per ton;"[8] a duty which clearly recognizes their right to carry on that trade on those terms.

The former act for registering and clearing vessels was repealed by that passed the 18th of February, 1793. This enacted that none but enrolled and licensed ships, etc. (or if under twenty tons, simply licensed), should be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries. These privileges, it will be again remembered, are only the paying of a less tonnage duty, and paying it but once a year; and they do not comprehend any exclusive or peculiar *right to trade [*136 anywhere. It enacts that before getting the license, the tonnage for the year must be paid; and the effect and object of the license was to certify that the proper tonnage duty for that

1.—2 U. S. L. p. 6.
2.—2 U. S. L. p. 7.
3.—Ib. p. 35, 42.
4.—2 U. S. L. p. 6.
5.—Ib. p. 43, s. 23.
6.—Ib. p. 42, 43.
7.—2 U. S. L. p. 119, 120.
8.—Ib. p. 332.

year had been paid, and that the vessel was therefore licensed for that year to trade without paying tonnage. But every other vessel had still a right to trade. By sec. 6,[1] vessels of twenty tons and upwards, except registered, found trading between district and district, or different places in the same district or fishery, not enrolled and licensed, etc., if laden with domestic produce or manufacture, shall pay the same duties as foreign ships; or if laden with foreign produce or manufacture, or distilled spirits, shall be forfeited. This shows that foreign ships had a right to carry on the coasting trade without a license (a thing which they could not possibly obtain), on paying the extra tonnage duties, and making entry at every port. This further and most fully appears by the 24th section of the same act,[2] prescribing the duties of masters of foreign ships, bound from one district to another, whether with a cargo or in ballast; and by sec. 34,[3] establishing the rates of fees under that act, in which are found, "For granting a permit for a vessel not belonging to a citizen or citizens of the United States, to proceed from district to district, and receiving the manifest, 200 cents. For receiv-137*] ing a manifest, and *granting a permit to unload, for such last-mentioned vessel, on her arriving in one district from another district, 200 cents." Indeed, until the year 1817, there was no kind of prohibition on foreign vessels carrying on the coasting trade. On the 1st of March, 1817, "an act concerning the navigation of the United States" was passed; and by sec. 4 it was enacted "that no goods, wares or merchandise shall be imported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging, wholly or in part, to a subject of any foreign power." This, however, does not affect American ships not having a license, and they have still a right to trade coastwise, subject only to the increased tonnage duty, and the necessity of making entry at every port. How, then, can it be said that the license gives the right to carry on the coasting trade, which exists as part of the jus commune, and existed, and was exercised, before the constitution, or any law on the subject, was formed; and when, until March, 1817, every foreign vessel had a right to carry it on, and when, to this hour, every American vessel has a right to carry it on, without a license or register, and only becomes subject to an increase of tonnage duty, and the necessity of making entry at the custom-house on every voyage? It is only a license to carry on the coasting trade, without making entry or paying tonnage duties, conformably to the laws of Congress in other cases. It gives no right to enter, nor to trade, nor to navigate the waters of the United 138*] States; *it only enables the licensed vessels to do those things, in certain cases, on cheaper and easier terms than other vessels could, who, nevertheless, had equal rights to carry on the same trade, though with less advantages; and now, in the event of having foreign produce or manufacture, or distilled spirits, on board, a license protects from a forfeiture, which was not enacted for some years after licenses were devised and used in their present shape. It is not, then, a license to trade, to enter, or to navigate, but to be exempt from paying tonnage duty for a year. If, then, the position is correct (and it undoubtedly is), that a license gives no right to trade, to enter a port, or to navigate its waters, no argument can be drawn from the act of March 12th, 1812, "respecting the enrolling and licensing of steamboats."[4] The only object of that law is, to enable aliens to be part owners of such vessels, and to modify, as to them, the oath that the boat belongs to a citizen or citizens of the United States.

But even if the right of entry, or to trade or navigate, were given by the acts of Congress, and not by the common law, as originally existing or subsequently modified, this exclusive right does not prevent the entry of any vessels into our waters, nor their navigating or trading there; nor does it materially impede them. The only part of this exclusive grant that can come under the cognizance of this court, in this case, is that on which the injunction is grounded. That, and the *prohibition of the [*139 injunction, can only be fairly considered as extending to prevent the navigation of the waters by the force or agency of steam or fire; not to prevent vessels from navigating those waters, because they have a steam-engine on board, and wheels at the side, if the engine and the wheels be not used on our waters for propelling the vessel, contrary to our state laws. Before the vessel comes into those waters, and after it leaves them, it is out of the state jurisdiction, and not liable to any state penalty for using the agency of steam. What, then, is the amount of the prohibition of entry? That the same vessel, with the same cargo and crew, may come up and pass through our waters, if, while in our waters, she will come up and navigate under sail, as all commercial vessels have hitherto done. In the argument of this case before the Court of Errors,[5] one of the appellant's counsel couched his reasoning in the form of a remonstrance by an English ship-master against those state laws. The reply can, perhaps, be best given by turning the discussion into a dialogue. An English steam vessel is boarded by a pilot, outside of Sandy Hook. "Captain," says the pilot, "you will have to stop those wheels at your sides when you get within our waters." "Why so?" asks the captain. "Because the state of New York have granted to Livingston and Fulton an exclusive right of navigating in its waters by steam." "Sir," resumes the captain, "I care nothing for the laws *of [*140 New York. I know of no laws or regulations of a particular state, in regard to trade and commerce. I claim the privilege of entering the harbor of New York, under the laws of the United States, and the treaty of amity and commerce subsisting between them and my Sovereign. I insist upon my right of entering your waters as I please; and if your state authorities, or anyone acting under them, should prevent me, the King, my master, will know how to enforce the rights of his subjects." "Patience, good captain, patience," replies the pilot; "let

1.—2 U. S. L. p. 335.
2.—Id. p. 343.
3.—Id. p. 346.
4.—4 U. S. L. p. 393.
5.—17 Johns. Rep. p. 488.

your head and your boiler cool; no one means to prevent your entering into our waters. Only stop your machinery, and hoist those sails you have carried twenty times between this and Liverpool, and I'll answer for it, we shall be alongside the wharf as soon as yon vessel that you see bound inwards with all her canvas spread." This is the extent of the prohibition —the Deo dignus vindice nodus. When the case occurs of a vessel navigating across the Atlantic, without sails, the question may be discussed, whether it be a violation of the laws of Congress, that she should be required to fit herself to the harbor, by providing herself with a sail. The same may be said as to coasting vessels from more distant states. As to those from contiguous states, and whose trade can just as well be carried on by sails as by steam-engines, it is ridiculous to say that such a regulation prohibits or interferes with their commerce. Is it any part of the power intended to be delegated to Congress, to regulate as to those 141*] matters? *The utmost that can be said is, that the passage may be a little longer, and may be somewhat retarded. The doctrine of the Federalist,[1] applies here, that it is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty. Regulations for a toll-bridge may delay the mail-carrier, and so far interfere with the execution of the power delegated to Congress of regulating the post-office and post-roads; but, could he gallop over a bridge that a state law directed should always be crossed on a walk?

But the clause in the constitution, authorizing Congress to make laws respecting patents, is supposed to present another argument against the constitutionality of those state laws. This point, having been but very slightly mentioned, and in some measure abandoned, by the appellant's opening counsel, would not be dwelt on now if the Attorney-General had not intimated an intention of insisting and relying on it. If the appellant had a patent of any kind, on which he could rest, it might fairly be urged by us that a patent cannot give to any unpatented thing, even though connected with one that is patented, the right to violate the state law. But how does or can that question come up in this case? There is here no allegation of a patent, nor a claim of anything entitled to be protected by the patent law, and the use or enjoyment of which has been interfered with by 142*] *the exclusive grant. As the appellant claims no patent, if this power in Congress can furnish to him any objection against the state laws, it must be on the ground that inasmuch as Congress is authorized to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries, every state law, calculated or purporting to promote the progress of science and useful arts, is utterly void, merely because that is its purport and object, even though it should not relate to any invention or discovery; though the privileges it may confer should not be given on the score of invention or discovery, but of public policy and convenience; and further, although there is no discovery or invention of any other person in existence, the right to which Congress could secure, and which has any relation to the state grant. That, in short, the appellant, or any other person, has a right to treat the state law as a nullity, and, in violation of it, to use unpatented articles, and incapable of being the subject of a patent or protection; and that no court or process of law has authority to restrain him from the use of what never can come within the power of Congress; because, peradventure, something may hereafter be discovered, having some relation to the subject of the state grant, and some person may, hereafter, be entitled to claim the benefit of the constitutional protection, as an inventor. The extraordinary boldness of this position must surprise and astonish. If the passing of the patent law is per se competent *to prevent a state granting this exclu- [*143 sive right for a thing (so far as the pleadings show) not the subject of a patent, it is equally so to prevent a state granting every other exclusive right, and particularly if connected with science and the useful arts. If the law alone will not produce that effect, until a patent is granted, at variance with the exclusive right, the patent should appear to let us see if it be really at variance and have that effect.

If the last steamboat laws, enacted since the North River boats were in operation, had, instead of using a general phraseology, forbid any person to use, on the waters of the state, steamboats constructed or made in the same manner as those then used by Livingston and Fulton, or in any manner before known or used, or in any manner invented by a non-resident alien, would there be anything for the patent laws or power of Congress to operate on in collision thereto? If not, then those state laws are so far good; and anyone, to impeach their operation, must claim and show that he has a boat constructed in a different manner, and which is patented as an invention, or, at least, as a subject for the laws of Congress to operate upon, and which he is restrained from using.

Has it ever been disputed that each state has a right to grant exclusive privileges, where not forbidden to the legislature by its constitution? The wisdom and the motives of the grant are points for which it is responsible to the people of the state only; they can never be drawn into *discussion in this court, nor come un- [*144 der the control of Congress. It is a right inherent in the sovereignty of every country, not delegated to Congress, but allowed to, and constantly exercised by, the state governments. It is a legislative instrument of great power, and may, therefore, be used to evil purposes; but it may be, and often has been, as in the present instance, productive of splendid benefits. It must reside somewhere; it does not reside in Congress; where, then, does it reside?

Whether the power delegated to Congress be exclusive or concurrent, the power of promoting science and useful arts, by the introduction of imported improvements, and encouraging the employment of things not susceptible of being patented, is exclusively in the state legislatures. It is of great importance and exercised by every wise government; by England, France, etc. It domesticates the sciences and useful

1.—The Federalist, No. 32.

arts, the talents and genius of the civilized world. The states, in the exercise of this their exclusive power, which has been employed in making those laws, are not to be interfered with from any apprehension of collision in the exercise of a concurrent power, only relating to another branch of the same subject which the state has not used, and which Congress may never have an opportunity of using.

I say a concurrent power, for such is that delegated to Congress. One of the counsel now opposed to us, in his argument in the case of 145*] *Sturges v. Crowninshield,[1] places in his third class, that is, among the concurrent powers, that to promote the progress of science and useful arts; and says, very truly, "from the exercise of any of these powers, the states are neither expressly, nor by any fair rule of construction, excluded." Judge Tucker, in his Appendix D, p. 182, 265, among the cases in which the states have unquestionably concurrent, though, perhaps, subordinate powers, with the federal government, ranks the power to promote the progress of science and useful arts, by securing to the authors and inventors the exclusive right, within the state, to their respective writings and discoveries. In the case of Livingston v. Van Ingen,[2] Thompson, J., takes for granted that it is so, and it is expressly asserted by Kent, Ch. J.; and in the same case, an instance is given of its exercise, by an act of the legislature of New York, in favor of Mr. Rumsey, passed on the 23d of February, 1789, after the adoption of the federal constitution, and shortly before the first meeting of Congress. It was entitled, "for securing to James Rumsey the sole right and advantage of making and employing, for a limited time, the several mechanical improvements by him lately invented."[3] I do not speak from research, but I understand that he obtained a similar patent from several other states. This law is a cotempo- 146*] raneous exposition of the *constitution, and shows that the state considered itself as still retaining a concurrent right of legislation on the subject of inventions in science and the useful arts, notwithstanding the new constitution, and the recent transfer of similar powers to Congress.

What is the power delegated to Congress, and on what principle is it founded? A confined and partial mode of promoting the progress of science and useful arts, viz., by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. The Federalist (No. 43),[4] says, "the utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions seems, with equal reason, to belong to the inventors." This commentary, and the words of the constitution, show that the power is only founded on the principle of literary property extended to inventions. It proceeds upon assuming a pre-existent common law right, which, however, requires to be properly secured by adequate remedies. Its principle is entirely different from that on which patents rest in England. They are exclusive rights, not merely secured, but created and granted; they are monopolies for things invented or imported, and do not suppose or act on any pre-existent right; but grant a right, the origin and efficacy of which is derived from its being a gift from the *Crown, permitted and [*147 legalized by act of Parliament. It is contended, because the English judges have construed their statute of monopolies, so as to include imported improvements, under the term inventions, that our constitution should receive the same construction; but there is no foundation for the position. The English judges strained the words of their statute, contrary to all fair construction, because they felt the importance of a power to encourage imported improvements, and saw no other way by which it could be done; and besides, their interpretation went to strengthen and increase the royal prerogative. But, with us, imported improvements can be perfectly encouraged by the states; and the power delegated to Congress is founded on the common law pre-existent right of inventors to their own discoveries, which can have no application to the mere possessors of imported improvements. The constitution itself does not use the word patent, and it is to be regretted that the act of Congress does; for the use of the word implying a resemblance to the English patent, has led to a false view of the powers of Congress.

But, in truth, according to the English acceptation of the term, Congress has no power to grant them. It has no authority to make exclusive grants of any kind; that power remains solely in the states, as a part of their original sovereignty, which has never come within the purview of the federal constitution. A patent, in England, and every country but this, implies the creation and gift of a right, by force of the sovereign power, *conferring[*148 upon an individual a monopoly, in which he had no pre-existent right. This can done by the states, and only by the states. The power delegated to Congress does not authorize it to create any right, or to give any right; it only enables that body to secure a pre-existent common law right, and for that purpose it may create and give a remedy. Where there is no pre-existent right to be secured, the power of Congress cannot operate. To these positions the attention of the court is directed, as they may be found important in the sequel.

Although the article in the constitution is expressed with accuracy, yet it also has employed a word sometimes taken in different senses, and which has likewise contributed to a false view of the power of Congress; the expression is, "an exclusive right." The word "exclusive" may well mean, as it does here, individual, sole, or separate, in which sense every man's private property, to which no other man has any claim, is his exclusive property. In that sense, Judge Chase says, in the case of Calder et ux. v. Bull et ux:[5] "If anyone has a right to property, such right is a perfect and exclusive right." But that word "exclusive" is more frequently applied to express that others have been excluded or shut out from the participation of what

1.—4 Wheat. Rep. 168.
2.—9 Johns. Rep. 567, 568.
3.—2 Greenleaf's ed. of the Laws, p. 271.
4.—p. 269.
5.—3 Dallas' Rep. 394.

they were previously entitled, or would, but for that exclusion, be entitled to enjoy and use. In this sense, the phrase, exclusive rights or priv-
149*] ileges, is ordinarily understood. *But it never was intended to give Congress any power to grant exclusive privileges; and in the article of the constitution, that meaning of the word would be inconsistent with the idea of securing a pre-existing right. All error would have been avoided if the adjective had been entirely omitted, or the word individual substituted.

At the time of making the state grant in question, no man had, and, indeed, no man yet has, any pre-existing right to an invention, connected with the subject-matter of the grant. Suppose any man, however, now to make an invention, and seek to use it without procuring for himself a patent, or availing himself of the power delegated to Congress, surely the law of the state would be competent to prevent his using it within its waters and jurisdiction. The statute law would, in that instance, operate on the common law, and prevent the common law right, pro tanto, from ever arising in the same way as in a fishery. The right of fishing in a public navigable river, is a common right; but suppose that before the birth of any given individual, a part of that navigable river had, by statute, been turned into a several fishery, surely his common right would not entitle him to fish in that part of the navigable river which a statute had, before the commencement of his common right, turned into a separate fishery. His right to fish there never had a commencement or origin. So with this supposed inventor. A statute, prior to the commencement of his common law right, so acted on that common
150*] law itself, that a right *in him to use his invention, in the waters of the state, never had a commencement or origin. Now, suppose the inventor to procure a patent; would that enable him to use his patented invention within the jurisdiction and waters of a state, contrary to its statutes? If it did, what would be its operation? The delegated power is only to secure a pre-existent right; it can only do that so far as there is a pre-existent right; where there is not, there is nothing to be secured. So far, then, as relates to any use or exercise of the invention within the state, there would be no right to be secured, and nothing for the power of Congress to operate upon. But further, if the inventor, before obtaining his patent, could not legally use his invention but, after obtaining his patent, could use it in despite of the state laws, the patent would then create and give a right that did not exist before, and thus transcend the power delegated to Congress, which does not enable that body to create or give any right, but only to create and give a remedy for the purpose of securing an existing right, which derives its origin and force from some other law or laws than those made by Congress.

So far, then, as relates to those state laws, it is impossible that their validity can be affected by the patenting of any invention or discovery made subsequent to their enactment. But it may still be advisable to pursue the same course of reasoning, and inquire how far even the existence of a patent, previous to the passing of
151*] such acts, would *enable the patentee to use his invention in despite of them.

The object of a patent, granted in pursuance of the delegated power, is to perfect an imperfect right, by exactly ascertaining, if I may say so, its means, and boundaries, and identity, and by affording an adequate remedy for its violation. The precise nature of the remedy is within the discretion of Congress; but the nature of the evil it purports to remedy is entirely illustrative of the extent of the power delegated to Congress. The patent law itself shows that its object is to turn the imperfect right into property, for it directs that the applicant's petition shall signify a desire of obtaining an exclusive property in his improvement. And the clause giving the remedy shows the injury against which Congress intended to guard, and against which alone it had any power, under the constitution, to provide a guard; where any person "shall make, devise, use or sell" the thing whereof the exclusive right is secured to the patentee by such patent, etc.[1] But no remedy is provided against preventing the patentee from making, devising, using or selling the thing so patented. That, if any grievance at all, is one not within the purview of the act, nor within the powers of Congress, and against which, therefore, no remedy is there provided.

The object of this power, and of the law made under it, is to give to the pre-existent but imperfect right the security and attributes of actual *property. When the law of Con- [*152
gress has done that, it is functus officio; and it leaves that right, which it has placed in the class of actual property, to be used and enjoyed like every other kind of actual property, conformably to the laws of the place where it is to be enjoyed. That which is thus the object of the power and law of Congress, is the patent-right, which it has, as it were, converted into a chattel. But the difference between the patent-right and the thing patented, is great and palpable, equal to the difference between a copy-right and a book. If a state attempted to authorize a violation of these rights, to enable another to make use of or vend the thing patented, or to print the book, or to throw open and in common the patent-right or the copy-right, then its law would be unconstitutional. But the rights, and only the rights, are the object of the power and laws of Congress; the things themselves are personal property or chattels of the ordinary kind, to be enjoyed, like all other property, subject to laws over which Congress has no control.

If so, why has not a state a right to prohibit the use of the thing patented within its jurisdiction? It can do so as to all other kinds of property. It is no argument to say that if one state can do it every state can do it. If every state wished to do it, how could they, or why should they, be prevented? But, is not that the case with every kind of property? And if they should extend that power over any species of unpatented property, could Congress interfere? The individual states having that power over every kind of *originally perfect [*153
property, can it be supposed that because Congress was empowered to turn imperfect into perfect property, this newly secured species should occupy a superior class, and possess privileges and exemptions that were never at-

1.—Act of Feb. 21, 1793, s. 1.

tached to any other kind of property? The power of regulating and prohibiting the use of every kind of property must be somewhere; it is a necessary part of legislative sovereignty, and must be intrusted to some constituted authority. As to all other kinds of property, it is undoubtedly in the state legislatures. Things patented may be dangerous or noxious; they may be generally useful, and locally injurious; such, for instance, might be torpedoes and a peaceful and commercial port, fire balloons and squibs in a populous city; though, in some places and on some occasions, they may well be useful and advantageous, or, at least, harmless. Among the curiosities in the patent-office, there probably are some patented velocipedes. The corporation of New York, in 1819, by an ordinance, prohibited the use of any velocipede in the streets of that city. Had it not a right to do so? and could the owner of any of those patent velocipedes use them in the streets, in despite of that ordinance? The legislature of New York has, for many years, prohibited the drawing of any lotteries there, except what it has granted to certain public institutions, such as Union College, and the College of Physicians. By virtue of the prohibition to others, and the grant to those institutions, they have obtained an exclusive right of 154*] drawing lotteries, similar to *that, the constitutionality of which is now in controversy. Joseph Vanini has patented a new mode of drawing lotteries, which is, unquestionably, a great improvement, simplifying the operation, and, by completing it in less than five minutes, preventing all insurances, and many of the evils attendant on the old mode. But, could he, because his invention is an improvement and patented, insist on a right to use it, and draw lotteries in the state of New York, contrary to its laws, and, indeed, now, to the express provisions of its constitution? No. The power to prohibit the use of patented things, either generally or locally, must reside somewhere. Can Congress prohibit the use of locally injurious, but patented things, in the waters, or the cities, or the populous towns of New York? If not, because it has no power of regulation or prohibition, where does that power reside? If it reside, as it must, exclusively in the state legislatures, or subordinate authorities, who but their constituents can inquire into the motives or propriety of their exercise of that power, or the extent to which it should be carried? If the states have not that regulating and controlling power, as Congress assuredly has it not, what is the consequence? A patent can be got for anything, and with no previous competent authority to decide upon its utility or fitness. If it once issues from the patent-office, as full of evils as Pandora's box, if they be as new as those that issued from thence, it is above the restraint and control of the state legislatures; of the legislature of the United States; of every human authority. 155*] *I put the case of their being noxious or dangerous; but there may be a multitude of other reasons for regulating, restraining, or even prohibiting their use; of these Congress can take no cognizance. If the state governments can take no cognizance of them, no institution can; if they can take cognizance, their power is exclusive, and their exercise of it cannot be reviewed. Could Congress (incapable as it is, of itself, prohibiting the use of patented things) pass a law, in words, that a patentee shall have a right to use his patented machine in any state, notwithstanding any prohibitory laws of that state? Would that be within the power of Congress? How, then, can implication give to the patentee the same right? If a patent can give a right to use the thing patented, in contravention of this exclusive right, it would have the same effect in contravention of any other exclusive right granted by a state. Ferries, stage-coaches, etc., all the grants respecting them, would be broken down by some patented vehicle, for they are all, in pari materia, exclusive grants, from motives of public policy; and, having no connection with the principle of literary property, which is the origin and the object of patent-rights, they cannot be affected by any power given to Congress. A state has the same jurisdiction and authority over its rivers and lakes that it has over its canals. Now, if the legislature of New York judged it advisable so to do, could it not prohibit any boat, using some patented machinery, from navigating its western canal? If it could, why could it not make the *same prohibition as to its rivers and [*156 lakes; and if the act here should be an excess or abuse of legislation, would not its responsibility be exclusively to the people of the state?

The state of New York, from motives not examinable here, made a contract, which is the foundation of our right; it could only do so by a law. The state had a right to contract, and, so far, it stands on the same footing as if one individual contracted, for a valuable consideration, with another, to receive his supplies of any article from him only. In the case of individuals, could a man, having a patented improvement of the same article, insist on annulling that contract, as interfering with his exclusive right and patent? If not, why should not a state, capable of contracting, have the same right to make that bargain, and, consequently, exclude the use of the patented article in its jurisdiction and domain, as an individual has in his own house and farm? The waters of the state are the domain and property of the state, subject only to the commercial regulations of Congress. Why should not the contract of a state, in regard to its domain and property, be as sacred as that of an individual? Such a contract was in this, and may in many cases, be very useful and advantageous. Who is to judge of that but the state legislatures? Could Congress have made this contract, or acquired this benefit for the state? Certainly not. If the state cannot, what power or authority can? And is it come to this, that a contract, such as every individual in the land may wisely and lawfully *make, for [*157 his own benefit, and to be enforced in his own premises, no state, and no authority for any state, can make for its benefit, and to be enforced in its jurisdiction?

There are circumstances connected with those laws, sufficient to make any tribunal require the strongest arguments before it adjudged them invalid. The state of New York, by a patient and forbearing patronage of ten years to Livingston and Fulton, by the tempt-

ing inducement of its proffered reward, and by the subsequent liberality of its contract, has called into existence the noblest and most useful improvement of the present day. Genius had contended with its inherent difficulties for generations before; and if some had nearly reached, or some even touched, the goal, they sunk exhausted, and the result of their efforts perished in reality and almost in name. Such would probably have been the end of Fulton's labors; and neither the wealth and talents of his associate, nor the resources of his own great mind, would have saved him from the fate of others, if he had not been sustained, for years, by the wise and considerate encouragement of the state of New York. She has brought into noonday splendor an invaluable improvement to the intercourse and consequent happiness of man, which, without her aid, would, perhaps, have scarcely dawned upon our grandchildren. She has not only rendered this service to her own citizens, but the benefits of her policy have spread themselves over the whole Union. Where can you turn your eyes, and where can [*158 you travel, *without having your eyes delighted, and some part of the fatigues of your journey relieved, by the presence of a steamboat? The Ohio and Mississippi she has converted into rapid channels for communicating wealth, comforts and enjoyments, from their mouths to their head waters. And the happy and reflecting inhabitants of the states they wash, may well ask themselves, whether, next to the constitutions under which they live, there be a single blessing they enjoy from the art and labor of man, greater than what they have derived from the patronage of the state of New York to Robert Fulton? But the mighty benefits that have resulted from those laws, are not circumscribed, even by the vast extent of our Union. New York may raise her head, she may proudly raise her head, and cast her eyes over the whole civilized world; she there may see its countless waters bearing on their surface countless offsprings of her munificence and wisdom. She may fondly calculate on their speedy extension in every direction, and through every region, from Archangel to Calcutta; and justly arrogating to herself the labors of the man she cherished, and, conscious of the value of her own good works, she may turn the mournful exclamation of Æneas into an expression of triumph, and exultingly ask,

Quæ regio in terris nostri non plena laboris?

And it is, after all those advantages have been acquired and realized to the world; after numerous individuals have embarked their for- [*159 tunes, on *the faith of those grants, and a ten years' acquiescence in the decision by which they were sanctioned; after the property they have created has been diffused among a multitude of possessors; after it has become the sole support of the widow and the orphan; after it has received and exhausted the accumulated savings of the laborious and industrious heads of families, that a decision is required, which cannot, indeed, undo the lasting benefits already procured to the world, but would, assuredly, undo many of those who have confided their wealth and means to the stability and observance of those laws.

The Attorney-General, for the appellant, in reply, insisted that the laws of New York were unconstitutional and void.

1. Because they are in conflict with powers exclusively vested in Congress, which powers Congress has fully exercised, by laws now subsisting and in full force.

2. Because, if the powers be concurrent, the legislation of the state is in conflict with that of Congress, and is therefore void.

He stated that the powers with which the laws of New York conflict, are the power "to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and inventions," and the power "to regulate commerce with foreign nations, and among the several states." If these powers were exclusive in Congress, and it had exercised them by *subsisting [*160 laws; and if the laws of New York interfere with the laws of Congress, by obstructing, impeding, retarding, burdening, or in any other manner controlling their operation, the laws of New York are void, and the judgment of the State Court, founded on the assumption of their validity, must be reversed.

In discussing this question, the general principles assumed, as postulates, on the other side, might be, for the most part, admitted. Thus, it might be admitted, that by force of the declaration of independence, each state became sovereign; that they were, then, independent of each other, and foreign to each other; that by virtue of their separate sovereignty, they had each full power to levy war, to make peace, to establish and regulate commerce, to encourage the arts, and generally to perform all other acts of sovereignty. It was also conceded that the government of the United States is one of delegated powers; and the counsel for the respondent added that it is one of enumerated powers. Yet they admitted that there were implied powers, and had given a different rule for the construction of the two classes of powers, which was, that "the express powers are to be construed strictly, the implied powers liberally." But the implied powers, he presumed, were only those which are necessary and proper to carry the powers, expressly given, into effect—the means to an end. This clause had not been generally regarded as, in fact, giving any new powers. Congress would have had them without the express declaration. *The clause was inserted only ex abun- [*161 danti cautela. With this explanation, it might be conceded that the constitution of the United States is one of delegated and enumerated powers; and that all powers, not delegated by the constitution to the national government, nor prohibited by it to the states, are reserved to the states respectively, or to the people. The peculiar rule of construction demanded for those powers might also be conceded: that the express powers are to be strictly construed, the implied, liberally. By which was understood to be meant, that Congress can do no more than they are expressly authorized to do; though the means of doing it are left to their discretion, under no other limit than that they shall be necessary and proper to the end.

On the other hand, the counsel for the respondent themselves admitted that Congress, nevertheless, has some exclusive powers; and,

in conformity with the decisions of the court, they admit that those exclusive powers exist under three heads. (1) When the power is given to Congress in express terms of exclusion. (2) When a power is given to Congress, and a like power is expressly prohibited to the states. (3) Where a power given to Congress is of such a nature that the exercise of the same power by the states would be repugnant.

With regard to the degree of repugnancy, it was insisted that the repugnancy must be manifest, necessary, unavoidable, total and direct. Certainly if the powers be repugnant at all, they must be so with all these qualifications. 162*] If Congress, *in the lawful exercise of its power, says that a thing shall be done, and the state says it shall not; or, which is the same thing, if Congress says that a thing shall be done, on certain terms, and the state says it shall not be done, except on certain other terms, the repugnancy has all the epithets which can be lavished upon it, and the state law must be void for this repugnancy.

A new test for the application of this third head of exclusive power had been proposed. It was said that "no power can be exclusive from its own nature, except where it formed no part of state authority previous to the constitution, but was first created by the constitution itself." But why were these national powers thus created by the constitution? Because they look to the whole United States as their theatre of action. And are not all the powers given to Congress of the same character? Under the power to regulate commerce, the commerce to be regulated is that of the United States with foreign nations, among the several states, and with the Indian tribes. No state had any previous power of regulating these. The same thing might be affirmed of all the other powers enumerated in the constitution. They were all created by the constitution, because they are to be wielded by the whole Union over the whole Union, which no state could previously do. If any one power, created by the constitution, may be exclusive for that reason, then all may be exclusive, because all are originally created. If, on the other hand, we are to consider the powers enumerated in the constitution, not with reference 163*] *to the greater arm that wields them, and the more extended territory over which they operate, but merely in reference to the nature of the particular power in itself considered; then, according to this new test, all the powers given to Congress are concurrent; because there is no one power given to it, which, considered in this light, might not have been previously exercised by the states within their respective sovereignties. But this argument proved too much; for it has been conceded that some of the powers are exclusive from their nature; whereas, if the argument were true, none of them could be exclusive. On this argument, the entire class or head of exclusive powers, arising from the nature of the power, must be abolished. But this court had repeatedly determined that there is such a class of exclusive powers. The power of establishing a uniform rule of naturalization is one of the instances. Its exclusive character is rested on the constitutional requisition that the rule established under it should be uniform.[1]

It had been objected that this would have been a concurrent power, but for the auxiliary provision in the constitution that a citizen of one state shall be entitled to all the privileges of a citizen in every other state. The answer was, that it is not so determined by the court in the case cited, and that the commentators on the constitution place it exclusively on the nature of the power as described in the grant.[2]

*So, also, the power of establishing [*164 uniform laws on the subject of bankruptcies, is clearly an exclusive power from its nature. The court has, indeed, determined that until Congress thought fit to exercise the power, the states might pass local bankrupt laws, provided they did not impair the obligation of contracts; but, that as soon as Congress legislate on the subject, the power of the States is at an end.[3]

But it had been said that this doctrine takes away state power, by implication, which is contrary to the principles of interpretation, laid down by the commentators on the constitution. It was not the opinion of the authors of the Federalist that a state power could not be alienated by implication. Their doctrine was, that it might be alienated by implication, provided the implication be inevitable; and that it is inevitable wherever a direct and palpable repugnancy exists. The distinction between repugnancy and occasional interference is manifest. The occasional interference, alluded to in the Federalist and admitted by this court, in its adjudications, is not a repugnancy between the powers themselves; it is a mere incidental interference in the operation of powers harmonious in themselves. The case put, was of a tax laid by Congress, and a tax laid by the state, upon the same subject, e. g., on a tract of land. The taxes operate upon, and are to be satisfied out of the same subject. It might be inconvenient to the proprietor to pay both taxes. In an extreme *case, the subject might [*165 be inadequate to the satisfaction of both. Then the tax laid by the paramount authority must be first satisfied. Still, this incidental interference in their operation is not an inherent repugnance in the nature of the powers themselves.

It was also said that to constitute the power an exclusive one in Congress, the repugnance must be such that the state can pass no law on the subject, which will not be repugnant to the power given to Congress.

This required qualification before it could be admitted. Some subjects are, in their nature, extremely multifarious and complex. The same subject may consist of a great variety of branches, each extending itself into remote, minute and infinite ramifications. One branch alone, of such a subject, might be given exclusively to Congress (and the power is exclusive only so far as it is granted) yet, on other branches of the same subject, the states might act without interfering with the power exclusively granted to Congress. Commerce is such a subject. It is so complex, multifarious and indefinite, that it would be extremely difficult,

1.—Chirac v. Chirac, 2 Wheat. Rep. 269.
2.—The Federalist, No. 42.
3.—Sturges v. Crowninshield, 4 Wheat. Rep. 122.

if not impracticable, to make a digest of all the operations which belong to it. One or more branches of this subject might be given exclusively to Congress; the others may be left open to the states. They may, therefore, legislate on commerce, though they cannot touch that branch which is given exclusively to Congress.

So Congress has the power to promote the progress of science and the useful arts; but 166*] only in *one mode, viz., by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. This might be an exclusive power, and was contended to be so. Yet, there are a thousand other modes in which the progress of science and the useful arts may be promoted, as by establishing and endowing literary and philosophical societies, and many others which might be mentioned. Hence, notwithstanding this particular exclusive grant to Congress, of one mode of promoting the progress of science and the useful arts, the states may rightfully make many enactments on the general subject, without any repugnance with the peculiar grant to Congress.

But, to come now to the question, whether these state laws be repugnant to this grant of power, we must first inquire why it was conferred on Congress. Why was it thought a matter of sufficient importance to confer this power upon the national government? The answer to this question would be found in the history of the country, in the nature of our institutions, and the great national objects which the constitution had in view. The country was in its infancy; its population was small; its territory immense; it had recently thrown off its bondage by the war of the revolution, and was left exhausted and poor—poor in everything but virtue and the love of country. It was still dependent on the arts of Europe for all the comforts and almost all the necessaries of life. We had hardly any manufactures, science or literature of our own. Our 167*] statesmen saw the *great destiny which was before the nation, but they saw also the necessity of exciting the energies of the people, of invoking the genius of invention, and of creating and diffusing the lights of science. These were objects in which the whole nation was concerned, and were, therefore, naturally and properly confided to the national government. The states, indeed, might have exercised their inherent power of legislating on this subject; but their sphere of action was comparatively small; their regulations would naturally have been various and conflicting. Discouragement and discontent would have arisen in some States, from the superior privileges conferred on the works of genius in others; contests would have ensued among them on the point of the originality of inventions; and laws of retortion and reprisal would have followed. All these difficulties would be avoided by giving the power to Congress, and giving it exclusively of the States. If it were wisely exerted by Congress, there could be no necessity for a concurrent exercise of the power by the States.

The terms of the grant are: "Congress shall have power to promote the progress of science and the useful arts, by securing, for a limited time to authors and inventors, the exclusive right to their respective writings and discoveries." This exclusive right is to be co-extensive with the territory of the Union. The laws to be made for securing it must be uniform, and must extend throughout the country. The exclusive nature of every power is to be tested by the character of the *acts which [*168 Congress is to pass. This is the case with the naturalization laws. The exclusiveness of the power to establish them resulted from their character of uniformity. So here, the exclusiveness results from the character of the right which they are to confer. It is to be exclusive. It is not, indeed, said that Congress shall have the exclusive power, but it is said that they shall have power to do a certain act, which, when done, shall be exclusive in its operation. The power to do such an act must be an exclusive power. It can, in the nature of things, be performed only by a single hand. Is not the power of one sovereign to confer exclusive rights, on a given subject, within a certain territory, inconsistent with a power in another independent sovereign, to confer exclusive rights on the same subject, in the same territory? Do not the powers clash? The right to be conferred by Congress, is to exclude all other rights on the subject in the United States; New York being one of those states. The right to be conferred by New York, is to exclude all other rights on the subject within the state of New York. That one right may exclude another, is perfectly intelligible; but that two rights should reciprocally exclude each other, and yet both continue to subsist in perfect harmony, is inconceivable. Can a concurrent power exist, if, from the very nature of its action, it must take away, or render nugatory, the power given to Congress? Supposing the power to be concurrent, Congress may secure the right for one period of time, and the respective states for another. Congress may *secure it [*169 for the whole Union, and each state may secure it to a different claimant, for its own territory. Congress possesses the power of granting an exclusive right to authors and inventors, within the United States. New York claims the power to grant such exclusive right within that state. An author or inventor in that state may take a grant for a period of time far longer than that allowed by the act of Congress. He may take a similar grant from every other state in the Union; and thus this pretended concurrent power supersedes, abrogates and annuls the power of Congress. What would become of the power of Congress after the whole sphere of this action was taken away by this concurrent power of the States? Who would apply to the power of Congress for a patent or a copy-right while the states held up higher privileges? This concurrent legislation would degenerate into advertisements for custom. These powers would be in the market and the highest bidder would take all. Are not powers repugnant, when one may take from the other the whole territory on which alone it can act? Is not the repugnance such as to annihilate the power of Congress, as completely as if the whole Union was itself annihilated?

Something had been said of Congress repealing the laws of the State, wherever they should conflict with those of the Union. But where

is this power of repeal? There is no such head of power in the constitution. Congress can act only by positive legislation on any subject, and this it has done in the present instance. But 170*] this action *would be in vain if another authority can act on the same subject. If this concurrent power would defeat the power of Congress, by withdrawing from it the whole territory on which it is to act, it would also defeat it by giving a monopoly of all the elements with which invention is to work. This has been done by these laws as to fire and steam. Why should it not be done equally with all the other elements, such as gravitation, magnetism, galvanism, electricity, and others? What is to consecrate these agents of nature, and secure them from state monopoly, more than fire or steam? If not, then is the power of Congress subject to be defeated by this concurrent power, first by a monopoly of all the territory on which it can act, and then by a monopoly of all the elements and natural agents on which invention can be exerted. Still it would be said, that there is no direct repugnance between these powers, and that the power of Congress may still act. But on what can it act? The territory is gone, and all the powers of invention are appropriated. There is no difference whatever between a direct enactment that the law of Congress shall have no operation in New York, and enactments which render that operation impossible. If, then, this process of reasoning be correct, the inevitable conclusion from it is that a power in the states to grant exclusive patents, is utterly inconsistent with the power given to the National government to grant such exclusive patents; and hence, that the power given to Congress is one which is exclusive from its nature.

171*] *But suppose, for the sake of the argument, that the states have this concurrent power, yet it cannot be denied that if the legislation of the state be repugnant to the laws of Congress, that of the state is void, so far as the repugnance exists. In the present case the repugnance is manifest. The law of Congress declares that all inventors of useful improvements throughout the United States shall be entitled to the exclusive right in their discoveries for fourteen years only. The law of New York declares that this inventor shall be entitled to the exclusive use of his discovery for thirty years, and as much longer as the state shall permit. The law of Congress, by limiting the exclusive right to fourteen years, in effect declares that after the expiration of that time the discovery shall be the common right of the whole people of the United States. The law of New York declares that it shall not, after fourteen years, be the exclusive right of the people of the United States, but that it shall be the exclusive right of this inventor for thirty years, and for so much longer as she, in her sovereign will and pleasure, may permit. If this be not repugnance, direct and palpable, we must have a new vocabulary for the definition of the word.

But it was said that the appellant had no patent under the United States, and, therefore, could not raise the question. To this it was answered that it was not necessary that he should have a patent. The question as to the validity of the law of New York, is raised, whenever a right is asserted under that law, and is resisted by the *party against [*172 whom it is asserted; and that validity is to be tested, not by comparing the law of New York with a patent, but by comparing it with the constitution and laws of the United States.

It was also said that there could be no repugnance, because it was admitted that wherever a patent from the United States appears, the patent obtained under the state law must yield to it; that the patent under the state is valid only until the patent from the paramount power appears; and that the rights derived from the different sovereigns must be found practically to clash, before the law of New York was to give away for repugnancy. This is an insidious argument, and fraught with all the dangers which have been enumerated. For if the New York patentee be the inventor, the law of New York is absolute, and however unconstitutional it may be, there is no power of resistance. Besides, the argument is incorrect. To illustrate this, suppose a grant of Virginia, within the military reservation in Ohio, after she had ceded the whole territory to the United States; would the party in possession, even if a mere intruder, be bound to show a grant from the United States before he could resist the unlawful grant of Virginia? But there the plaintiff would be claiming under a state which had previously ceded away the power to make such grants, which is precisely the case here, so that there need be no repugnance arising from patents. If a repugnance exist between the laws of New York and the constitution and laws of the United States, any citizen of the United States has a right to act *as if [*173 the law of New York were a nullity; and the question of its nullity and validity arises wherever an attempt is made to enforce it.

But it was argued that the power of Congress is limited to inventors, and that the power to encourage by patents the introduction of foreign discoveries, stands clear of this constitutional grant. If it were necessary, this doctrine might be questioned. The statute of the 21st James I., c. 3, uses the same word with the constitution, "inventors;" and the decisions upon the construction of this statute might be referred to, in order to show that it has been considered as embracing discoveries imported from abroad.[1] But, even acceding to this doctrine, it might be asked whether the question now before the Court had anything to do with an art, machine, or improvement imported from abroad. The privilege here granted by the state is to an American citizen who claims to be the inventor. The privilege is the reward of invention, not of importation, and this it is which brings it in conflict with the act of Congress. It is true, the law does not call him the inventor; it calls him merely the "possessor." But can the constitution and laws of the United States be evaded in this manner? If he was not the inventor, why this unjust tax which has been levied upon our admiration and gratitude? When the validity of a law is challenged for a fraudulent evasion of the rights of others, you are not bound by its own averments, but may resort to proof *aliunde to es- [*174 tablish the facts. The word possessor is a new

1.—17 Vin. 211.

and unusual word to apply to such a case, and marks a studious effort to conceal the truth. He was, of necessity, either the inventor or the importer. If he was the importer, there is no conceivable reason why he should be called by any other than that name. The legislature of New York, in its act in behalf of Fitch, passed before the adoption of the constitution, had no difficulty in applying the natural and appropriate name to him. But when the final law was passed in favor of Livingston and Fulton, in 1798, the constitution of the United States, which cedes this power to Congress, had been adopted, and the laws by which that power is executed had been passed. This constitution and these laws used the term inventors. But the privilege was too short. The state of New York offered better terms. The only difficulty was, to give them effect without encroaching upon that power which had been constitutionally exercised by Congress. It would not do to call them inventors, and the devise was adopted of calling him merely the possessor, which was a manifest evasion of the law of Congress.

But it was contended that the patent laws of the United States give no right; they only secure a pre-existing right at common law. What, then, do these statutes accomplish? If they do nothing more than give the inventor a chattel interest in his invention, and a remedy for its violation, he had these at common law. And if they only give him a mere right to use 175*] his invention in the states, *with their permission, he had that before. The case of Millar v. Taylor proves the right to have been perfect at common law. The time of enjoyment was far greater. Thomson's Seasons had been published forty years when that action was brought. If the patent and copy-right laws were merely intended to secure an exclusive right throughout the United States, and are, in fact, a limitation on the common law right (as was contended by the respondent's counsel), when this right has been thus secured throughout the United States, and a limitation constitutionally put upon it by Congress, can a state interfere with this regulation? The limitation is not for the advantage of the inventor, but of society at large, which is to take the benefit of the invention after the period of limitation has expired. The patentee pays a duty on his patent, which is an effective source of revenue to the United States. It is virtually a contract between each patentee and the people of the United States, by which the time of exclusive and secure enjoyment is limited, and then the benefit of the discovery results to the public. A state cannot, by its local laws, defeat this resulting interest of the whole Union.

But it was said that a state might prohibit the use of a patented machine, if it be noxious to the health of its citizens, or of an immoral or impious book, the copy-right of which had been secured. The answer to all such arguments was, that it would be time enough to consider such questions when they arise. The constitutional power of Congress is to patent 176*] useful discoveries. The *patent authorizes the patentee to use his inventions, and it is the use which is secured. When a discovery is deemed useful by the national government, and a patent shall issue authorizing the patentee to use it throughout the United States, and the patentee shall be obstructed by a state in the exercise of this right, on the ground that the discovery is useless and dangerous, it will be time enough to consider the power of the states to defeat the exercise of the right on this ground. But this is not the question before the Court. It might be admitted that the state had the authority to prohibit the use of a patented machine on that ground, or of a book, the copy-right of which had been secured, on the ground of its impiety or immorality. But the laws which are now in judgment were not passed upon any such ground. The question raised by them is, can the states obstruct the operation of an act of Congress, by taking the power from the national legislature into their own hands? Can they prohibit the publication of an immoral book, licensed by Congress, on the pretext of its immorality, and then give an exclusive right to publish the same book themselves? Can they prohibit the use of an invention on the ground of its noxiousness, and then authorize the exclusive use of the same invention by their own law?

But there is no pretext of noxiousness here. The authority to enact these laws is taken up under a totally distinct head of state power. It is the sovereign power to grant exclusive privileges and create monopolies, the constitution and laws *of the United States to [*177 the contrary notwithstanding. This is the real power under which these laws are defended; and it may perplex, although it cannot enlighten the discussion, to confound it with another and a distinct head of state power. If, then, the power of securing to authors and inventors the use of their writings and discoveries be exclusively vested in Congress, the acts of New York are void, because they are founded on the exercise of the same power by the state. And if the power be concurrent, these acts are still void, because they interfere with the legislation of Congress on the same subject.

These laws were also void, because they interfere with the power given to Congress to regulate commerce with foreign nations and among the several states. This nullity of the state laws would be supported, first, upon the ground of the power being exclusive in Congress; and secondly, that if concurrent, these laws directly interfered with those of Congress on the same subject.

That this power was exclusive, would be manifest from the fact that the commerce to be regulated was that of the United States; that the government by which it was to be regulated was also that of the United States; and that the subject itself was one undivided subject. It was an entire, regular and uniform system which was to be carried into effect, and would not admit of the participation and interference of another hand. Does not regulation, ex vi termini, imply harmony and uniformity of action? If this must be admitted to be the natural and proper force of the *term, let us suppose [*178 that the additional term, uniform, had been introduced into the constitution, so as to provide that Congress should have power to make uniform regulations of commerce throughout the United States. Then, according to the adjudications on the power of establishing a uniform rule of naturalization, and uniform laws

of bankruptcy, throughout the United States, this power would unquestionably have been exclusive in Congress. But regulation of that commerce which pervades the Union, necessarily implies uniformity, and the same result, therefore, follows as if the word had been inserted.

With regard to the quarantine laws, and other regulations of police respecting the public health in the several states, they do not partake of the character of regulations of the commerce of the United States. It had been said that these local regulations were recognized by Congress, which had made them a part of its own system of commerce. But this recognition would have been superfluous, if they could have stood without it on the basis of state sovereignty; and so far as their adoption by Congress could be considered as affecting the question, the manner and purpose of the recognition operated the other way. It would be found that, by the commercial regulations which Congress had made, a general system was adopted, which, if executed in every instance, would have carried ships and vessels into all the ports of the several states, their local quarantine laws to the contrary notwithstanding. An express regulation is therefore introduced, 179*] requiring the collectors *of the customs to conform the execution of their official duties, under the navigation and revenue laws, with the quarantine laws of the respective states. Without such a provision, the local health laws must have given way to the supremacy of the navigation and revenue laws of the Union.

A serious objection to the exclusive nature of this power of regulating commerce, was supposed to arise from the express prohibitions on the states, contained in the 10th sec. of the 1st art. of the constitution. It has been considered that these prohibitions imply that, as to everything not prohibited, the power of the state was meant to be reserved; and the authority of the authors of the Federalist was cited in support of this interpretation. But another commentator, of hardly less imposing authority, and writing, not as a polemic, for the purpose of vindicating the constitution against popular objections, but for the mere purpose of didactic instruction as a professor, with this section before him, and with a strong leaning toward state pretensions, considers the power to regulate commerce, as an exclusive power.[1] But the difference between them is rather in appearance than in reality. It does not appear that the author of that number of the Federalist did himself consider these police regulations as, properly speaking, regulations of the commerce of the Union. But the objectors to the constitution had presented them as such, and his argument in substance is, that 180*] if *they are, the constitution does not affect them. The other commentator did not consider them as regulations of the commerce of the United States; for if he did, he could not admit them, as he did, to be left in the states, and yet hold the opinion that the power to regulate commerce was exclusively vested in Congress. But might not a reason for these prohibitions be found, in the recent experience of the country, very different from that which had heretofore been assigned for them. The acts prohibited, were precisely those which the states had been passing, and which mainly led to the adoption of the constitution. The section might have been inserted ex abundanti cautela. Or the convention might have regarded the previous clause, which grants the power to regulate commerce, as exclusive throughout the whole subject; and this section might have been inserted to qualify its exclusive character, so far as to permit the states to do the things mentioned, under the superintendence and with the consent of Congress. If either or both of these motives combined for inserting the clause, the inference which had been drawn from it against the exclusive power of Congress to regulate commerce, would appear to be wholly unwarranted.

But if these police regulations of the States are to be considered as a part of the immense mass of commercial powers, is not the subject susceptible of division, and may not some portions of it be exclusively vested in Congress? It was viewing the subject in this light that induced his learned associate[2] *to assume [*181 the position which had been misconceived on the other side. This proposition was, not that all the commercial powers are exclusive, but that those powers being separated, there are some which are exclusive in their nature; and among them is that power which concerns navigation, and which prescribes the vehicles in which commerce shall be carried on. It was, however, immaterial, so far as this case was concerned, whether the power of Congress to regulate commerce be exclusive or concurrent. Supposing it to be concurrent, it could not be denied that where Congress has legislated concerning a subject on which it is authorized to act, all state legislation which interferes with it is absolutely void. It was not denied that Congress has power to regulate the coasting trade. It was not denied that Congress had regulated it. If the vessel now in question was sailing under the authority of these regulations, and has been arrested by a law of New York for bidding her sailing, the state law must, of necessity, be void. The coasting trade did, indeed, exist before the constitution was adopted; it might safely be admitted that it existed by the jus commune of nations; that it existed by an imperfect right; and that the states might prohibit or permit it at their pleasure, imposing upon it any regulations they thought fit, within the limits of their respective territorial jurisdictions. But those regulations were as various as the states; continually conflicting, and the source of perpetual discord *and [*182 confusion. In this condition, the constitution found the coasting trade. It was not a thing which required to be created, for it already existed. But it was a thing which demanded regulation, and the power of regulating it was given to Congress. They acted upon it as an existing subject, and regulated it in a uniform manner throughout the Union. After this regulation, it was no longer an imperfect right, subject to the future control of the states. It became a perfect right, protected by the laws of Congress, with which the states had no authority to interfere. It was for the very purpose of putting an end to this interference that the power was given to Congress; and if they

1.—Tucker's Bl. Com. part 1, Appen. 180.

2.—Mr. Webster

still have a right to act upon the subject, the power was given in vain. To say that Congress shall regulate it, and yet to say that the states shall alter these regulations at pleasure, or disregard them altogether, would be to say, in the same breath, that Congress shall regulate it, and shall not regulate it; to give the power with one hand, and to take it back with the other. By the acts for regulating the coasting trade, Congress had defined what should be required to authorize a vessel to trade from port to port; and in this definition, not one word is said as to whether it is moved by sails or by fire; whether it carries passengers or merchandise. The license gives the authority to sail, without any of those qualifications. That the regulation of commerce and navigation, includes the authority of regulating passenger vessels as well as others, would appear from the most approved definitions of 183*] the term commerce. It always *implies intercommunication and intercourse. This is the sense in which the constitution uses it; and the great national object was to regulate the terms on which intercourse between foreigners and this country, and between the different states of the Union, should be carried on. If freight be the test of commerce, this vessel was earning freight; for what is freight, but the compensation paid for the use of a ship? The compensation for the carrying of passengers may be insured as freight. The whole subject is regulated by the general commercial law; and Congress has superadded special regulations applicable to vessels employed in transporting passengers from Europe. In none of the acts regulating the navigation of the country, whether employed in the foreign or coasting trade, had any allusion been made to the kind of vehicles employed, further than the general description of ships or vessels, nor to the means or agents by which they were propelled.

In conclusion, the Attorney-General observed that his learned friend (Mr. Emmett) had eloquently personified the state of New York, casting her eyes over the ocean, witnessing everywhere this triumph of her genius, and exclaiming, in the language of Æneas,

"Quæ regio in terris, nostri non plena laboris?"

Sir, it was not in the moment of triumph, nor with feelings of triumph, that Æneas uttered that exclamation. It was when, with his faithful Achates by his side, he was surveying the 184*] works of art *with which the palace of Carthage was adorned, and his attention had been caught by a representation of the battles of Troy. There he saw the sons of Atreus and Priam, and the fierce Achilles. The whole extent of his misfortunes—the loss and desolation of his friends—the fall of his beloved country, rush upon his recollection.

"Constitit, et lachrymans; Quis jam locus, inquit Achate,
Quæ regio in terris nostri non plena laboris?"

Sir, the passage may, hereafter, have a closer application to the cause than my eloquent and classical friend intended. For, if the state of things which has already commenced is to go on; if the spirit of hostility, which already exists in three of our states, is to catch by contagion, and spread among the rest, as, from the progress of the human passions, and the unavoidable conflict of interests it will too surely do, what are we to expect? Civil wars have often arisen from far inferior causes, and have desolated some of the fairest provinces of the earth. History is full of the afflicting narratives of such wars, from causes far inferior; and it will continue to be her mournful office to record them, till time shall be no more. It is a momentous decision which this Court is called on to make. Here are three states almost on the eve of war. It is the high province of this Court to interpose its benign and mediatorial influence. The framers of our admirable constitution would have deserved the wreath of immortality *which they have acquired, [*185 had they done nothing else than to establish this guardian tribunal, to harmonize the jarring elements in our system. But, sir, if you do not interpose your friendly hand, and extirpate the seeds of anarchy which New York has sown, you will have civil war. The war of legislation, which has already commenced, will, according to its usual course, become a war of blows. Your country will be shaken with civil strife. Your republican institutions will perish in the conflict. Your constitution will fall. The last hope of nations will be gone. And what will be the effect upon the rest of the world? Look abroad at the scenes which are now passing on our globe, and judge of that effect. The friends of free government throughout the earth, who have been heretofore animated by our example, and have held it up before them as their polar star, to guide them through the stormy seas of revolution, will witness our fall with dismay and despair. The arm that is everywhere lifted in the cause of liberty, will drop, unnerved, by the warrior's side. Despotism will have its day of triumph, and will accomplish the purpose at which it too certainly aims. It will cover the earth with the mantle of mourning. Then, sir, when New York shall look upon this scene of ruin, if she have the generous feelings which I believe her to have, it will not be with her head aloft, in the pride of conscious triumph—"her rapt soul sitting in her eyes;" no, sir, no; dejected, with shame and confusion—drooping under the weight of her *sorrow, with a voice [*186 suffocated with despair, well may she then exclaim,

"Quis jam locus,
Quæ regio in terri nostri non plena laboris!"

Mr. Chief Justice Marshall delivered the opinion of the Court, and after stating the case, proceeded as follows:

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant:

1st. To that clause in the constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The state of New York maintains the constitutionality of these laws; and their legislature, their Council of Revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration that virtue, intelligence, and office, can bestow. No tribunal can approach the decision of this

question, without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this Court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United 187*] *States expect from this department of the government.

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are con- 188*] ferred; nor is there one sentence in *the constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects *for which [*189 it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial *intercourse between nations, [*190 and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that

sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that "commerce" as the word is used in the constitution, comprehends naviga- 191*] tion *also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties, in another.' These words mave a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing that all America is unit- 192*] ed *in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such a case, an embargo is no more a war measure, than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo, which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility, will not be imputed to those who were arrayed in opposition *to this. [*193 Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be *carried on between this country [*194 and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention *been [*195

to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear, 196*] when *applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation, on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain 197*] terms, and do not affect the *questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that although the power of Congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally *exercise the same [*198 power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised *by the states, are transferred to [*199 the government of the Union, yet the state governments remain, and constitute a most im-

portant part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power 200*] that is granted to Congress, *and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question, whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the state, while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the tenth section, as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor of the existence of that power, and that the section which prohibits the states from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the state is competent, may still be made.

That this restriction shows the opinion of the convention, that a state might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as 201*] a consequence, *from this concession, that a state may regulate commerce, with foreign nations and among the states, cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts and excises;" and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the states on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states *to levy taxes, not [*202 from the questionable power to regulate commerce.

"A duty of tonnage" is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also. This tax may be imposed by a state, with the consent of Congress; and it may be admitted that Congress cannot give a right to a state, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the states from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussion which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

These restrictions, then, are on the taxing power, *not on that to regulate com- [*203 merce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution, as being passed in the exercise of a power remaining with the states.

That inspection laws may have a remote and

considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The objects of inspection laws is to improve the quality of articles produced by the labor of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states and prepared it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be 204*] where the *power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged power; that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, 205*] whose *action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of Congress, passed in 1796 and 1799,[1] empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a state, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might *interfere with, and [*206 be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But in making these provisions, the opinion is unequivocally manifested, that Congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce.

The act passed in 1803,[2] prohibiting the importation of slaves into any state which shall itself prohibit their importation, implies, it is said, an admission that the states possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself, it might now be exercised. Any state might now import African slaves into its own territory. But it is obvious that the power of the states over this subject, previous to the year 1808, constitutes an exception to the power of *Congress [*207 to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the states to admit or exclude, for a limited period. The words are: "The migration or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." The whole object of the exception is to preserve the power to those states which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in

1.—2 U. S. L. p. 545; 3 U. S. L. p. 126.
2.—3 U. S. L. p. 529

the constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7th, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations, and amongst the states. But this inference is not, we think, justified by the fact.

Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adop-
208*] tion of laws to be made *in future, presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the states, until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only "until further legislative provision shall be made by Congress," shows, conclusively, an opinion that Congress could control the whole subject, and might adopt the system of the states, or provide one of its own.

A state, it is said, or even a private citizen, may construct light-houses. But gentlemen must be aware, that if this proves a power in a state to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden
209*] by law, *erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in Congress that the states possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the states. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the states retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether *of trading or police, the [*210
states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended that if a law, passed by a state in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, *inconsistent with [*211
the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true.

The constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur, that, when a legisla- 212*] ture *attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone, if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a state is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the state of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress; but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state. To the court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other or vessels enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment, that the vessels it describes 213*] shall *be entitled to the privileges of ships or vessels employed in the coasting trade. Those privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself.

The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to *him all the [*214 right which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be—a legislative authority to the steamboat Bellona, "to be employed in carrying on the coasting trade, for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade; and that its sole purpose is to confer the American character.

The answer given to this argument, that the American character is conferred by the enrollment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade, corresponds precisely with the registration of vessels *designed for [*215 the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards; and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do; that is, to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade.

But, if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which Congress may regulate.

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to compre-

hend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine as one em- [*216 ployed *in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men as to vessels carrying manufacturers; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar, rests on the foundation that the power of Congress does not extend to navigation, as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section which restrains Congress from prohibiting the migration or importation of such persons as any of the states may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, so far as an exception from a power proves its existence, this section proves that the power [*217 to regulate commerce applies equally *to the regulation of vessels employed in transporting men, who pass from place to place voluntarily and to those who pass involuntarily.

If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally, must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, sections twenty-three and forty-six, contains provisions respecting passengers, and shows that vessels which transport them, have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the process of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally; and, on the 2d of March, 1819, passed "an act regulating passenger ships and *vessels." This [*218 wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government, to the Department of state, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress (if, indeed, any evidence to that point could be required), that the pre-existing regulations comprehended passenger ships among others; and, in prescribing the same duties, the legislature must have considered them as possessing the same rights.

If, then, it were even true, that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question, in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the *United [*219 States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the state court. The bill does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers, only, that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam ma-

chine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of Congress, for the regulation of commerce, do not 220*] look to the *principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know, that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest by the act 221*] already *mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers Congress to promote the progress of science and the useful arts.

The court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear, is imputable to *a considerable part of this opin- [*222 ion. But it was unavoidable. The conclusion to which we have come, depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

Mr. Justice Johnson. The judgment entered by the court in this cause has my entire approbation; but having adopted my conclusions on views *of the subject materially differ- [*223 ent from those of my brethren, I feel it incumbent on me to exhibit those views. I have, also, another inducement. In questions of great importance and great delicacy, I feel my duty to the public best discharged by an effort to maintain my opinions in my own way.

In attempts to construe the constitution, I have never found much benefit resulting from the inquiry, whether the whole, or any part of it, is to be construed strictly, or literally. The simple, classical, precise, yet comprehensive language in which it is couched, leaves, at most, but very little latitude for construction; and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended. The great and paramount purpose, was to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means. But the principal of those means, one so essential as to approach nearer the characteristics of an end, was the independence and harmony of the states, that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic.

The strong sympathies, rather than the feeble government, which bound the states together during a common war, dissolved on the return of peace; and the very principles which gave rise to the war of the revolution, began to threaten the *confederacy with anarchy [*224 and ruin. The states had resisted a tax imposed

by the parent state, and now reluctantly submitted to, or altogether rejected, the moderate demands of the confederation. Everyone recollects the painful and threatening discussions which arose on the subject of the five per cent. duty. Some states rejected it altogether; others insisted on collecting it themselves; scarcely any acquiesced without reservations, which deprived it altogether of the character of a national measure; and, at length, some repealed the laws by which they had signified their acquiescence.

For a century the states had submitted, with murmurs, to the commercial restrictions imposed by the parent state; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the states, and fatal to their commercial interests abroad.

This was the immediate cause that led to the forming of a convention.

As early as 1778, the subject had been pressed upon the attention of Congress, by a memorial from the state of New Jersey; and in 1781, we find a resolution presented to that body, by one 225*] of *the most enlightened men of his day,[1] affirming that "it is indispensably necessary that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every state, that none may take place that shall be partial or contrary to the common interests." The resolution of Virginia,[2] appointing her commissioners, to meet commissioners from other states, expresses their purpose to be, "to take into consideration the trade of the United States, to consider how far an uniform system, in their commercial regulations, may be necessary to their common interests and their permanent harmony." And Mr. Madison's resolution, which led to that measure, is introduced by a preamble entirely explicit to this point: "Whereas, The relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities which cannot fail to arise among the several states, from the interference of partial and separate regulations," etc., "therefore, resolved," etc.

The history of the times will, therefore, sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of 226*] remedying those *evils, could be only commensurate with the power of the states over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people, when the grant was made.

There was not a state in the Union in which there did not, at that time, exist a variety of commercial regulations, concerning which it is too much to suppose that the whole ground covered by those regulations was immediately assumed by actual legislation, under the authority of the Union. But where was the existing statute on this subject, that a state attempted to execute? or by what state was it ever thought necessary to repeal those statutes? By common consent, those laws dropped lifeless from their statute-books, for want of the sustaining power, that had been relinquished to Congress.

And the plain and direct import of the words of the grant is consistent with this general understanding.

The words of the constitution are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It is not material, in my view of the subject, to inquire whether the article a or the should be prefixed to the word "power." Either, or neither, will produce the same result; if either, it is clear that the article "the" would be the proper one, since the next preceding grant of power is certainly exclusive, to wit, "to borrow money on the credit *of the United [*227 States." But mere verbal criticism I reject.

My opinion is founded on the application of the words of the grant to the subject of it.

The "power to regulate commerce," here meant to be granted, was that power to regulate commerce which previously existed in the states. But what was that power? The states were, unquestionably, supreme, and each possessed that power over commerce which is acknowledged to reside in every sovereign state. The definition and limits of that power are to be sought among the features of international law; and, as it was not only admitted, but insisted on by both parties, in argument, that, "unaffected by a state of war, by treaties, or by municipal regulations, all commerce among independent states was legitimate," there is no necessity to appeal to the oracles of the jus commune for the correctness of that doctrine. The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the state to act upon.

And such has been the practical construction of *the act. Were every law on the [*228 subject of commerce repealed to-morrow, all commerce would be lawful; and, in practice, merchants never inquire what is permitted, but what is forbidden commerce. Of all the endless variety of branches of foreign commerce, now carried on to every quarter of the world, I know of no one that is permitted by act of Congress, any otherwise than by not being forbidden. No statute of the United States, that

1.—Dr. Witherspoon.

2.—January 21, 1786.

I know of, was ever passed to permit a commerce, unless in consequence of its having been prohibited by some previous statute.

I speak not here of the treaty-making power, for that is not exercised under the grant now under consideration. I confine my observation to laws properly so called. And even where freedom of commercial intercourse is made a subject of stipulation in a treaty, it is generally with a view to the removal of some previous restriction; or the introduction of some new privilege, most frequently, is identified with the return to a state of peace. But another view of the subject leads directly to the same conclusion. Power to regulate foreign commerce is given in the same words, and in the same breath, as it were, with that over the commerce of the states and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive. The states are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government [*229 229*] would be *held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

But the language which grants the power as to one description of commerce, grants it as to all; and, in fact, if ever the exercise of a right, or acquiescence in a construction, could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

A right over the subject has never been pretended to in any instance, except as incidental to the exercise of some other unquestionable power.

The present is an instance of the assertion of that kind, as incidental to a municipal power; that of superintending the internal concerns of a state, and particularly of extending protection and patronage, in the shape of a monopoly, to genius and enterprise.

The grant to Livingston and Fulton interferes with the freedom of intercourse among the states; and on this principle its constitutionality is contested.

When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence.

Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; [230* 230*] the subject, *the vehicle, the agent, and their various operations, become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to regulate commerce.

That such was the understanding of the framers of the constitution, is conspicuous from provisions contained in that instrument.

The first clause of the 9th section not only considers the right of controlling personal ingress or migration, as implied in the powers previously vested in Congress over commerce, but acknowledged it as a legitimate subject of revenue. And, although the leading object of this section undoubtedly was the importation of slaves, yet the words are obviously calculated to comprise persons of all descriptions, and to recognize in Congress a power to prohibit, where the states permit, although they cannot permit when the states prohibit. The treaty making power undoubtedly goes further. So the fifth clause of the same section furnishes an exposition of the sense of the convention as to the power of Congress over navigation: "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another."

But it is almost laboring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption, and continued exercise of the power, and universal acquiescence, have so clearly established *the right of Con- [*231 gress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. As to the transportation of passengers, and passengers in a steamboat, I consider it as having been solemnly recognized by the State of New York, as a subject both of commercial regulations and of revenue. She has imposed a transit duty upon steamboat passengers arriving at Albany, and unless this be done in the exercise of her control over personal intercourse, as incident to internal commerce, I know not on what principle the individual has been subjected to this tax. The subsequent imposition upon the steamboat itself, appears to be but a commutation, and operates as an indirect instead of a direct tax upon the same subject. The passenger pays it at last.

It is impossible, with the views which I entertained of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed to-morrow, the rights of the appellant to a reversal of the decision complained of, would be as *strong as [*232 it is under this license. One-half the doubts in life arise from the defects of language, and if this instrument had been called an exemption instead of a license, it would have given a better idea of its character. Licensing acts, in fact, in legislation, are universally restraining acts; as, for example, acts licensing gaming houses, retailers of spirituous liquors, etc. The act, in this instance, is distinctly of that character, and forms part of an extensive system, the object of which is to encourage American shipping, and place them on an equal footing

with the shipping of other nations. Almost every commercial nation reserves to its own subjects a monopoly of its coasting trade; and a countervailing privilege in favor of American shipping is contemplated, in the whole legislation of the United States on this subject. It is not to give the vessel an American character, that the license is granted; that effect has been correctly attributed to the act of her enrollment. But it is to confer on her American privileges, as contradistinguished from foreign; and to preserve the government from fraud by foreigners, in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected. Many duties and formalities are necessarily imposed upon the American foreign commerce, which would be burdensome in the active coasting trade of the states, and can be dispensed with. A higher rate of tonnage also is imposed, and this license entitles the vessels that take it, to those exemptions, but to nothing 233*] more. *A common register, equally entitles vessels to carry on the coasting trade, although it does not exempt them from the forms of foreign commerce, or from compliance with the 16th and 17th sections of the enrolling act. And even a foreign vessel may be employed coastwise, upon complying with the requisitions of the 24th section. I consider the license, therefore, as nothing more than what it purports to be, according to the 1st section of this act, conferring on the licensed vessel certain privileges in that trade, not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all.

Yet there is one view in which the license may be allowed considerable influence in sustaining the decision of this court.

It has been contended that the grants of power to the United States over any subject, do not, necessarily, paralyze the arm of the states, or deprive them of the capacity to act on the same subject. That this can be the effect only of prohibitory provisions in their own constitutions, or in that of the general government. The vis vitæ of power is still existing in the states, if not extinguished by the constitution of the United States. That, although as to all those grants of power which may be called aboriginal, with relation to the government, brought into existence by the constitution, they, of course, are out of the reach of state power; yet, as to all concessions of powers which previously existed in the states, it was otherwise. The practice of our govern- 234*] ment certainly *has been, on many subjects, to occupy so much only of the field opened to them as they think the public interests require. Witness the jurisdiction of the circuit courts, limited both as to cases and as to amount; and various other instances that might be cited. But the license furnishes a full answer to this objection; for, although one grant of power over commerce should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the states must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence. So far as relates to the commerce coastwise, the act under which this license is granted contains a full expression of Congress on this subject. Vessels, from five tons upwards, carrying on the coasting trade, are made the subjects of regulation by that act. And this license proves that this vessel has complied with that act, and been regularly ingrafted into one class of the commercial marine of the country.

It remains to consider the objections to this opinion, as presented by the counsel for the appellee. On those which had relation to the particular character of this boat, whether as a steamboat or a ferry-boat, I have only to remark, that in both those characters, she is expressly recognized as an object of the provisions which relate to licenses.

The 12th section of the act of 1793 has these words: "That when the master of any ship or vessel, ferry-boats excepted, shall be changed," etc. And the act which exempts licensed steamboats *from the provisions against [*235 alien interests, show such boats to be both objects of the licensing act, and objects of that act, when employed exclusively within our bays and rivers.

But the principal objections to these opinions arise, 1st. From the unavoidable action of some of the municipal powers of the states, upon commercial subjects. 2d. From passages in the constitution which are supposed to imply a concurrent power in the states in regulating commerce.

It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated, are no more intended as regulations on commerce than the laws which permit their importation are intended to innoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision. As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities, for which, by the consent of mankind, a compensation is paid, upon the same principle that the whole commercial world submit to pay light-money to the Danes. Inspection laws are of a more equivocal nature, and it is obvious that *the constitution [*236 has viewed that subject with much solicitude. But so far from sustaining an inference in favor of the power of the states over commerce, I cannot but think that the guarded provisions of the 10th section, on this subject, furnish a strong argument against that inference. It was obvious that inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the states, for obvious reasons, an absolute control is given over state legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. The inferences, to be correctly drawn, from this

whole article, appear to me to be altogether in favor of the exclusive grants to Congress of power over commerce, and the reverse of that which the appellee contends for.

This section contains the positive restrictions imposed by the constitution upon state power. The first clause of it specifies those powers which the states are precluded from exercising, even though the Congress were to permit them. The second, those which the states may exercise with the consent of Congress. And here the sedulous attention to the subject of state exclusion from commercial power is strongly marked. Not satisfied with the express grant to the United States of the power over commerce, this clause negatives the exercise of that power, to the states, as to the only two objects which could ever tempt them to assume the exercise of that power, to wit, the collection of a revenue from imposts and duties on imports and exports; or from a tonnage duty. As 237*] *to imposts on imports or exports, such a revenue might have been aimed at directly, by express legislation, or indirectly, in the form of inspection laws; and it became necessary to guard against both. Hence, first, the consent of Congress to such imposts or duties is made necessary; and as to inspection laws, it is limited to the minimum of expenses. Then, the money so raised shall be paid into the treasury of the United States, or may be sued for, since it is declared to be for their use. And lastly, all such laws may be modified, or repealed, by an act of Congress. It is impossible for a right to be more guarded. As to a tonnage duty, that could be recovered in but one way; and a sum so raised, being obviously necessary for the execution of health laws, and other unavoidable port expenses, it was intended that it should go into the state treasuries; and nothing more was required, therefore, then the consent of Congress. But this whole clause, as to these two subjects, appears to have been introduced ex abundanti cautela, to remove every temptation to an attempt to interfere with the powers of Congress over commerce, and to show how far Congress might consent to permit the states to exercise that power. Beyond those limits, even by the consent of Congress, they could not exercise it. And thus we have the whole effect of the clause. The inference which counsel would deduce from it, is neither necessary nor consistent with the general purpose of the clause.

But instances have been insisted on, with much confidence, in argument, in which, by 238*] municipal *laws, particular regulations respecting their cargoes have been imposed upon shipping in the ports of the United States; and one, in which forfeiture was made the penalty of disobedience.

Until such laws have been tested by exceptions to their constitutionality, the argument certainly wants much of the force attributed to it; but admitting their constitutionality, they present only the familiar case of punishment inflicted by both governments upon the same individual. He who robs the mail, may also steal the horse that carries it, and would, unquestionably, be subject to punishment, at the same time, under the laws of the state in which the crime is committed, and under those of the United States. And these punishments may interfere, and one render it impossible to inflict the other, and yet the two governments would be acting under powers that have no claim to identity.

It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto the only remedy has been applied which the case admits of —that of a frank and candid co-operation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the states, and to aid in enforcing their health laws; that which surrenders to the states the superintendence of pilotage, and the *many [*239 laws passed to permit a tonnage duty to be levied for the use of their ports. Other instances could be cited, abundantly to prove that collision must be sought to be produced; and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers.

I have not touched upon the right of the states to grant patents for inventions or improvements, generally, because it does not necessarily arise in this cause. It is enough for all the purposes of this decision, if they cannot exercise it so as to restrain a free intercourse among the states.

Decree.—This cause came on to be heard on the transcript of the record of the court for the Trial of Impeachments and Correction of Errors of the State of New York, and was argued by counsel. On consideration whereof, this court is of opinion that the several licenses to the steamboats, the Stoudinger and the Bellona, to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New York, which were granted under an act of Congress, passed in pursuance of the constitution of the *United States, gave full authority[*240 to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding; and that so much of the several laws of the State of New York, as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New York, by means of fire or steam, is repugnant to the said constitution, and void. This Court is therefore of opinion, that the decree of the Court of New York for the Trial of Impeachments and the correction of Errors, affirming the decree of the Chancellor of that state, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigat-

ing the waters of the State of New York with the steamboats the Stoudinger and the Bellona, by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled. And this Court doth further direct, order and decree, that the bill of the said Aaron Ogden be dismissed and the same is hereby dismissed accordingly.

241*] [*Local Law.]

KIRK et al., Plaintiffs in Error,

SMITH, ex dem. PENN, Defendant in Error.

The act of Pennsylvania, of 1779, "for vesting the estates of the late proprietaries of Pennsylvania, in this commonwealth," did not confiscate lands of the proprietaries which were within the lines of manors: nor were the same confiscated by the act of 1781, for establishing a land-office.

The statute of limitations of Pennsylvania, of 1705, is inapplicable to an action of ejectment, brought to enforce the unpaid purchase money, for lands of the proprietaries within the manors for which warrants had issued.

Nor is the statute of limitations of 1785, a bar to such an action.

ERROR to the Circuit Court of Pennsylvania.

This was an ejectment, brought by the defendant in error in the court below, to recover the possession of certain lands in York county, in the State of Pennsylvania. On the 4th of March, 1861, Charles II. granted to William Penn, the ancestor of the lessor of the plaintiff below, that tract of country which now constitutes the State of Pennsylvania. The grant contains special powers to erect manors and to alien the lands, with liberty to the alienees to hold immediately of the proprietor and his heirs, notwithstanding the statute of quia emptores. On the 11th of July, in the same year, William Penn, having interested many persons in his grant, agreed with "the adventurers 242*] *and purchasers" in England, on "certain conditions and concessions," which, being for their mutual advantage, were to be obligatory in the future management of the property and settlement of the province. The 9th of these conditions is, that in every 100,000 acres, the Governor and proprietary, by lot, reserveth ten to himself, which shall lie but in one place." In the year 1762, a warrant was issued for the survey of the manor of Springetsbury. This warrant recites a former survey of the same land, in 1722, as a manor; states the general outlines of such former survey, and directs a resurvey. This resurveying was made, and returned into the land-office in 1768, where it has remained ever since. This resurvey included the lands claimed by the plaintiffs in error, which were held under warrants, of which the following is a specimen:

"Pennsylvania, ss: By the proprietaries.

"Whereas, Bartholomew Sesrang, of the county of Lancaster, hath requested that we would grant him to take up two hundred acres of land, situate between Codorus Creek and Little Conewaga Creek, adjoining the lands of Killian Smith and Philip Heintz, on the west side of the Susquehanna River, in the said county of Lancaster, for which he agrees to pay to our use the sum of fifteen pounds ten shillings, current money of this province, for each hundred acres; and the yearly quit-rent of one half-penny sterling for every acre thereof.

"These are, therefore, to authorize and require you to survey, or cause to be surveyed, unto the *said Bartholomew, at the place [*243 aforesaid, according to the method of townships appointed, the said quantity of two hundred acres, if not already surveyed or appropriated; and make return thereof into the secretary's office, in order for further confirmation; for which this shall be your sufficient warrant. Which survey, in case the said Bartholomew fulfill the above agreement within six months from the date hereof, shall be valid; otherwise void.

"Given under my hand and seal of the land office, by virtue of certain powers from the said proprietaries, at Philadel-
[L. S.] phia, this eighth day of January, Anno Domini one thousand seven hundred and forty-two. "George Thomas.

"To Wm. Parsons, Surveyor-General."

In virtue of this warrant, a survey of the land claimed by Caleb Kirk, one of the plaintiffs in error, was made on the 12th of October, 1747, in favor of Jacob Wagner, the then holder of the warrant, by various mesne transfers. The title was regularly deduced by various conveyances, from Wagner to Kirk, accompanied with possession. No grant was ever issued for the land. Ten pounds, a part of the consideration, were paid about the date of the warrant, and there was no proof of the payment of the residue. It appeared to have been the usage of the proprietaries, not to insist upon the terms of the contract, by which the survey was declared to be void, unless the agreement was fulfilled within six months from the date of the warrant, and large arrearages of purchase money remained due after the surveys were made. *both within and without the [*244 manors. The only distinction appears to have been, that the reserved lands were sold by special contracts; and the lands not reserved were sold at stated prices.

At the commencement of the war of the American revolution, the proprietary went to Great Britain, where he remained; and in the year 1779, the legislature of Pennsylvania passed an act, entitled "An act for vesting the estates of the late proprietaries of Pennsylvania, in this commonwealth." The ejectment was brought in the year 1819, and on the trial of the cause, the question whether the land in controversy was included within the lines of the manor of Springetsbury, as surveyed under the warrant of 1762, was left to the jury, who found that it was included within those lines. The opinion of the court below was, that if the land was within those lines, the right of the plaintiff below was excepted out of the general operation of the act of 1779, and was not vested in the commonwealth. The court also instructed the jury, that the statute of limitations of 1705, commonly called the "seven years law," was inapplicable to the case. To these instructions,

the defendant's counsel excepted, and a verdict and judgment for the plaintiff having been rendered in the court below, the cause was brought by writ of error to this court.

The cause was argued by Mr. Clay and Mr. Webster for the plaintiffs in error, and by the Attorney-General and Mr. Sergeant for the defendants in error.

245*] *On the part of the plaintiffs in error, it was contended, 1. That the rights derived to the plaintiffs below, were proprietary, and not manorial. Being in their origin proprietary, they were not, and could not be affected by the survey of a manor in 1768, subsequent to their commencement.

2. That the rights, being proprietary, and not manorial, vested in the commonwealth of Pennsylvania, by the right of conquest, and the act of confiscation of 1779. The 7th section confirms all persons, and consequently, the plaintiffs below, in their rights, derived from the proprietaries. The act must be construed according to its intention, ascertained by a comparison of all its parts. The intention was to confiscate the proprietary rights, wherever situated; and to reserve the private or manorial rights, wherever located. If a proprietary right was situated within a manor, it was to be confiscated. If it were part of the manor, that is, of the right springing out of the manor, it was reserved. There is no reservation to the proprietaries of the arrears of purchase money due within manors. There is only an exception from the operation of the abolition of quit-rents and arrears of purchase money, within manors; and this exception must be construed to mean the case of lands bought as part of the manor. It would be to contradict the whole scope and meaning of the act, to construe it as abolishing proprietary rights everywhere but in manors, and to leave them there in full vigor. According to this view of the act, we shall have a consistent and congruous interpretation. The 246*] public *rights of the proprietaries, wherever situated, will have been confiscated; and the private rights, wherever situated, will have been preserved. The court will look to the nature of the thing, and not to the accident. If a proprietary right be situated within a manor, it will be abolished, because it is proprietary. Such is the construction which the local legislature itself has put upon this statute, by the act of 1781, for establishing the land-office,[1] and by the act of 1784.[2] These acts are cotemporaneous, and in pari materia. If, then, the rights of the proprietors were vested in the state, there remained nothing in them; the legal title passed to the commonwealth, and, consequently, they could not maintain this action of ejectment. But if any was reserved, it was only the arrears of the purchase money, and not the title, which they might sue for in any manner.

3. That whatever might be the nature of the claim (manorial or proprietary), it was barred by the statute called the seven years law, passed in 1705, whether the consideration money is paid or not.[3] This limitation of seven years appears to have been a favorite period of protection in Pennsylvania. William Penn enacted a law to that effect in England, the year after he obtained his charter;[4] and again, in 1700, the same period is provided.[5] And a short period of limitation to *protect posses- [*247 sions, is believed to have been the favorite policy of all the colonies. The act of 1705, to afford the protection which it intends to give, requires two circumstances: (1) That the entry should be under an equitable estate. (2) That there should have been seven years' quiet possession. The intention of the act was to protect the property. The vendor was at liberty to enforce payment of the consideration money, by all legal means. Even the land itself was not withdrawn from the operation of a judgment. After seven years, the title was complete, but it was still liable to execution. If the plaintiffs in ejectment can recover, it is because they have a lien. Now if the lien were express, it would have been barred by the lapse of twenty years; and no lien, created by operation of law, can be more durable than one created by express act of the party.[6] To support this right of recovery, would be to uphold a remedy after the right is gone, and to make the remedy immortal, whilst the right is temporary.

4. That the payment of the purchase money ought to have been presumed; and, consequently, a perfect equitable title in the defendants, barring the action of ejectment. The length of time elapsed would have authorized a jury to presume a charter, patent or deed.[7] The fact of actual payment being made out by presumption, the courts of Pennsylvania adopt the chancery principle of considering that as done which ought to *be done.[8] When a party, [*248 entitled to a conveyance, does everything necessary to be done, in order to obtain a decree for a specific performance, he stands by the local law, in a situation to support or defend an action for the possession of the land.[9]

5. That the plaintiffs below were barred by the statute of limitations of 1785.[10] If we had entered by disseisin, our right would have been protected. We entered claiming the whole fee. Our title and our possession were, therefore, exclusive; that is to say, adverse to every other title or possession. It is said that it was not adversary, because we claim from them; but the mortgagee claims from the mortgageor, and, nevertheless, is barred after twenty years. The idea of an amicable possession is founded upon confounding the case with that of leases, reversions and remainders. If the vendee purchases the whole estate, his possession, from the moment of his entry, is adverse to that of the vendor.[11] But, from the period of the survey of 1768, there was an adverse state of possession. The proprietaries set up their manorial or private right against their public or proprietary right, and from that epoch, inconsistent and opposing titles were brought into being. From that moment, the statute of limitations began

1.—1 Laws of Penn. 529, preamble and sec. 5.
2.—2 Ib. 102.
3.—1 Ib. 48.
4.—5 Ib. 416. art. 16.
5.—B. Franklin's Appen. 9, 10.
6.—Ricard v. Williams, 7 Wheat. Rep. 119.
7.—Id. 109; 1 Phill. Ev. 119, 120, 125.
8.—Moody v. Vandyke, 4 Binn. 41; Vincent v. Huff, 4 Sergt. & Rawle, 301.
9.—Griffith v. Cochrane, 5 Binn. 105.
10.—2 Laws of Penn. 299.
11.—Blight v. Rochester, 7 Wheat. Rep. 535.

249*] to run. There is no *escape from this dilemma; either the survey of the manor did not affect, in any way whatever, the previous proprietary right, or it did, and was an attempt to re-appropriate to the use of the manor, what had been appropriated before. In the first case, the right was confiscated; in the latter it is barred.

For the defendants in error, it was stated, that, by the royal charter to William Penn, of 1681, he derived an absolute right of ownership to the territory within the limits described, and power to grant, subject to no restriction but such as he thought fit to impose upon himself. He came to Pennsylvania in 1682; and the powers of government and rights of property were always kept distinct, the former being exercised by the General Assembly, and the latter by means of an agency, constituting what is called a land-office. Two principles were early settled, that no sales were to be made, nor settlements permitted, till the Indian title should be extinguished; and that no title could originate but by grant from William Penn. In the establishment of the land-office, it was originally intended that no title should begin but by warrant and survey. But this was soon broken in upon; every kind of irregularity occurred; and, finally grew up the title by settlement and improvement.[1] All these inceptive rights were under the proprietary, and they were to be consummated by payment of the purchase money 250*] and *issuing the patent. For that purpose, the warrant fixed a price and time of payment; and where there was no warrant, the price of the time was to be paid, which was called "common terms." The mass of the country was opened by opening the land-office, but this did not include proprietary tenths and manors. These last were appropriated by virtue of his own right of ownership, and are not to be understood as meaning a manor in a legal sense, with its court and train of feudal appendages. The term did not mean a private reservation, for his own separate use, to be taken out of the market, and granted in a different mode. It meant only a portion of country, separated from the common mass, so as not to be open to purchasers (on common terms) or to settlers. The peculiar and appropriate mode of granting in a manor, was a warrant to agree. It was, in fact, an exception out of the country offered for sale. No particular form of exceptions was necessary, and none was pursued.[2] He was subject to laws, but only to his own laws. He might be considered as saying, "So much I will sell at a fixed price; so much at the value to be agreed." W. Penn died in 1718, and a dispute arose with Lord Baltimore respecting the boundary line of Maryland,[3] which was settled by an agreement between the two proprietaries, in 1732, and ratified by decree in chancery, in 1750.[4] The line 251*] *was finally run in 1768, and ratified by the King in council, in 1769. In 1732, the Marylanders encroaching, and the Indians growing uneasy, Sir W. Keith, at the request of the latter, issued an order to survey the manor of Springetsbury, which was accordingly surveyed in that year. The land-office was not then open west of the Susquehanna, the Indian title not being extinguished. In 1736, before the land-office was opened, Thomas Penn, the proprietary, recognized and adopted the survey, and thereby gave it validity. In 1762, the survey of 1732 having been mislaid or lost, Gov. Hamilton issued a warrant of resurvey, which was duly returned into the land-office, in 1768, where it has since remained.

When the revolution occurred, the descendants of the proprietary were the owners of all the vacant lands in the province; they had the legal estate in all lands, to which individuals had only acquired inceptive rights, for the purpose of enforcing the terms; they were entitled to all purchase money, and to all quit-rents; they had also private estates subject to the ordinary legislation. The whole, as then existing, may be arranged into three classes: (1) Their private estates, which may be at once dismissed. (2) Estates or rights in lands not included in the limits of manors; and these might be legal, or legal and equitable. (3) Estates or rights in lands included within the limits of manors; which might also be legal, or legal and equitable. And the nature of their legal right to lands within a manor would depend upon the nature of the equity of the occupant. *Whether his equity be more [*252 or less, is of no consequence at law, since it does not diminish the extent or power of the legal right. These inceptive rights are passed from hand to hand by deed; they descend, are devised, and sold by the sheriff; and everybody knows their nature, and the liabilities to which they are subject. The deeds frequently express it, as in the present instance. Hence the lapse of time affords no presumption of the payment of the purchase money, or completion of the title. In truth, there is no such thing in Pennsylvania as the presumption of a grant.

This was the state of things at the period of the revolution. That event, ipso facto, determined the powers of government conferred by the charter, but left the rights of property exactly as they stood before, in which state they remained until the act of 1779. That act devests the estate of the proprietaries, only by vesting it in the commonwealth. It therefore devests no further than it vests; and as to all besides, leaves it on the same footing as before. It did not at all change the relation between the proprietaries and those who had purchased their lands. They then had, and still have, a land-office, to receive purchase moneys and grant patents. The commonwealth land-office will not receive the purchase money of lands included in the limits of manors, nor will they grant patents for it. The act thus had the effect of making a partition, and from that time forward there have, in fact, been two land-offices in Pennsylvania. Great indulgence has *been shown in the collection of the [*253 purchase money; but the tenure has never undergone any change, and it has never been doubted that the legal title remained in the proprietors and the commonwealth, respectively, and that they might at any time enter, to enforce the terms of sale.

The act of 1779 did not assert that the estates of the proprietaries had been devested

1.—2 Smith's Laws of Penn. 137, note.
2.—4 Dall. Rep. 407.
3.—2 Smith, 133, note.
4.—Penn v. Lord Baltimore, 1 Ves. 444.

by the revolution, nor could that proposition now be maintained, if the question were open. It did not profess to confiscate their property, nor could it justly do so, for they had committed no offense. Neither did it assert a right of conquest. The act was not passed to benefit individuals, nor to alter or lessen their just liability. It was a partition between the commonwealth and the proprietary of all their estates, legal and equitable, of which the manor lines were the lines of division. It left the proprietors, then, their vacant lands, their legal estates, and all these within the manors. The terms of the act give no countenance to the idea that the legal title was assumed by the commonwealth, leaving the purchase money to the proprietaries. The reservation is of private rights. But the whole of this question has been long since disposed of, and it is now considered as settled law in Pennsylvania, that the legal estate is in the descendant of the proprietaries, as a security for the purchase money.[1]

As to the seven years law of 1705, it has 254*] never *been heard of since the time of its enactment, and we are therefore compelled to look for a construction of it consistent with its disuse. It is a retrospective law in its very terms, and, having performed its office at the time, has been ever since disused. No such construction as that insisted on ever could have been given to it.

As to the presumption of payment, it must be founded, in every such case, both upon the length of time, and the omission to do what would be done if the presumed fact did not exist. It is a presumption merely, and may be repelled by circumstances, showing why an earlier demand has not been made.[2] No such presumption, therefore, exists, unless the forbearance be unusual, or contrary to what might have been expected. But it has been the universal practice to forbear. If there had been a payment, there would have been a patent. Where the fact to be proved must appear by deed, the presumption, from length of time, does not arise.[3] The surveys, if made, were never returned; therefore, there could have been no payment. The receiver-general's books will show what has been paid.

The statute of limitations of 1785 is not a bar. To make possession a bar, it must be adverse.[4] It may be adverse as to one, and not as to another. A possession under one, is not 255*] adverse to him. *Possession under an agreement, is not adverse;[5] and ouster cannot be presumed where the possession is not only under, but according to the agreement. To maintain a title, or a claim, of adverse possession, such possession must be adverse at its commencement, and so continue for twenty years.[6] There must be, at least, a claim, or color of title, adverse or hostile; though it is not necessary that it should be a good title.[7] A person who enters without claim, or color of title, is deemed to be in possession in subservience to the legal owner, and no length of time will make it adverse.[8] The doctrine of adverse possession must be strictly taken, and the fact must be made out by clear and positive proof, and not by inference. Every presumption is in favor of a possession, in subordination to the title of the true owner.[9] If the defendant has acknowledged by the plaintiff's title, he cannot, afterwards dispute it.[10] So, an acknowledgment, by a person under whom the defendant claims, that he went into possession under the lessors of the plaintiff, is conclusive against the defendant, as to tenancy. And though it may not have that effect, yet it will prevent possession from being adverse.[11] *In the [*256 present case, it is not disputed that the defendants went into possession under the proprietors, and nothing has since occurred to change the character of the possession. No one could hold adversely, unless he came in by title paramount to the proprietary; and no title against the commonwealth, or grantee of the commonwealth, can be acquired by length of time.[12] The possession of lands held by warrant and survey, is not adverse to, but under the commonwealth.[13]

The cause was continued to the present term for advisement.

Mr. Chief Justice Marshall delivered the opinion of the court:

This is a writ of error to a judgment rendered by the Circuit Court for the District of Pennsylvania, in favor of Penn's lessee, who was plaintiff in a writ of ejctment. The case depends on a bill of exceptions taken to the opinion of the court, expressed in a charge to the jury.

On the 4th of March, in the year 1681, Charles II. granted to William Penn, the ancestor of the plaintiff in the Circuit Court, that tract of country which now constitutes the State of Pennsylvania. By this grant, the property in the soil, as well as in the right of government, was conveyed to William Penn and his heirs, in fee-simple.

The grant contains special powers to erect manors, and to alien the lands, with liberty to the *alienees to hold immediately of [*257 the proprietor and his heirs, notwithstanding the statute of quia emptores. On the 11th of July, in the same year, William Penn, having interested many persons in his grant, agreed with the "adventures and purchasers" in England, on "certain conditions or concessions," which being for their mutual advantage, were to be obligatory in the future management of the property and settlement of the province. The 9th of these conditions is, that "in every 100,000 acres, the Governor and proprietary,

1.—4 Dall. Rep. 402, 410; Penn v. Klyne, 1 Peters, Rep. C. C.; 6 Laws of Penn, 205.

2.—Phill. Ev. 118, 119.

3.—Ib. 117, 118.

4—1 Dall. 67.

5.—Barr v. Gratz, 4 Wheat. Rep. 213.

6.—Branett v. Ogden, 1 Johns. Rep. 230; Doe v. Campbell, 12 Johns. Rep. 365.

7.—2 Caines, 183; 13 Johns. Rep. 118.

8.—16 Johns. Rep. 293.

9.—3 Johns. Cas. 124; 8 Johns. Rep. 220; 9 Johns. Rep. 163; 12 Johns. Rep. 365; 10 Johns. Rep. 475.

10.—1 Caines, 444; 2 Caines, 215; 3 Johns. Rep. 499,

11.—2 Johns. Cas. 358; 4 Johns. Rep. 230.

12.—Morris v. Thomas, 5 Binney, 77.

13.—M'Coy v. Dickinson College, 4 Sergt. & Rawle, 305.

by lot, reserveth ten to himself, which shall lie but in one place."

It would seem as if this article should be construed as restraining the power of the proprietor. Being the absolute owner of the soil, it was in his power, independent of contract, to sell, or not to sell, any part of it. But, as the value of the lands must necessarily depend on the progress of settlement, it was obviously the interest of the great purchasers and adventurers, as well as of the proprietor, that he should open the country generally to emigrants. It was also the interest of the proprietor to make large reservations for his private use, that he might avail himself of the increased value to be derived from settlement. To prevent his checking the advance of the settlements by unreasonable reservations, this article fixes the proportion of land which he may take out of the general stock offered to the public. The great mass of land was in the market, to be acquired by any adventurer, at a given price; but out of 258*] this mass, *the proprietor reserved for himself one-tenth, to lie in bodies of not less than 100,000 acres.

The survey reserving these lands for his own use, whether distinguished by the common appellation of manor, or by any other name, was not to give any new title to the proprietor. The sole effect was to separate the land so surveyed from the common stock, and to withdraw it from the market. The survey was notice to all the world, that the land was not subject to individual appropriation on the common terms, but could be acquired only by special contract.

It was not the intention, because it could not be the interest of the proprietor, to continue all these manors, or reserved lands, as unoccupied wastes, but to sell them at such advanced price as the continuing progress of settlement and increase of population would justify. The lands reserved, and the lands not reserved, belonged equally to the proprietor, and were equally for sale. The only difference between them was, that the lands not reserved were offered to the public at a fixed price, while those which were reserved, could be acquired only by special agreement. This difference produced the distinction, of which we have heard in argument, and which seems to have been well understood in Pennsylvania, between warrants on the common terms, and warrants to agree.

In the year 1762, a warrant was issued for the survey of the manor of Springetsbury. This warrant recites a former survey of the same land in 1722, as a manor, states the general outlines of such a former survey, and directs a 259*] resurvey. This *resurvey was made, and returned into the land-office, in the year 1768, where it has remained ever since, among the documents of the land titles in Pennsylvania.

This resurvey included the lands of the plaintiffs in error, which were held under warrants, of which the following has been selected as a specimen:

"Pennsylvania, ss: By the proprietaries.

"Whereas, Bartholomew Sesrang, of the county of Lancaster, hath requested that we would grant him to take up two hundred acres of land, situate between Codorous Creek and Little Conewaga Creek, adjoining the lands of Killian Smith and Philip Heintz, on the west side of the Susquehanna River, in the said county of Lancaster, for which he agrees to pay to our use the sum of fifteen pounds ten shillings, current money of this province, for each hundred acres; and the yearly quit-rent of one-half penny sterling for every acre thereof.

"These are, therefore, to authorize and require you to survey, or cause to be surveyed, unto the said Bartholomew, at the place aforesaid, according to the method of townships appointed, the said quantity of two hundred acres, if not already surveyed or appropriated, and make return thereof into the secretary's office, in order for further confirmation; for which this shall be your sufficient warrant. Which survey, in case the said Bartholomew fulfill *the above agreement within six [*260 months from the date hereof, shall be valid; otherwise void.

"Given under my hand and seal of the land-office, by virtue of certain powers from the said proprietaries, at Phila-
[L. S.] delphia, this eighth day of January, Anno Domini one thousand seven hundred and forty-two.

"George Thomas.

"To William Parsons, Surveyor-General."

In virtue of this warrant, a survey of the land claimed by Caleb Kirk, one of the plaintiffs in error, was made on the 12th of October, 1747, in favor of Jacob Wagner, the then holder of the warrant, by various mesne transfers. The title was regularly deduced by various conveyances, from Wagner to Kirk, accompanied with possession.

No grant has been issued for the lands. The pounds, in part of the consideration, were paid, about the date of the warrant, and there is no proof of the payment of the residue.

It appears to have been the common usage, for the proprietaries to give great indulgence to the purchasers of lands, for the purchase money. Although, by the terms of the contract, the survey was declared to be void, unless the agreement were fulfilled in six months, yet the proprietaries appear not to have been in the practice of availing themselves of this condition. Large arrearages of purchase money remained due after the surveys were made, which, as the grants were withheld, were debts upon interest, secured in the *best pos- [*261 sible manner. This credit was mutually advantageous. By accelerating the settlement of the province, it was beneficial to the proprietaries; and the purchaser could terminate it whenever it ceased to be beneficial to himself.

Until the war of our revolution, this state of things appears to have continued. The settlements advanced with great rapidity. Manors were surveyed, lands were sold, and large arrearages were due for purchases made, both within and without the manors. The only distinction appears to have been, that the reserved lands were sold by special contract, and the lands not reserved were sold at stated prices.

When the war of our revolution commenced, the proprietary went to Great Britain, and was, consequently, to be considered as a British sub-

ject, not as an American citizen. The right to confiscate his property, or to leave it untouched, was in the government of Pennsylvania. The legislature of that state, for reasons satisfactory to itself, took a middle course. In 1779, an act was passed, entitled "An act for vesting the estate of the late proprietaries of Pennsylvania in this commonwealth." This ejectment was brought in the year 1819.

On the trial of the cause, the question, whether the land in controversy was included within the lines of the manor of Springetsbury, or surveyed under the warrant of 1762, was left to the jury, who have found that it was included within them. The opinion of the judges who tried the cause, was, that if the land was within 262*] those lines, the *right of the plaintiff, in that court, was excepted out of the general operation of the act of 1779, and was not vested in the commonwealth.

To this opinion an exception was taken, which has been supported in this court by arguments in part applicable to warrants of every description; and, in part, to those only which were issued on the common terms.

In that part of the argument which applies to all warrants, the plaintiffs in error contend that the 5th section of the act of 1779 vests all the rights of the proprietary in the commonwealth, with the exception of those only which are reserved by other sections of the same act; and that the right to the purchase money, which then remained unpaid, is comprehended within the general words of the 5th section, and not excepted in any other section.

In considering this argument, it will be necessary to examine the 5th section critically, and to ascertain its extent with precision.

It enacts, "that all and every the estate, right, title, interest, property, claim and demand of the heirs," etc., "or others claiming as proprietaries of Pennsylvania," "to which they, or any of them, were entitled, or which to them were deemed to belong, on the 4th day of July, 1776, of, in or to the soil or land contained within the limits of the said province," "together with the royalties, franchises, lordships, and all other the hereditaments and premises comprised, mentioned or granted in the same charter or letters patent of the said King 263*] Charles II. (except *as hereinafter is excepted), shall be, and they are hereby vested in the commonwealth of Pennsylvania."

The first part of the description of that which the Legislature intended to vest in the commonwealth, comprehends all the rights of the proprietaries in the "soil and land" of Pennsylvania, but comprehends nothing else. It would not, we presume, be contended that this part of the description would embrace the purchase money due for land, if any such existed, which had been sold and conveyed by the proprietary, and for the purchase money of which a bond had been taken. This act could not, we presume, be pleaded in bar to an action of debt on a bond given to secure the payment of money due for land. This section, at least, is directed against the landed estate of that proprietary, not against his claims for money.

If this first part of the description does not reach debts on account of land sold, neither does the second. It seems almost useless to observe that a debt for land sold, is neither "a royalty, franchise, lordship, or other hereditament;" and that it forms no part of the premises granted in the charter.

The subsequent part of the section vests nothing. It contains only a more ample description of the absolute and unqualified manner in which the property, previously described, is to vest in the commonwealth. It is freed and discharged from every incumbrance, claim or demand whatsoever, as fully as if the said charter, etc., "and all other *the estate, right [*264 and title of the said proprietaries, of, in and to the same premises, were herein transcribed and repealed."

It is unnecessary to comment on the particular words of the legislature, which are regularly and technically applicable to the charter, because it is too obvious for controversy, that the whole design and effect of the clause is to show that the property described in the preceding confiscating clause is to vest in the commonwealth, freed from every trust, limitation, or incumbrance whatsoever. But the property comprehended in the confiscating clause, was land only; and the land of the proprietaries, together with the royalties, etc., annexed to it.

If, then, the particular subject of this controversy be within the 5th section of the act of 1779, it is because it is to be considered as land to which the proprietaries were entitled. If not so considered, the 5th section does not vest it in the commonwealth. If it be so considered, the next inquiry is, whether it be within the exceptions made by the act.

The 8th section provides and enacts, "that all and every the private estates, lands and hereditaments of any of the said proprietaries, whereof they are now possessed, or to which they are now entitled, in their private several right or capacity, by devise, purchase or descent; and likewise all the land called and known by the name of 'the proprietary tenths,' or manors, which were duly surveyed and returned into the land-office, on or before the 4th day of July, in the year 1776, together *with [*265 the quit or other rents, and arrearages of rents, reserved out of the said proprietary tenths, or manors, or any part or parts thereof, which have been sold, be confirmed, ratified and established forever, according to such estate or estates therein, and under such limitations, uses and trusts, as in and by the several and respective reservations, grants and conveyances thereof, are directed and appointed."

This section reserves the private estates of the proprietaries, "and likewise all the lands called and known by the name of 'the proprietary tenths,' or manors, which were duly surveyed and returned into the land-office, on or before the 4th day of July, in the year 1776."

That the manor of Springetsbury was duly surveyed, and returned into the land-office before the 4th of July, 1776, has not been controverted in this Court, so far as respects land not sold before the resurvey, which constitutes the question now under particular consideration; and that the land for which this ejectment was brought, lies within the survey describing the external boundaries of that manor, is established by the verdict of the jury. The dilemma, then, presented to the plaintiffs in error, is a fair one. The legislature did or did not consider

the right reserved by the proprietary to re-enter and avoid the warrant, or to regrant the land, as an estate or interest in the soil, as land, even before such right was asserted. If it was so considered, and, as land, was confiscated by the 5th section, then it was likewise so considered in the 8th section; and, as land, was excepted 266*] and *saved to the proprietary. If the legislature considered this right merely as a claim to money, secured on the land, then it is not confiscated by the 5th section, but remains to the proprietor, unaffected by it. We can perceive no principle of sound construction, by which, comparing the 5th and 8th sections with each other, the 5th shall, so far as respects land in manors, be made more comprehensive than the 8th; no principle by which the confiscating clause shall be made broader than the saving clause.

It was necessary to reserve the quit-rents expressly in the 8th section, because they may, on fair construction, be understood to be comprehended in the 5th section; and, consequently, to be vested in the commonwealth, if not expressly excepted. The quit-rents would not, indeed, be confiscated by that part of the section which relates to soil or land; but may very well pass under the words "royalties, franchises, lordships, and all other the hereditaments and premises comprised, mentioned, and granted in the same charter, or some of them." The quit-rent is a hereditament, reserved under the very words of the charter, and annexed to the seigniory. It would not be absolutely improper to term it "royalty," since similar reservations are generally to be found in grants made to individuals in the royal governments. The express exception of quit-rents, therefore, without mentioning the arrears of purchase money, furnish no argument in favor of the plaintiffs in error. The quit-rents were excepted in the 8th section, because they would, 267*] if not excepted, have *been vested in the commonwealth by the 5th. The arrears of purchase money were not excepted, because they did not pass by the 5th section. But if the quit-rents were not comprised in the 5th section, they were abolished in the 9th, and might, therefore, without impropriety, be included in the exception of the 8th, so far as respects manors.

There is nothing in the act of 1779 which would lead to the opinion that the legislature was actuated by a spirit of hostility against the Penn family. No disposition is shown to confiscate the debts generally, which were due to that family. The great object of the act was, to transfer the right to the soil of Pennsylvania, from the proprietary to the commonwealth. This was a great and national object. It was of the most pressing importance at the moment, because no means existed at the time of obtaining titles to ungranted lands, in consequence of which, as the 4th section recites, "multitudes of inhabitants were daily emigrating from the state." In accomplishing this great object, the legislature was not unmindful of the ties by which Pennsylvania had been formerly connected with the proprietor. In addition to the private estates of the family, to the manors actually surveyed, and to the quit-rents received on the lands sold within those manors, £120,000 are bestowed on the family, among other considerations, "in remembrance of the enterprising spirit which distinguished the founder of Pennsylvania." Not only, then, is there nothing in the act evincing that vindictive, hostile temper, which would justify te court in extending it, by construction, to *objects not fairly embraced by its [*268 terms, but its whole spirit is in opposition to the idea. Taking this view of the subject, we should be astonished, indeed, to find that the same Legislature which left untouched the accruing quit-rents on the lands sold within the manors, as well as those which were in arrear, should seize the arrears of purchase money within the same manors; that the legislature should spare, so far as respected the manors, that which partook, in its nature and essence, of the proprietary character and should seize that which was, in its essence, private debt, and was distinguishable from other private debts in nothing but in the manner in which it was secured.

The 5th and 8th sections, then, leave the arrears of purchase money due for land sold within the manors, precisely in the situation in which the act found them.

Both parties have resorted to the 9th and 10th sections of the act.

The 9th section discharges all the lands held under the late proprietaries, not within the tenths or manors, from quit-rents or arrearages of quit-rents, and arrearages of purchase money. And the 10th section provides "that the said arrearages of purchase money, other than for lands within the said tenths and manors, shall be accounted to be due and payable to the commonwealth."

No man who reads this act, will be at a loss for the motive which induced the draftsman to the bill to introduce the 9th section. The 5th and 8th taken together, would leave all the lands of *Pennsylvania still chargeable [*269 with quit-rents; and would vest those not within the manors, in the commonwealth. It was the intention of the legislature to discharge the lands not within the manors, from this burthen, and a section was necessary for that purpose. Read the section, omitting the words respecting the purchase money of lands not within the manors, and it expresses, with plainness and perspicuity, the idea which has been suggested. All who are acquainted with our course of legislation, know, that after a bill has been framed, and the language adapted to its objects, amendments are sometimes introduced into it, in a late state of its progress, without being sufficiently cautious to change the language which was adapted to the original matter, so as to fit it to the new matter contained in the amendment. This can alone account for the perplexity and confusion of the 9th and 10th sections of the act. The 9th section, which is so perfectly clear without the words respecting the arrearages of purchase money for lands not within the manors, is so embarrassed and confused with them as to be scarcely intelligible; and the whole office of the 10th section is, to vest in the commonwealth a part of that which the 9th had abolished. Courts must, however, give to these sections that interpretation which seems best to comport with the intention of the legislature.

The 8th section had confirmed to the proprietors, forever, the quit-rents reserved in the manors. The 9th, which was intended to abolish all quit-rents on all other lands, com- [*270 mences with *general words, which in themselves would comprehend the quit-rents of the manors, and produce a conflict between the two sections, were not those general words limited and explained afterwards. But they are limited and explained by the words "other than the quit or other rents, reserved within the proprietary tenths, or manors, before mentioned." Between the general words, however, with which the clause commences, and those words of limitation, which have been just recited, are introduced the words, "and arrearages of purchase money for lands not within the tenths or manors aforesaid." Because the words of limitation apply to the quit-rents only, and not to the purchase money, it has been supposed that the purchase money for lands within, as well as without, the manors, has been abolished, and that the concluding words of the section, that the "same lands shall be held free and discharged therefrom, forever," apply to the purchase money of lands within the manors, as well as to the quit-rents of lands not within the manors.

This construction cannot, we think, be sustained. The general words which introduce the section, required the exception and limitation afterwards introduced, so far as respected quit-rents; but the words respecting purchase money, contain their limitation within themselves. The words of description exclude lands within the manors. No general words are applied to the purchase money, which require subsequent explanation or diminution. The words of limitation, too, are, in themselves. [*271 applicable to quit-rents *only. When, then, we come to the enacting part of the clause, which ordains that the "same lands and other hereditaments, shall be held free and discharged therefrom, and from the payment thereof, forever;" and ask, what are the same lands? and from what they are discharged? The only answer which can be made to the question is, that "the same lands" are lands not within the manors; and that the discharge is "from all quit-rents other than the quit or other rents reserved within the proprietary tenths or manors, before mentioned," "and arrearages of purchase money for lands not within the tenths or manors aforesaid." That the legislature deemed it necessary, by one of these sections, to take from the proprietaries the arrearages of purchase money not within the manors, and by the other, to vest them in the commonwealth, is proof that this was not done by the 5th.

The inference to be drawn, as we think, from the 9th section, that the legislature never lost sight of the distinction set up between manors and the general territory of the commonwealth, is strengthened by the language of the 10th section, which provides and enacts, "that, in order to preserve equality among the purchasers of land under the said late proprietaries, the said arrears of purchase money, other than for lands within the said tenths and manors, shall be accounted to be due and payable to the commonwealth."

Now, if the legislature had supposed itself, by the preceding section, to have abolished all the arrears of purchase money due from lands within *the manors, how would it "pre- [*272 serve equality among the purchasers," to coerce the payment of the purchase money for lands without the manors, to the commonwealth? Or, what motive can be assigned for discharging those within the manors from paying for their lands, and requiring payment from those without the manors? It would be a caprice for which it would be impossible to account.

Where the language of the legislature is clear, courts cannot be permitted to assume an intention repugnant to that language, because it imports what they think unreasonable; but words are not to be forced out of their natural meaning, to produce what is unreasonable, if not absurd.

The plaintiffs in error also rely on the 6th section of the act establishing a land-office, passed in 1781, as amounting, unequivocally, to a confiscation of the rights of the proprietary in the land in contest.

This proposition is sustained by applying to all lands, words which are, indeed, general in themselves, but which are, obviously enough, used by the legislature with reference to particular lands, the right to which was vested in the commonwealth by the act of 1779.

This act does not purport to be an act of confiscation, but an act for opening a land-office for the lands of the commonwealth. It does not purport to be an act of acquisition, but of disposition of that which had been previously acquired. It commences with a recital, that "many of the lands in the state, heretofore taken up," etc., *"are yet [*273 unpatented, and the purchase money, and arrearages of purchase money, thereon due, are vested in the commonwealth;" "and the owners and holders of such rights, since the shutting up of the land-office, have not had it in their power to pay in the purchase money and obtain patents; for remedy whereof, be it enacted, that an office be erected," etc.

The subsequent regulations, then, respecting the payment of the purchase money, were intended for such purchase money only as was already vested in the commonwealth; and the unpatented lands referred to, are those only, the purchase money due on which was then vested in the commonwealth. It is important, too, in the construction of this act, to recollect that the framers of the act of 1779 could not have intended any interference, by means of a land-office, or otherwise, with the manors. They remained the property of the proprietaries, who were themselves to receive the arrears of purchase money, and to complete the titles. The whole act being framed for the property of the commonwealth, the general words of the 6th section must be understood to be limited to the subject-matter of the act; that is, to the property of the commonwealth.

The act directs that patents shall be issued for lands for which the purchase monev shall be received; and the 16th section directs that the land, so granted, "shall be free and clear of all reservations and restrictions, as to mines, royalties, quit-rents, or otherwise." Now, the act of 1779 *expressly reserves for the [*274 proprietors the quit-rents within the manors. This act, then, cannot be construed to authorize the issuing patents for lands within the manors,

unless it be also construed to be a confiscation, by implication, of property expressly reserved for, and vested in individuals, by a preceding act of the legislature. This construction, to be justified, must be unavoidable.

But the 12th section appears to the court to deserve some consideration. That section declares "that nothing in the act shall be construed to extend to lands, not granted in the usual forms of the land-office."

There were, then, lands in Pennsylvania, "not granted in the usual forms of the land-office."

As this case comes on after a general verdict, on an exception to a charge given by the court to the jury, it is incumbent on the person taking the exception to show that the charge is erroneous. If it comprehended this act, of which the court is not satisfied, still it is incumbent on the exceptor to show that lands within manors were "granted in the usual forms of the land-office." This fact is not shown.

The act of 1783 is obviously limited to the same subject to which the act of 1781 applies. All arguments founded on this act are liable, too, to this additional objection. It was enacted after the treaty of peace, when the power of the state legislature over the estate of William Penn, real and personal, had ceased.

We come now to that part of the argument 275*] which *applies particularly to warrants issued on the common terms, for lands afterwards surveyed as a manor.

It is contended by the plaintiffs in error, that such lands, though comprehended geographically within the lines of a manor, are not legally a part of it; and are not, therefore, either as to the land itself, or as to the purchase money, saved to the proprietaries, under the act of 1779.

The reservation in the 8th section of that act, is of "all the lands called and known by the name of 'the proprietary tenths or manors,' which were duly surveyed and returned into the land-office, on or before the 4th day of July, 1776."

It has not been suggested that the lands which may happen to be held by common warrants within a manor, are distinguished by a different appellation, and are "not called and known by the general name given to all the adjoining lands within the survey;" but it is contended that such are not brought within that part of the description which requires that they should be "duly surveyed." Although lands for which a conditional warrant had previously issued, be, in fact, surveyed as a manor, it is insisted that such survey was not duly made.

This is giving to the word "duly," a meaning which, in the opinion of the court, was not intended by the legislature.

The act of 1779 conferred no new right on the Penns, but left them in possession of their pre-existing rights, whatever they might be, within a described territory. It did not interfere with any controversy which might exist 276*] between Penn and *others within that territory, but left such controversy to be decided between the parties, as if the law had never been passed. The act is simply an adjustment between Penn and the commonwealth. It refers to the fact of public notoriety, as marking the lines of division between them. That fact is, a survey, duly made and returned into the land-office, before the 4th of July, 1776. The survey must be understood as one entire thing, describing the particular tract of country surveyed, and the words "duly made," mean, made according to the forms prescribed by law or usage. It was very well known that, within these surveys, some lands were sold, and some were not sold. On all which were sold, quit-rents were received, and on some of them the purchase money was still due. With the land, if not sold, with the quit-rents and purchase money, if sold, the legislature, as has been already shown, declares its purpose not to interfere. There is nothing in the language, nor is there anything in the character of the transaction, which would lead to the opinion that the legislature intended to discriminate between the different rights of the proprietaries within the manors. The hand of government is not laid upon the manors, and all the rights of the proprietaries within those boundaries, whether to land, purchase money, or quit rents, remain untouched. There can be no conceivable reason for supposing that the legislature meant to inquire into the dates of the warrants evidencing the sale of lands, while the right to sell was acknowledged, and to discharge one contract of sale within the untouched boundary, *while another remained valid. The [*277 words make no such distinction, and we can perceive nothing in the nature of the property which will justify the court in making it.

If we trace these words, "manors," and "proprietary tenths," to their first use, we shall find reason to confirm, not to change, the sense in which we suppose them to have been used in the act of 1779.

By the 19th section of the charter, license is granted to William Penn, and his heirs, "to erect any parcels of land, within the province aforesaid, into manors." There is no restriction on this power, which confines its exercise to lands which are vacant at the time. There was, then, no want of power in Penn to comprehend within a manor lands which were actually sold. The rights of the purchaser, the tenure by which he held his property, could not be changed, nor would they be changed, by including his land within the survey of a manor.

The proprietary tenths originate in the "conditions or concessions agreed on between William Penn and certain adventurers and purchasers, on the 11th of July, 1681. The 9th condition, or concession, is: "In every 100,000 acres, the Governor and proprietary, by lot, reserveth ten to himself, which shall lie but in one place."

Now, it is very apparent that, supposing this stipulation to be a fundamental law, and to enure to the benefit of all the inhabitants, it can only restrain the proprietary from reserving more than ten out of every 100,000 acres of land, and compel him to lay it off in one body. If, within any survey *of 10,000 acres, [*278 there should be some lands previously granted, the survey would certainly not impair those grants; nor would those grants vitiate the survey. The respective rights of the parties would depend upon the law, which would decide that

the purchaser should hold his land, on complying with the conditions of the purchase; and that, on his failing to comply with them, the proprietary might either indulge him by giving further time, or might re-enter and hold the land, or re-grant it. In the event of re-entry, it can scarcely be contended, that this land would not be considered as a part of the proprietary tenth, provided it did not swell the amount of the reservation beyond the tenth which might be legally reserved. The including of lands previously sold, within a survey of a reserved tenth, as it would give the proprietary no new right against the purchaser, might sink so much of his reservation, but could produce no other question than might arise between him and the purchaser, respecting the validity of the sale. These are questions with which the legislature of 1779 manifested no intention to interfere. It will not, we presume, be doubted that the words "manors" and "proprietary tenths" have the same meaning throughout the act; that they always designate the same lands; that, when used in reference to quit-rents, they have the same meaning as when used in reference to the arrears of purchase money.

Now, it appears, from the statement of the testimony made in the charge of the court to the jury, which is the only regular information 279*] of the *evidence given in the cause, that an agreement was entered into, in 1736, between the proprietary and a number of the inhabitants, by which he engaged to make them titles for certain specified quantities of land in their possession, on the common terms. This agreement is stated to have been afterwards carried into execution. The contract, as stated, contains unequivocal proof of having been made under the idea that the survey of 1722 was valid, that it related to lands within the lines of that survey, and that the land within its lines was considered as a manor. That survey may not have been attended with those circumstances which would bring it within the saving of the act of 1779, and, certainly, in this cause, is not to be considered as a valid survey of a manor. It was, nevertheless, believed, in 1736, by the parties to this contract, to be a manor; and those proceedings which took place respecting lands within it, are, consequently, such as might take place respecting lands within a manor. We find sales of land made to fifty two persons upon the common terms, and grants made to them according to contract. When the final survey was made, comprehending these lands as being part of the manor of Springetsbury, were they less a part of that manor because they were granted as a part of it before that survey was made? When, in 1779, the legislature excepted from confiscation the quit-rents "reserved out of the said proprietary tenths or manors," is it creditable that they intended to create a distinction, never heard of before, between the quit-rents on 280*] lands lying *within the lines of the manor, and sold as part of the manor, to depend on the terms or the time of the grant?

The defendants in the Circuit Court gave in evidence fifteen instances of lands lying within the manor being settled for on the common terms. Were these lands excluded from the manor by being so settled for? Did the legislature of 1779, when about to save for the proprietaries the quit-rents reserved out of manors or proprietary tenths, or out of land commonly called and known by the name of manors or proprietary tenths, which were duly surveyed and returned into the land-office, on or before the 4th of July, 1776, fix its mind on the survey to which reference is made, or on the dates and terms of the grants made for lands within the survey? If on the survey, then the language expresses the intention; if some other distinction was designed, it is strange that no words were inserted pointing to such distinction. The legislature intended to confiscate the estates of the proprietaries in part, and in part only. The line of partition between the commonwealth and the Penn family was to be drawn. It was the province of wisdom and of justice to make this lien a plain one. It was proper that the commonwealth, and Penn, and the people of Pennsylvania, should be able distinctly to discern it. If the lines of the manors, as surveyed and returned in the land-office, before the 4th of July, 1776, constitute the dividing lines between the parties, they are plainly and distinctly drawn. If some *imaginary [*281 distinctions are to be made between the lands comprehended within those lines, or the quit-rents reserved on those which had been sold, the whole certainty of the division is lost, unless some other line, equally plain, equally rational, and equally justified by the words of the act, can be substituted. Is this practicable in the case before the court? Extensive sales were made in a tract of country, supposed by the seller and the purchaser to be a manor. Other sales were made, containing in the contracts no intrinsic evidence that the parties understood the lands to be within a manor. The purchase money, in both cases, is paid, and deeds are made, reserving the usual quit-rents. To ascertain the real boundaries of the manor, to make a legal survey of it, if one had not before been made, a warrant of resurvey is issued, and a survey made and returned into the land-office, comprehending both these classes of lands, with others which were at the same time vacant, as being within the manor. When the legislature saves to the proprietaries the quit-rents out of lands sold within the manors, can a distinction have been intended between those lands which were sold as part of the manor before, and those which were sold after the resurvey? If it be assumed, where the warrants contain no evidence of being intended for manor lands, that the parties or the proprietaries were ignorant of their being comprehended within a manor, what difference, in reason, can this make? The lands were equally liable to quit-rents in the one case and the other. They were equally within a manor, *whether known or not known to be [*282 within it. Could the legislature have a motive in the one case more than in the other, for abolishing these quit-rents? If the motive existed, it would be shown in the language adopted. But the search for it in the language of the legislature would be as fruitless as in the reason of the case. The court cannot set up this distinction.

If the word manor, when used as describing territory within which quit-rents are saved comprehend lands sold before the resurvey,

then the same word, when applied to the arrears of purchase money, retains the same meaning.

It has been urged in argument, that the legislature intended clearly to distinguish between the rights of Penn, as an individual, and his rights as proprietor. The first were reserved; the last were confiscated. This distinction, so far as respects the subject of the present controversy, is not to be found in the law. The 8th section confirms to the proprietaries all their private estates, "and likewise all the lands called and known by the name of the proprietary tenths or manors." These proprietary tenths or manors, then, did not compose a part of, but were in addition to, their private estates. They were held, too, by precisely the same title by which other lands in Pennsylvania, not sold nor reserved, were held. Nor was there any new modification of that title. They were withdrawn from the mass of property offered for sale on the common terms; but were still held by Penn, solely as proprietor under the charter. The quit-rents, too, were 283*] clearly an appendage *to the original grant, retained on the lands which were sold, and retained by Penn in his character as proprietor. Yet these are expressly saved to him. There is, then, in the act of 1779, no intention to make the private and proprietary rights of Penn the criterion by which the line of partition between him and the commonwealth should be ascertained; but there is a clear intention to divide his proprietary estate, and to make his surveys of manors the criterion by which this line of partition should be ascertained.

This result is, we think, very clearly produced, so far as respects the soil, by the 5th and 8th sections; and is, we think, produced not less clearly with respect to the arrears of purchase money, by the 9th and 10th sections. Strike out those sections, and there is nothing in the act which can reach the arrears of purchase money, within or without the manors. They would, like other debts, remain the property of the creditor. The 9th section expressly abolishes "the arrearages of purchase moneys for lands not within the tenths or manors aforesaid;" and if, as we think, the tenth, or manor, was in the minds of the legislature described by a survey thereof, made according to law or usage, and returned into the land-office before the 4th of July, 1776, then the lands on which the arrearage of purchase money is claimed, in this case, are within one of the aforesaid tenths, or manors.

We think, then, that the lands, or the purchase money, which the plaintiffs in the Cir- 284*] cuit Court *claim in this case, are not confiscated by any act of the State of Pennsylvania.

Before we take leave of the act of 1779, it may be proper to inquire, whether it has any operation on the lands lying within the manors, and which had been sold, but not granted, the terms of sale not having been complied with. It will be recollected, that those on whose property this law acted were the subjects of an enemy, and that the legislature possessed full power over their estates. Having the power to confiscate absolutely, they might modify that power in its exercise, as to them might seem proper. The 7th section provides and enacts that all the rights, etc., which were derived from the proprietaries, or to which any person other than the said proprietaries were entitled, "either in law or equity," by virtue of any deed, patent, warrant or survey, of, in or to any part or portion of the lands contained within the limits of this state, or by virtue of any location filed in the land-office before the 4th of July, 1776, shall be, and they are hereby confirmed, ratified and established forever, according to such estate or estates, rights or interests, and under such limitations or uses as in and by the several and respective grants and conveyances thereof are directed and appointed.

This section comprehends all the lands within the state, whether within or without the manors, to which any individuals had derived a title from the proprietaries, either in law or equity, by virtue of any deed, patent, warrant or survey, and confirms such title according to the estate, right or interest *conveyed. [*285 That the section operates alike on lands within and without the manors, and that it confirms titles under warrants or surveys, for which the purchase money has been paid, are certain. It is equally certain that it does not interfere with the arrears of purchase money which may still be due, because that whole subject is taken up and disposed of in the 9th and 10th sections of the act. The doubt is, whether it has any influence on any lands, the purchase money for which had not been paid; and if any, how it affects the title to such lands.

The right of re-entry was reserved as a security for the payment of the purchase money, but does not appear to have been exerted, and was probably considered in the light of a mortgage, to be used merely as the means of enforcing the fulfillment of the contract, not as absolutely terminating the estate. That the proprietaries looked on for a great number of years, and saw lands held under warrants void on their face, for the failure to fulfill the contract within the specified time of six months, and never, in a single instance, so far as appears in the case, or has been alleged in argument, attempted to avoid the estate, would certainly afford a strong equity to such purchaser against the proprietary, should such an attempt be made. And that ejectments were maintained on such titles, is also evidence of the opinion entertained of them in the courts of Pennsylvania. It seems to have been understood by all, that the proprietary was to avail himself of the condition in the warrant, for no other purpose than to coerce the payment of the *pur- [*286 chase money. This became, from usage, a kind of tacit agreement, which their real interest required all parties to observe. Yet, when a new state of things was introduced, it was natural for that numerous class of purchasers, who had not paid up the whole of the purchase money, to be uneasy at the hazard in which their titles were involved; and their representatives would very naturally feel disposed to quiet their minds on this interesting subject. It would not be unreasonable to suppose the existence of a disposition to make the contract expressly what it was understood to be, and to do away the forfeiture, except as a mode of enforcing payment of the arrears of purchase money. The confirmation of titles, by their own terms void, for non-payment of the purchase money, accompanied with the preservation of the right to the

purchase money, admits of the construction, that the clause of forfeiture may be used to enforce the payment of those arrears, but not as extinguishing the estate. At all events, this section has the same application to lands within, as to lands without the manor; and the construction it has received with respect to the one, may serve as a rule for the other.

The next exception to be considered, is to that part of the charge which declares the act of 1705, commonly called the seven years law, to be inapplicable to the case. That act enacts "that seven years' quiet possession of lands within this province, which were first entered on upon an equitable right, shall forever give an unquestionable title to the same against all 287*] during the estate *whereof they are or shall be possessed, except in cases of infants," etc.

It has been contended that this act is merely retrospective; and, in support of this opinion, it has been said, that for more than one hundred years it has never been resorted to in the courts of Pennsylvania.

To this argument it is answered, that the language of the act is prospective; that it purports to be an act of limitations, that it is found among the printed statutes of Pennsylvania, and that its operation has never been denied, so far as we are informed, in any of the courts of that state. During the irregularities which take place in the first settlement of a country, an act of limitations is peculiarly desirable, and it would be strange if Pennsylvania should have remained entirely without one. The 16th section of the laws agreed upon in England, enacts "that seven years' quiet possession shall give an unquestionable right, except in cases of infants," etc. An act of the same import as to possession, without any exception in favor of infants and others, was passed in 1700, but was repealed in England, in 1705, in which year the act was passed which is now under consideration. The people of Pennsylvania had one uniform and constant wish on this subject. Neither the 16th section of the laws agreed on in England, nor the repealed act of 1700, can be considered as retrospective; and there is some difficulty in giving this construction to the act of 1705. But, the courts of Pennsylvania having never considered this act as having the effect of 288*] *an act of limitations, this court is not inclined to go further than they have gone. If, however, it were to be so considered, it must be governed by those rules which apply to acts of limitation generally.

One of these, which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is, that possession, to give title, must be adversary. The word is not, indeed, to be found in the statutes; but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by legislators and by judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title. Several cases have been decided in this court, in which the principle seems to have been considered as generally acknowledged;[1] and in the State of Pennsylvania particularly, it has been expressly recognized. To allow a different construction, would be to make the statute of limitations a statute for the encouragement of fraud —a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such a construction.

The true question then is, whether the occupancy of those who held under these conditional warrants, was consistent with, or adversary to, *the title of the proprietaries. [*289 Upon the answer to this question, it seems difficult to entertain a serious doubt. It is reasonable to suppose that the practice of selling lands on credit, and of issuing warrants in the form of that which is inserted in this case, and of holding the legal title to secure the payment of the purchase money, prevailed from the first proceedings under the charter, until the declaration of independence, a period of near one hundred years. In the particular case before the court, credit was given from the year 1742; and we are not informed, and, consequently, have no reason to suppose, that this indulgence was singular. The legislation of Pennsylvania on the subject, justifies the contrary opinion; for we perceive among their printed statutes, several of a late date, giving farther time to pay in the purchase money for lands sold before the 10th of December, 1776. These acts of farther indulgence, continued for such a length of time, furnish strong evidence that the cases were very numerous to which those acts would apply; and show, too, that in the opinion of the legislature, no act of limitations had barred the claim. Now, this practice, in which the proprietaries, and a great portion of the population of Pennsylvania, concurred, is incompatible with the idea that the title of the purchaser became adversary to that of the proprietary, within six months after the date of the warrant of survey. In the case before the court, the survey was made, in fact, upwards of five years after the date of the warrant. Is it conceivable that the surveyor, who *was an agent of the proprie- [*290 tary, would have made the survey, had he supposed it to confer a title adversary to that of his principal? a title which would enable the holder, by remaining quiet only one year and three months longer, to set the proprietary at defiance, and to hold the land discharged from the contract by which it was acquired. The very practice of holding back the title, and of giving such extensive indulgence for the payment of the purchase money, seems to demonstrate a general opinion that, so long as this state of things continued, the title to the land was still in the proprietary, and the purchaser acknowledged his title. The occupation of the purchaser was with the consent of the proprietary, and, consequently, not hostile to his rights. The proprietary permitted the purchaser to hold the land, subject to his claim to the purchase money; and the purchaser held under the admission, that the land remained liable to the purchase money, and that the proprietary might, at any distance of time, assert his title to it, so far at least as to secure his purchase money. There seems

1.—See Alexander v. Pendleton, 8 Cranch, 462; Base v. Gray, 4 Wheat. Rep. 213; M'Clary v. Ross, 5 Wheat. Rep. 116; Ricard v. Williams, 7 Wheat. Rep. 59.

to have been a mutual understanding and a mutual confidence between the parties. How far the proprietary may have had it in his power to violate this confidence, by seizing the land, and refusing to convey it on a tender of the residue of the purchase money, is a question which does not appear ever to have been determined, or ever to have occurred. But, certainly, during this state of things, the 291*] purchaser could not be considered *as holding a possession adversary to the title which he acknowledged.

It has been contended that the survey of the manor was a determination of the estate under the warrant, and the assertion of an adversary title, from which time the act of limitations began to run.

There is certainly nothing in the fact itself which supports this proposition. All the transactions of the parties contradict it. There is no fact which shows a disposition in the proprietary to re-enter on any lands for which a warrant had previously been granted; nor is any case of such re-entry shown, from the first settlement of Pennsylvania. Several instances are mentioned, of grants completed on the common terms, within the manor of Springetsbury, while it was considered by the parties as a manor. No inference, then, is to be drawn from the facts in the case, favorable to the conclusion that the survey of a tract of country as a manor, was considered as determining the estates created by surveys on warrants previously issued, the conditions of which had not been fulfilled by the purchasers. This must be a conclusion of law, from the single act of survey, so inflexible as not to be influenced by the intention with which that act was performed, and the opinion prevailing at the time, as attested by usage, or the argument cannot be sustained.

But how is this conclusion of law to be supported? The survey of a large tract of land cannot be considered as an entry on a smaller tract within its lines, as an ouster of the occu- 292*] pant, or even as a *trespass on him. How, then, can such survey be considered as having any legal effect different from the intention with which it was made? It is indispensable to the argument, to maintain that the mere act of survey does, of itself, in point of law, show an intention inconsistent with the continuance of any conditional estate, within the limits of the manor. This the plaintiffs in error have endeavored to maintain; and for this purpose have contended that a new title, which they call the "manorial title," and which they say is distinct from the proprietary title, was created by the survey; that the plaintiffs in error hold under the proprietary title; the plaintiffs in ejectment, under the manorial title. Their claims are, consequently, adversary to each other.

But this argument cannot be reconciled with the fact. No new title was created by the survey. There was no source from which title could be derived, other than from the proprietary himself. The survey was, not to give a new title, but to separate a certain tract of land from the general mass, which was offered to every adventurer. The effect of this survey was, not to avoid contracts already made, but to give notice to the public, that these lands were thereafter to be acquired by special contract only. The act of 1779 found this to be the existing state of things; and, in dividing the estates of the proprietaries between the commonwealth and the former owners, adopted the lines of the manors as the lines of partition between them. This created no new title, but left *to the proprietaries their former [*293 title, within the described boundaries.

We perceive, then, nothing, either in the law or the fact of this transaction, which tends to show that the possession of the plaintiffs in error has been adversary to the rights of the person under whom he originally claimed.

Having considered the act of 1705 as if it were an act of limitation, all the reasoning which has been applied to that act, applies also to the act of 1785, on which the eighth exception is founded. The several treaties formed with Britain have a very important influence on the time which has elapsed since the war between the two countries.

The opinion that the plaintiffs in ejectment have still a right, notwithstanding the acts of 1705 and 1785, to proceed at law, presupposes their consent to the continuance of the original title, created by the warrant; for if the possession taken under the warrant or survey was not continued with the consent of the proprietary, it immediately became adversary, and the act of limitations immediately commenced. If, then, there be any case in which this assent is not to be presumed, that is a case in which the plaintiff in ejectment is barred by the act of 1705 or 1785.

If, as the court thinks, the rights of the proprietaries were converted, by long acquiescence in the usage which must have been known to them, of selling the lands, as being liable only for the purchase money; or by the 7th section of the act of 1779; or by both united, into a mere right to the purchase money, still the remedy of proceeding *against the land [*294 for the purchase money remains, and is not taken away by the act of 1779. That act, having reserved the purchase money for the proprietor, must, of course, be construed to reserve his remedy, unless it was expressly taken away. It is not easy to point out any other remedy than this, by ejectment. The original purchaser has transferred; and were his representatives even still liable for the purchase money, which is far from being admitted, they may not be able to pay it, if they could be found. It was not on their personal responsibility, but on the land itself, that the vendor relied. His claim was attached to the land, and passed with it. The remedy reserved is on the land, not on the person. It would be difficult to form an action at law against the person; and in Pennsylvania, there is no court of chancery, even if a bill in equity could be sustained. The remedy must be by ejectment.

There are other exceptions in the record, which, though not pressed, have not been waived. It was, therefore, the duty of the court to examine them. The result of that examination is, that the only serious questions in the cause are those which grow out of the acts of 1705 and 1779. These having been rightly decided, there is no error, and the judgment of the Circuit Court is affirmed.

Mr. Justice **Johnson** dissented. The reasoning upon this cause must be utterly unintelligible to those who hear it, unless premised by the following state of facts:

The grant to William Penn, vested in him 295*] and *his heirs, both the soil and sovereignty of the State of Pennsylvania, subject to a few reservations of right and power, not material to be noticed here. But, before his colony took their departure from England, he entered into a variety of stipulations, restricting the exercise of both his power and rights over the territory which they were about to occupy. These are known by the epithets of his conditions or concessions; and it is by one of the articles of this instrument that he precludes himself from setting apart more than one-tenth of the soil, for the several and individual use of his family. The rest was to be granted out to settlers, on terms which were to be common to all except those who purchased within the proprietary tenths, with whom he was at liberty to contract as he pleased for the sale of his lands.

By the 17th section of the charter, there was power given to the proprietary to erect manors, with right of court-baron, frank-pledge, etc., and to grant the land therein for estates, which the grantees could not devest of the incident of being held directly of the manor, or the grantee of the manor, who is denominated lord of the manor. The manor of Springetsbury, within which this land lies, was surveyed for the use of the proprietaries, and surveyed as a manor. There was evidence in the cause below of its having been laid off as early as 1722, but it was certainly resurveyed in 1768; and as the court below rested the case upon the effect of the resurvey, as equivalent to an original appropriation, I presume the case does not require that 296*] we should look beyond it. *The titles under which the defendants below (and plaintiffs in appeal) defend their possession, originated in 1747 and 1748, and would be entitled to unquestionable precedence, but for the following facts: The warrants of survey contain a condition in these words, "which survey, in case the said A. B. fulfill the above agreement within six months from the date hereof, shall be valid, otherwise void." The agreement here referred to was, to pay a sum of money (called, with reference to its fixed amount, the common terms) in six months. A portion, about one-third, of this sum, it appears, was paid, but there was nothing in the cause to sustain the payment of the residue, unless it was possession, lapse of time, and supposed acquiescence of the proprietaries. When the manor was surveyed in 1768, there were many of these individual land-holders comprised within the lines then laid off, all holding on the common terms; and there were, afterwards, many other tracts sold, upon what are called, in the peculiar language of that country, the terms agreed; by which is understood, according to a value to be adjusted, without confining the vendor to the common terms. Such tracts were sold out to the purchasers of this class, as Penn's individual property. Upon all these lands there were reserved a small annual sum, called quit-rents. In the year 1779, the legislature passed an act, entitled "an act for vesting the estates of the late proprietaries of Pennsylvania in this commonwealth,' by one section of which, the proprietary tenths, or manors, are granted to the proprietaries, "together *with the quit- [*297 rents and other rents reserved thereon." By another, all the lands of the state, except those within the tenths or manors, are exempt from quit-rents, and released from any lien for balances of purchase money, which purchase money is vested in the commonwealth.

The question is, whether the lands within the manors, granted out to individuals previous to surveying the manors, are entitled to the benefit of these exemptions, in common with all lands of the same class within the state; and the action below is an attempt to exclude from that benefit those prior grantees, under the idea that they are excepted by the effect of the reservations in favor of the proprietaries. And this supposed right of the proprietaries is asserted through the medium of an action of ejectment, under the idea that the legal estate is in the grantee of the manor, and only an equitable interest in the tenant, the prior purchaser.

The received doctrines on the subject of what creates a legal estate in a grantee, it must be observed, are altogether peculiar in the State of Pennsylvania. A warrant, a survey, and payment of the consideration money, is held to give an absolute estate in fee, though not consummated by a patent. This subject came on to be considered by this court as early as the year 1799; and the law was then clearly recognized to be as I here state it. Judge Iredell uses the expression, as applied to a title so acquired, "a legal title, as distinguished from an equitable title."

*The peculiarities of the form in [*298 which this question comes up, must be attributed to local practice. The charge given by the court, on summing up to the jury, is copied into the record, and exceptions taken to those parts of it which were unfavorable to the defendants below. These exceptions were ten in number; but only the 4th, 7th, 8th and 10th have been insisted on in argument here. Of these, I consider the last in numerical order as proper first to be noticed. It is expressed in these words: "Because the evidence exhibited manifested the absence of legal title in the plaintiff's lessee, whereas the court charged the jury that he was possessed of the legal title, and as such, entitled to recover in this action."

The court below has considered the title of the defendants below as a mere equitable title; all its conclusions, from first to last, have their basis in this doctrine. And had it been shown in argument that this idea was sustained by a course of decisions in the state courts, I certainly should not feel myself at liberty to contest it. But everything conspires to satisfy me that the estate vested in the warrantee upon the execution of a survey, was never considered in any other light than a legal estate, in the jurisprudence of that country. Whatever may be the correct legal constructions of the words of the warrant, if such has been the practical construction, communis error facit jus, and it is now too late to criticise on the meaning of terms.

*My reasons for adopting this opin- [*299 ion are the following:

1. I look in vain through the statutes of that State for any legal provision for entering, avoid-

ing, and regranting lands, for failure in paying the arrears of purchase money. On the contrary, I find an act passed on the 9th of April, 1751, which furnishes a legislative exposition of the law on this subject. By the provision of that act, the treasurer is authorized to issue an execution for the arrears of purchase money due on lands granted prior to the 10th of December, 1776, and to levy on and sell the land so granted. That the warrants and survey created in favor of the state a debt and a lien, is unquestionable; and this is all that the State affirms in passing this law; but, by the same legal provision, it negatives the idea of the property in the soil having ceased to exist in the tenant. No change in this respect was effected by the act of 1779, commonly called the vesting act, since that act only confirms individual estates according to their existing qualities.

Nor has the legislative power been altogether silent on the subject of forfeiture and regranting; for, by the 10th article of the concessions, there is provision made for regranting lands which may become forfeited for failing, for three years, to seat and improve them. Nor do I believe that there can be produced in the history of the jurisprudence of that country, an instance in which this power of regranting has been extended to any other case.

300*] *2. I think this opinion follows as a corollary to the proposition that payment of the consideration money vests a legal estate. For why should a patent be unnecessary, if there remained any act to be done on the part of the proprietary, in order to pass a legal estate? It may be contended, that this doctrine results from the peculiar jurisprudence of that state, in which, for want of courts of equity, the courts of law have adopted the maxim, that we must consider that as done which ought to be done. But to this there is a brief and unanswerable reply. Such might be the reason where a patent is demanded, and the fees tendered; but such demand and tender have never been insisted on as necessary in support of the general effect of payment of the consideration money, to vest a fee-simple absolute, without a patent.

Some analogy may be supposed to exist between this case and that of mortgageor and mortgagee. But, if so, the relation is reversed, and the converse of the rights and liabilities of the mortgagee results from it. For the debtor conveys the fee to the creditor, in the ordinary form of mortgaging, and retains only the right to redeem. Here the creditor conveys the estate cum onere. And the question as to the interest vested in the defendants below, whether it was legal or equitable, still recurs. If legal, it bears an analogy with an estate in fee subject to a charge, rather than to an estate subject to a mortgage; in which former case, the creditor could not maintain ejectment.

301*] *The only analogy, in my judgment, between this estate and any one known to the common law, is that of a feoffment on condition. The warrant is the deed, the survey the livery of seisin, and the condition is a condition in deed, as distinguished from a condition in law; and it is also a condition subsequent. In which case, it is clear that the estate is a legal estate, and remains good until entry made for the forfeiture, by some one legally authorized. This leads to the questions, whether, previous to their formal entry on bringing this ejectment, such an entry was made. Whether legally made. And what were its legal effects.

Unless the manorial appropriation of 1768 can be considered as an entry, it is not pretended that any legal eviction of the defendants below ever took place. And as to that, I think it perfectly clear that it could, on no principle, operate as a legal eviction. It was an act, on every principle, perfectly consistent with the full and unmolested enjoyment of the premises in question. And this consequence follows, whether we consider it in the light of a simple designation of metes and bounds, over which the original proprietary rights were retained, or, what appears to be the more proper view, as an original grant, converting it from an interest existing in the proprietary, in his political capacity, into an estate held by him in his individual relations to the society of which he was both a member and a ruler. In the first view, there was no sensible change made in the estate, as it existed previously in this, and the whole territory; *and in the second, the [*302 interest acquired, or effect produced, could be nothing beyond that of a grant to any individual, other than the proprietary. In the latter case, it is perfectly clear that running the circumscribing lines would be no trespass or eviction. These appropriations to the proprietary were intended to operate exclusively upon unseated territory. On that which had been previously surveyed to individuals, they could produce no effect whatever; otherwise they might as well have dispossessed those who held by a perfect, as those who held by an inchoate title. Although circumscribed by the lines of the manor, the seated tracts composed no part of the thing appropriated; they could not have been estimated as any part of the proprietary's tenths; and there never was a doubt of his right having still existed, to extend the limits of his survey, so as to take in as much land as he was deprived of by these prior included individual appropriations. A different construction would be greatly to his prejudice, inasmuch as he might, by possibility, have lost the whole of his tenths, by taking in the grants to others. This view of the subject, I shall again have reason to recur to, on another point.

But, if this circumscribing survey could, on any principle, be held equivalent to an entry, it is still necessary to maintain that it was a legal entry. And this I am prepared to negative, upon various grounds. It is obvious that such an entry must be justified, either on the ground of personal right or legal power. A mere arbitrary power to resurvey did not exist in the proprietary; the province *of [*303 Pennsylvania had taken the form of a state, governed by a wise and beneficent government, in which the will of the proprietary had been subjected to the public will, and his allodial interests circumscribed to his purchase money and quit-rents, and his reserved tenths. As to the land seated under warrants to individuals, he was bound by his own concessions and the legislative will; and I see no power delegated by law to anyone to enter and evict for failure to pay the consideration money reserved on such appropriations; nor have we been told of any

practice on this subject, that could be construed into a national acquiescence, in the exercise of such a power. The debt and the lien remained, but the right of eviction and regranting for non-payment, was never legalized nor asserted, nor could it, in any case, have been tolerated, without a tender of that part of the consideration money which had been already paid. Again, an entry for condition broken, must be made as such, and with intent to produce the legal effects of an entry; a mere casual friendly passing of the boundaries of the premises will be unconsequential; but here, the sole object of the survey of 1768 was to appropriate unseated land, and not to assert a title to that which had been previously appropriated. The present claim is but an afterthought; a speculation upon the possible effect of an act not intended to produce eviction.

This leads to another consideration, operating against both the fact and legality of this supposed entry, for condition broken. It is agreed, on all hands, that proof of the full payment of 304*] the consideration *money would have been conclusive against the title of the plaintiffs below. But why may not presumption of such a payment arise from length of time and acquiescence? and that of the plaintiff below be left as a fact to the jury? If resumption of a patent may, under circumstances, be left to a jury in favor of possession, much more so may a fact so much less solemn in its nature, and more difficult of proof, as payment. In this case, and in all cases arising in Pennsylvania, such a fact may well be submitted, since in practice it has superseded the issuing of a patent, and may well tempt the parsimony of purchasers, since the expense of a patent has become an expense of supererogation. The long forbearance and acquiescence of the proprietaries, can be referred only to one of three causes; a consciousness that they had acquired nothing in the seated lands within their manorial appropriations; that they had no right to enter on the premises previously seated; or that the title in it was perfected by payment. All which would operate against both the fact and legality of the supposed entry.

From these considerations, I am led to adopt the opinion that the title of the defendants below was a legal title, and the better title; that if voidable, it could be avoided only by entry for conditions broken. That no such entry was made, or was intended to be made, or could be legally made; and that they were, therefore, entitled to a charge in their favor. With this view of the subject, it may not be necessary for me to go farther. But it comports 305*] with the practice of this *court, that I should express an opinion on the other points in the cause.

And first, as to the bearing of the act of confiscation, on the subject of this suit.

The court below appears to have considered a manor in the light of a geographical tract, or portion of territory designated by metes and bounds. I, on the contrary, consider the term as designating an estate or legal interest within the geographical limits. In this sense, nothing will be comprised in the meaning of the words of the 8th section of the law, but those tracts of land within those limits which were held of the manor; or, in the peculiar language of that country, granted on terms to be agreed. It is very clear that the 8th section of the act of confiscation was not intended to convey to the proprietaries any interest not previously existing in them. Now, how did a manorial appropriation operate upon the lands that had been seated previous to such appropriations? It is clear that it vested no interest in such lands, nor anything incident to them. If the whole purchase money had been paid, the individual's estate was consummated. And if the whole was not paid, it is admitted in the charge, that the proprietary could not change the tenure or the terms of purchase. And so far were these previously seated tracts from being considered in law as making part of the manor, that the proprietary's right to indemnify himself from adjacent unseated territory, for the deduction from his tenths, caused by these excepted tracts, has been solemnly recognized in that court. Then, *though [*306 within the manor, they were not of the manor; as well might an island or an oasis be denominated water or desert. And there were unanswerable reasons, in justice and policy, why such land should have been so considered. It is asserted that the proprietaries never, in fact, exercised any of those privileges and powers within the tracts denominated manors, which were authorized by the charter. But this consideration has no influence upon my opinion; for, 1st, I see no reason, except the intervention of the revolution, why the proprietaries, or lords of the manors, may not have assumed the exercise of those privileges. In case of escheats, there can be no doubt that they would have asserted one manorial right, and were probably prevented from asserting all, only because in the actual state of the province, they would have been burdensome and unproductive. But, 2d, They did not assert one important privilege within those limits, a privilege which they were precluded by law from exercising beyond those limits. This was the right to demand a higher price for the lands within their manors than that to which they had restricted themselves in the state at large. And this appears to me to establish a familiar and definite ground of discrimination, by which to determine the operation of this act of confiscation, in any given case. Was the land held on the common terms, or the terms agreed? It cannot be disputed that the general purpose of the act of confiscation was, to distinguish between the land appropriated to the individual use of the proprietaries, and that *over which they were [*307 held to exercise only a political power, or fiduciary interest. They were permitted to acquire an individual property in one-tenth of the territory of the state; and the lands so appropriated, as well as the proceeds of the sale of such lands, were meant to be set apart to them, while that which had been seated by individuals, as a part of the unappropriated nine-tenths, reserved to the community, was intended to be confiscated. Any other construction would go to imply that the state had reserved to the proprietaries, territory which was no part of their legal tenths; and, also, that but for this reservation, the act of confiscation would have devested individual interests not intended to be confiscated.

But let us examine more particularly the provisions of this act, with a view to determin-

ing its just construction. And here let me premise, that, for all the purposes of this suit, I care not whether the 9th section of the act vests in the proprietaries the balances due on the tracts within the manor, sold on the common terms, or not. The question here is, whether they are entitled to judgment in a suit in ejectment, and of consequence, to a writ of possession, for I cannot distinguish the one from the other. I wholly reject the doctrine of suing for possession, and recovering money; of suing for land, and recovering pounds, shillings and pence. Such a perversion of means might proceed from positive legislation; and, in the state of Pennsylvania, where an amalgamation of law and equity necessarily grows out of the 308*] *want of an equity jurisdiction, the practice has grown up, of giving an alternative judgment in such cases, for either the land or the money, or rather for the money to be levied on the land. But this court is expressly prohibited from thus confounding legal and equitable proceedings, and the whole opinion of the court below proceeds on a recognition of the necessity of pursuing the two classes of legal and equitable rights, by their appropriate remedies. I have said, and in this I do not understand myself as differing from this court, that the only practical effect of the terms of the warrants to individuals is, to create a debt and a lien; but surely a tenant may covenant to stand seized, subject to a charge in gross, and yet retain the legal estate. And even in the ordinary case of a mortgage, where the legal estate passes from the debtor to the creditor, and the converse of the present case exists, an assignment of the debt is no conveyance of the legal estate to the assignee. A court of equity will pass the one as an incident to the other; but in a court of law, the assignee could not maintain ejectment. And that is the only question here. If it be said, that although in this suit the plaintiff below may not be entitled to recover the land, but may avail himself of this form of action to recover the purchase money due, I consider it as an abandonment of the question; for, the debt, if existing, was but an equitable lien, and the remedy here resorted to is a common law remedy. I think, however, I shall show, that although the debt exists, the lien is taken away by the act of confiscation; 309*] and *though the debt be due, it is not due to these parties, but to the commonwealth of Pennsylvania.

In following this act of confiscation through the detail of its provisions, we find, that after four sections, setting forth the views and motives of the legislature, the fifth section, or first enacting clause, contains a general assumption of the soil and sovereignty of the state, and a revocation of the charter to Penn, as fully, to use its own language, "as if the same were therein transcribed and repealed." The sixth section asserts the future exclusive appropriation of the "soil and lands, heriditaments and premises, to be in the legislature of the state;" and, under the operation of these two clauses, it is very clear, that every right, civil and political, of the proprietaries, "of, in or to the soil" of Pennsylvania, derived under the charter, was (subject to the exceptions in the same act) vested in the commonwealth, "freed and discharged," as the act expresses it, "from and against all estates, uses, trusts, charges, incumbrances, titles, claims and demands whatsoever." And all the title which they now hold therein, they hold by virtue of the provisos contained in the 8th and 9th sections. But to understand the force and meaning of these two sections, I deem it material that the language and effect of the 7th section should be duly weighed. This section contains a general confirmation of all the estates, legal and equitable, derived from the proprietaries, their officers, etc., or otherwise, or to which any person or persons, other than the proprietaries, were entitled, either by deed, patent, warrant or survey, *on the 4th of July, 1776. This [*310 clause operates in favor of all persons "other than the proprietaries," and confirms, unquestionably, the estates of these defendants below, in common with every other citizen. The next proviso (8th section) is confined to the subject of the estates and interests of the proprietaries. And here it is obvious that three subjects claimed the attention of the legislature. Their estates and interests were distributable into three classes: they held property acquired, in common with every other individual, "by devise, purchase, descent," etc.; they held other property, under the reservation of a tenth of the soil, to their individual use; and they held, or claimed, a third class of interests, as proprietaries, which clashed with that eminent domain which was now about to be assumed by the state of Pennsylvania. The latter, the state determined to confiscate, and compensate them for; the former two, to preserve to them unviolated. And these considerations draw a line of demarkation between the subjects of this act, infinitely more definite and rational than that marked out by trees or streams. The estates held upon the common terms, were those which constituted the third class; and the phraseology of the act appears to me to be in perfect accordance with the general intent. On this point, I hold it to be an important fact, that, without exception, throughout these two sections, tenths, and manors are never used apart; they are constantly considered synonymous and equivalent. Now, although a manor may, by common acceptation, be considered as a geographical section, a *tenth is a [*311 term of comparison and quantity, and has direct relation to that interest which the proprietaries had acquired, and might acquire, as a distinct individual property in the soil. I consider, therefore, both manor and tenth, as here used, as designating estate and interest, and not geographical limits. And why should it be held a reservation, by geographical limits? Let it be remarked that it is no immaterial question to the defendants in the court below, not only as it affects their interests, but as it affects their claims upon the justice and impartial legislation of country. There can be no reason assigned, why they should be excluded from the benefits which this act confers upon citizens of their class, and, in fact, subjected to confiscation. There are important interests growing out of this act to all other land-holders, upon common terms; they are exempted from quitrents, and the lien for the balance of the purchase money is taken from off their lands. Can there be a reason assigned why those of this class who, by the caprice or cupidity of the pro-

prietaries, or their agents, have been embraced within the lines of their surveys, should be excluded from the common benefits extended to their fellow citizens? The injustice of such a discrimination is conclusive on the construction of the act, if an act is to be construed according to the intent of the legislature. With regard to those who held of the manor, or held, as is usually said, on terms agreed, the case is widely different. It is the effect of their own individual contracts with the proprietary. They [*312] are, by the nature of *their relation to the proprietaries, distinguished from those of the other class, and have nothing to complain of. Their quit-rents and arrears were considered as debts due to their landlord, and the legislature intended to take from the Penns nothing which belonged to them in their individual capacity.

Again, extending the construction of the act to the geographical limits of the manor, leads to the most absurd consequences.

It has been insisted, that it was lawful, in surveying the manors, to include within their boundaries the grants to individuals. This is readily conceded; and the inference from the fact is directly the reverse of what has been attributed to it. Did the legislature mean, by the proviso in favor of the Penns, to reserve to them their legitimate tenths; or did they mean, by possibility, to reserve to them half the state? There cannot be a doubt that, although any particular survey had embraced half a county, yet if the vacant land within it had amounted to no more than a tenth, the appropriation would have been duly made, and valid. But could the legislature ever have intended to exclude all the individuals thus circumscribed, from the common benefits of grantees on the common terms? to have subjected them to the most odious and unmerited exceptions? Could the state have intended to permit the proprietaries, under the pretext of surveying a tenth, to cast their net over half its limits? It was for the very reason that including individual surveys made them no part of the manor, that the [*313] right to include previous *locations to individuals was tolerated. It had not entered into the mind of man to conceive, that they thereby produced any change in the relation which subsisted between those individuals and the commonwealth; or could expose them to be separated from the mass of the community, in the several legislation of the state; or exclude them for an equal participation in all the benefits of the revolution. But by this geographical construction, without any act or offense on their part, they are shut out from immunities extended to others, who had no greater claims upon the community than themselves.

But again, if we are to construe this act without a reference to its general spirit and intent, we have but to carry the principle through, in order to involve us in irreconcilable absurdity, and such as will oblige us, for the purpose of common sense, to come back to the very principle of construction which I would apply to the law throughout. A liberal construction of the 8th section, vests in the Penns the whole geographical contents of their manors, whether sold or unsold; and then adds to the grant the rents reserved out of the parts sold. The words are: "All the lands, etc., duly surveyed, etc., together with the quit or other rents, or arrearages of rent, reserved out of the said proprietary tenths, or manors, or any part or parts thereof sold." Now, to reduce this section to the standard of common sense, we have at once to reject the geographical limits, and circumscribe the thing granted to the estate or interest existing in the Penns at the time specified. *Nor is it immaterial to note the par- [*314 ticular phraseology here made use of. The words are "reserved out of the said proprietary tenths, or manors, or the part or parts thereof which have been sold." Now, the lands sold to these defendants below, were sold out of the general funds of the state, and the quit-rent on these was reserved out of the land of the state, and not of the manor, for that had no legal existence when this sale and reservation were made. The land was not sold as part of the manor, nor was the rent reserved out of part of the manor.

But, secondly, there is not a pretext for this supposed resulting legal estate in the Penns, except the assumed reservation to them of the balance of purchase money on the grants held within their lines upon common terms. And how does this stand? It will be found to be only an implied grant, to which this implied legal estate is appended; an implication tacked to another implication; and finally, as the concluding link of this chain of implication, that ejectment is the remedy reserved for the recovery of that balance of the purchase money, which is itself the subject of the first implication.

If the rights of the Penns be circumscribed by the positive enactments of this law, then are they not only precluded from all claim to the balances due by this class of grantees, but also from those due by every description of purchasers; for there is no positive provision in the law which vests those balances in them. Their quit-rents are expressly reserved to them in the manors, but not so *with their [*315 balances of purchase money. But in the 9th and 10th sections, these arrearages of purchase money are excepted from the provisions of the law, without any express declaration to whom they shall belong; and from this, an implication is supposed to result in their favor. But surely, so far as relates to the balances due by the general grantees, the implication is so far from being a necessary implication, that its bearing is altogether the other way; the implied intent of the legislature is against a construction so obviously inconsistent with the general purposes of that body; a construction producing such an unjust, unreasonable and improbable discrimination between innocent and equally meritorious men of the same class. Construe the act so as to confine the grant to the Penns to their private interests in the manors, and it becomes sensible and consistent throughout; and while it secures to them, on the one hand, all the interests which, as individuals, they are entitled to; on the other hand, you extend to all other individual citizens, one uniform rule of legislation and relief.

Again, there is no reason for supposing that when the legislature uses the terms tenths and manors aforesaid, in the 9th section, or the said tenths and manors, in the 10th section, that it

uses them in any other sense than that in which they are used in the 8th section. The terms used, in fact, identify their meaning. But a correct construction of the terms used in the 8th section, in describing these tenths, or manors, is fatal to all implication in favor of the 316*] Penns, with reference to any *interest in the lands legally seated, previous to their appropriation. The words are "tenths, or manors, duly surveyed and returned into the land-office." But who will deny that these words are to be construed with reference to the intent and effect of such surveys? And what was that intent and effect? Simply to appropriate unseated lands. Would these proprietaries have been content in laying off these surveys, to have been precluded and deprived of half their interest by previous surveys, over which they could not have exercised the right of selling or retaining as they thought proper? If not, then, so far as relates to previously ceded lands, they never were appropriated by them, and it cannot be predicated of them, that in the sense of the parties they were surveyed and returned.

The construction now contended for, is obviously an afterthought of the plaintiffs below, growing entirely out of a supposed ambiguity in the words of the confiscation act, and would have been strenuously resisted, had they been so applied when their surveys of manors were first made.

Again, the rule of construction applicable to leases and wills are not essentially different in their principles. In legislating on this subject, the state had assumed all the rights, and, at least, could exercise all the powers of a manor-holder, in making his last will. Although by the charter the purchasers under manors are restricted from any alienation of their purchases, by which they might be devested of the incident of holding directly of the manor, it is obvious that such a change of 317*] *estate might be produced, by the act of the manor-holder. Suppose, then, the grantees of the manor in Springetsbury had sold any portion of the soil, and devested it of this incident, lying, we may suppose, in the very centre of the whole, would a devise in the very words of this act, "to wit, of the manor of Springetsbury, as duly surveyed and returned," have been construed to carry the portion previously disposed of? Or, to pursue the analogy further; suppose the purchase money unpaid, and a covenant by indenture of the tenant to pay the money to the vendor and his heirs, and even to hold the land charged with the payment, would a devise of the manor carry the money so reserved, or the devise of the debt carry the freehold in the land sold?

But, on this doctrine of implication I will make another observation. It is rebutted by the provisions of the instrument itself; and, in the case of a will, would be considered as an undisposed residue; for, when we look through the whole act, and we find this 8th section to be the only one which purports to give anything to the proprietaries, their whole interest having been previously confiscated; and when, in this section, we find their individual interests in the soil of the state, whether acquired as other individuals, or as proprietary appropriations, carefully designated, and even to the arrearages of quit-rents on such lands, expressly reserved to them; surely the implication arises, that this section was intended to embrace the whole provision meant to be made for them out of the common patrimony of the state.

*The omission to mention and reserve [*318 the arrearages of purchase money due on the manorial sales, might, with much greater reason, be urged as raising a presumption against their claims even to those balances. This, however, I reject; and for a reason which serves to throw some light upon the subsequent clauses of this statute; which is, that as the Legislature, in so many words, recognizes these alienations as individual sales, they very properly considered the balance due thereon as private debts; and, as no confiscation of private debts could be implied from the enacting clauses of the act, so no express reservation of such balances was deemed necessary. The subsequent exceptions in favor of balances due on manorial lands, therefore, I consider as intended only to guard against an extension of the words of the law to such individual contracts. The nine-tenths of the soil, and the balances of purchase money due on such parts as had passed to individuals, they considered as the property of the body politic, and appropriated it as such to the state. The one-tenth set apart for the proprietaries, they propose to put on the same footing with their individual interests, properly so called, and with it, to reserve to them the balances due on the lands appropriated to themselves. These are fair and consistent inferences, if not positive enactments; but it would be much more consistent with the positive enactments, to hold that all the balances due on the lands circumscribed on the manorial lines were still at the disposition of the legislature, than that they meant to *confer [*319 on the Penns more than they have declared, or made discriminations among the citizens at large, which no reason or policy could justify.

Upon the questions that have been raised upon the operation of the law, commonly called the seven years law, or the law of 1705 (though of much greater antiquity), it may be proper to make a few remarks.

I cannot see a reason why this law should have been supposed obsolete, more especially with reference to the early day in which it must have acted upon the interests of the parties in this cause. On the contrary, it appears to have been a favorite law of the colony, for we find it enacted and re-enacted, in opposition to reiterated appeals by the King in council, as will be seen by reference to Carey and Bioren's edition of the laws. In the same work, we find it printed under sanction of the legislature, and republished under the same authority, as lately as 1810. Indeed, upon reference to the concessions which composed the fundamental laws of the colony, we find the very law in its present terms; and are led to the conclusion that its constitutional character gave it a peculiar sanctity in the eyes of the commonwealth. Another consequence, also, results from its very early enactment; which is, that, contrary to a ground taken in argument, it must be construed as having a prospective effect, since it was adopted at a time when there could not have existed a case for it to govern, if solely retrospective. Of this law it has been

remarked, that for 116 years it does not appear 320*] that a cause *has been won or lost on the basis of it. And had the decisions of the state courts, prior to the revolution, been preserved, the observation would have had its influence. But in the absence of reports of such adjudications, there cannot exist such satisfactory evidence on the subject as to sustain the fact. One thing is very certain, that some beneficial influence must have been felt from its existence, or it would not have been so often or so pertinaciously insisted on by the colonists. If it covered their estates in no other way than by preventing suits, its great purposes were answered; and its sovereign influence, in this respect, may well be inferred, from the assumed nonexistence of decisions at law. It preserved health, if it did not cure disease. At present, it is unquestionably repealed by the act of 1785, for the two acts cannot stand together. The latter act extends the limitation of suits to twenty-one years; but if the limitation of seven years would produce the same effect, then would the prior law repeal the latter, or render it a mere nullity. And this accounts for its not having been heard of for the last forty years, which may be called the period of reported causes. Its repeal, however, at that time, has no influence upon the previous effect upon the rights of these parties.

It has been remarked of this law, as incontestable, that it could not convert an equitable into a legal estate. But this doctrine appears to me to do more than render the law obsolete; it renders it a mere nullity in its origin. What is gained by an estate's continuing an equitable 321*] estate? From *its inherent strength, unaided by the law, if accompanied with continued possession, it would continue a good equitable estate; and why should not the comprehensive words, "shall forever give an unquestionable title against all," be construed into a transmutation from an equitable into a legal title? How can any but a good legal title be denominated an unquestionable title? and why should not all comprise legal as well as equitable claimants? The opinion below supposes the signification of those terms to be circumscribed by the words "during the estate." But from this I must dissent, since these words do not necessarily convey that meaning, and are more properly applied to the distinction of estates into terms for years, estates for life, estates to be fee, in tail, etc.; all which may be either legal or equitable. Neither can I acquiesce in that part of the opinion which considers a discharge from the purchase money of the land as a necessary consequence of giving effect to the seven years law, as against the plaintiffs below in this cause; for the lien might continue, though a legal and absolute estate be vested in the defendants below. And, to prevent the operation of this law in favor of the possession, lest the claim for the purchase money should incidentally be barred, appears to be inverting the order of things; for, by the acts limiting suits on contracts, the suits for the purchase money might by possibility be barred; while the remedy to recover the land was still in full force, being of longer duration. The superior purpose of quieting estates of freehold, also would, under 322*] that *doctrine, be controlled by the inferior one of enforcing open contracts, or implied covenants. While the most ordinary means of adjusting contracts for the sale of lands on credit remained in practice, there could be no danger, in giving credit on sales, of losing both land and money, as the court supposes. But if that consequence did follow, non constat, but that the public interest, as well as private tranquillity, might have been promoted by it.

To me it appears, that this seven years law has had a sovereign influence over the rights of property in that state. I have no doubt that it is under its influence the doctrine has grown up, that a possessor of the soil need not produce a patent to protect his freehold; as well as the doctrine, that those words which, on the face of the warrant, would seem a condition, shall not be held to produce more than a contract and a lien.

But if this seven years law did not quiet the possession of the defendants below, I confess I am at a loss to understand the principle upon which that effect is denied to the limitation act of 1785. Was their estate void or voidable, legal or equitable? In every point of view, the law appears to me to operate in their favor.

The opinion below is thus expressed: "Possession, to create a bar by length of time, must be adverse, which it cannot be, if the defendant's entry was under a title derived from the plaintiffs." That a possession, to sustain a bar under the act, must be adverse, is unquestionable. But when the court comes, in the next number of the *period, to ex- [*323 plain what is meant by an adverse possession, we find the doctrine asserted, that a possession cannot be held adverse to the title of him from whom it is derived. This doctrine I hold to be altogether untenable; and this sentence alone, though every other idea be put out of the case, would, in my view of the subject, entitle the plaintiffs here to a reversal of the judgment. The title acquired by a vendee is most peculiarly adverse to that of him from whom he purchases.

But under what view of the subject could these plaintiffs be held mere tenants at will to the parties plaintiffs below? or their possession any other than an adverse possession? They did not hold as the agents or representatives of those through whom they derived the title. From the time of entering into possession, they held in virtue of the estate in themselves, and not that of any other. If the idea is, that the proprietaries might at any time have entered upon them, and in that sense, the estate was held at their will, the answer is, that is one of the very cases that the act of limitation provides against; for it takes away that volition in the proprietary, unless the entry be made in twenty-one years. But the fact was not so; these tenants did not hold at the will of the proprietaries, for all those who acquired under the common terms were taken under the care of the law, and we find act upon act to regulate the proceedings of the proprietary towards them. The right to turn them out by the shoulders never existed in the proprietary; he must have resorted to his entry, or suit, to recover possession; they were *consid- [*324 ered as holding a freehold, and the law did not entitle him to resume possession arbitrarily. It

was the doctrine of that state, that his rights were restricted to the payment of the purchase money and quit-rents, at least until he tendered a return of advances and improvements. It cannot be imagined that the reservation of quit-rents converted the purchasers into tenants at will; neither principle nor authority would sanction the idea. Nor can I perceive anything either in the legal relations or contracts of these parties that could sustain the doctrine that the possession of the defendants was permissive, and identified with that of the proprietary. A tenancy at will must be the result of contract, express or implied; but a freehold, granted on condition, is not converted by forfeiture into a tenancy at will. Yet, had it been otherwise, surely lapse of time, general acquiescence, and received opinion, ought to be held to produce the same consequences as to the tenure of property in this State, which were produced by the same causes in England upon the tenure by copy of court-roll. That which was in its origin nothing but a tenure at will, retains now nothing of its origin but the formula which attests its history.

To conclude, let the estate of these defendants below be considered as either void or voidable, and I see not how the act of limitations is to be escaped by their antagonist. If voidable, on failure to pay the purchase money, the entry is expressly taken away by that statute; and if void, they cannot be reduced lower than 325*] to the grade *of tenants by sufferance, with regard to whom entry and suit was just as indispensable, as with regard to any other tenure. (Co. Lit. 57.) In the application of the doctrines on the statute of limitations, the incidents to the two tenures ought not to be confounded.

Judgment affirmed.

[Devise. Condition Precedent or Subsequent.]

ROBERT J. TAYLOR, et al., Appellants,
v.
JOHN THOMPSON MASON, Respondent.

R. B., being seized of lands in Maryland, made three instruments of writing, each purporting to be his will. The first, dated in 1789, gave his whole estate to his nephew, J. T. M., after certain pecuniary legacies to his other nephews and nieces. In the second will, dated in 1800, the testator gave his whole real estate to J. T. M., during his life; and after his death, to his eldest son, A., in tail, on condition of his changing his name to A. Barnes, with remainder to the heirs of his nephew, J. T. M., lawfully begotten, forever, on their changing their surnames to Barnes.

The third will, which was executed after the others, and probably in 1803, after some small bequests, proceeded thus: "I give the whole of my property, after complying with that I have mentioned, to the male heirs of my nephew, J. T. M., lawfully begotten, forever, agreeably to the law of England, which was the law of our state before the revolution, that is, the oldest male heir to take all, on the following terms: That the name of the one that may have the right, at the age of twenty-one, with his consent, be changed to A. Barnes, by an act of public authority of the State, without any name added, together with his taking an oath, before he has *possession, before a magis- [*326 trate of St. Mary's county, and have it recorded in the office of the clerk of the county, that he will not make any change, during his life, in this my will, relative to my real property. And on his refusing to comply with the above-mentioned terms, to the next male heir, on the above-mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the same terms; and all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say, not exceeding twelve months, if in that time it can be done, so that no act of intention to defeat my will shall be allowed of; and on their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, J. T. M., named A. T. M., on the above-mentioned terms; and on his refusal, to his brother, J. T. M.; and on his refusing to comply with the above-mentioned terms, to the heirs male of my nephew, A. B. T. M., lawfully begotten, on the above-mentioned terms; and on their refusal, to the male heirs of my neice, Mrs. C., lawfully begotten, on their complying with the above-mentioned terms; and on their refusal, to the daughter of my nephew, J. T. M., named Mary, so on to any daughter he may have or has." The testator then appoints J. T. M. his sole executor, with a salary of $1,600 per annum, for his life, and adds "and my will is, that he shall keep the whole of my property in his possession, during his life." He then empowers his executor to manage the estate at his discretion, to employ agents, and to pay them such salaries as he shall think proper; to repair the houses, and to build others, as he may think necessary; to reside at his plantations, and to use their produce for his support; and adds, "after which, to be the property of the person that may have a right to it, as above mentioned."

Held, that the conditions, annexed to the estate devised to the oldest male heir of J. T. M., were subsequent and not precedent, and that, consequently, the contingency on which the devise was to take effect, was not too remote, the estate vesting on the death of J. T. M.; to be devested, on the non-performance of the condition.

Quære, Whether J. T. M. took an estate tail.

Quære, Whether the last will revoked those which preceded it.

APPEAL from the Circuit Court of Maryland.

The bill in this cause was filed in behalf of

NOTE.—Conditions in Wills, etc.

No precise form of words is necessary to create conditions in wills; any expressions disclosing the intention will have that effect.

Conditions are either precedent or subsequent; in other words, either the performance of them is made to precede the vesting of an estate, or the non-performance to determine an estate antecedently vested. 1 Jarman on Wills, 2d Am. ed. 671, marg. p. 796.

It is a well-established rule of construction of wills, that no form of words will constitute a condition precedent, when the intentions of the testator, to be collected from every part of the will, clearly indicate a different purpose. Stark v. Smiley, 25 Me. 201; Acherly v. Vernon, Wills, 153; Harvey v. Aston, 1 Atk. 361; Welles v. Smith, 2 Edw. Ch. 78; Campbell v. McDonald, 10 Watts. 179.

Conditions precedent are such as must happen or be performed before the estate can vest or be enlarged; they admit of no latitude; they must be strictly, literally, and punctually performed. Van Horne v. Dorrance, 2 Dall. 317, per Patterson, J.

Where an act is previous to any estate, and that act consists of several particulars, every particular must be performed before the estate can vest or take effect; and this has been so strongly adhered to, that even where the condition has become impossible, no estate or interest shall grow thereon. Co. Litt. 206, a; 1 Atk. 376: Moakley v. Riggs, 19 John. 71, 72; Taylor v. Bullen, 6 Cow. 627.

A devisee cannot avail himself of the invalidity of a condition precedent in a devise. Taylor v. Mason, supra, 350, per Marshall, C. J.

Where one takes an estate with power to sell, depending on a contingency, the happening of the contingency is a condition precedent to his right to sell. A deed made by him before is void. Minot v. Prescott, 14 Mass. 495.

A devise of land "for the purpose of building a school-house, for the use of a school, provided it be built" on a certain site, is a condition subsequent. Hayden v. Stoughton, 5 Pick. 528.

So of a devise to a town, to use and improve forever, and not to be sold, but rented out, and the rents applied to the ministry of the town. Brigham v. Shattuck, 10 Pick. 306.

Where there is a general devise in words import-

327*] *one of the co-heirs of Richard Barnes, deceased, and her children; and claims on account of the profits of his estate, from the defendant, J. T. M., also a co-heir, who claims and holds possession of the estate, under the will of the said Richard.

Three instruments of writing, purporting to be the will of the testator, all of them properly authenticated, were exhibited in the record. The first, dated on the 31st day of October, in the year 1789, gives his whole estate, after pecuniary legacies to his other nephews and niece, to the defendant, J. T. M.

In the second will, which is dated the 16th day of July, 1800, the testator gives his whole real estate to J. T. M. during his life, and after his death to his eldest son, Abraham, in tail, on condition of his changing his name to Abraham Barnes, with remainder to the heirs of his nephew, J. T. M., lawfully begotten, forever, on their changing their surname to Barnes.

The third will is without date, but is proved, by its contents, to have been executed after the others, probably in the year 1803. After some small bequests, the testator says: "I give the whole of my property, after complying with what I have mentioned, to the male heirs of my nephew, J. T. M., lawfully begotten, forever, agreeable to the law of England, which was the law of our state before the revolution, that is, the oldest male heir to take all, on the following terms: That the name of the one that may have the right, at the age of twenty-one, with his consent, be changed to Abraham 328*] *Barnes, by an act of public authority of the state, without any name added; together with his taking an oath, before he has possession, before a magistrate of Saint Mary's county, and have it recorded in the office of the clerk of the county, that he will not make any change during his life in this my will, relative to my real property. And on his refusing to comply with the above-mentioned terms, to the next male heir on the above mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the above terms; and all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, if in that time it can be done, so that no act of intention to defeat my will shall be allowed of; and of their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, J. T. M., named A. T. M., on the above-mentioned terms; and on his refusal, to his brother, J. T. M.; and on his refusing to comply with the above-mentioned terms, to the heirs male of my nephew, A. B. T. M., lawfully begotten, on the above mentioned terms; and on their refusal, to the male heirs of my neice, Mrs. Chichester, lawfully begotten, on their complying with the above-mentioned terms; and their refusal, to the daughter of my nephew, J. T. M., named Mary; so on, to any daughter he may have, or has." The testator then appoints J. T. M. his sole executor, with a salary of sixteen hundred dollars per year for his life; and adds, "and that my will is, that he shall keep the whole of my property *in his [*329 possession during his life." The testator then empowers his executor to manage the estate at his discretion, to employ agents, and to pay them such salaries as he shall think proper; to repair the houses, and to build others, as he may think necessary; to reside at his plantations, and to use their produce for his support; and adds, "after which, to be the property of the person that may have a right to it, as above mentioned." The testator also requires his executor to take an oath, "that he will justly account for the property that he may have the power of."

Richard Barnes died in April, 1804, and J. T. M. proved three several paper writings, as his last will, and qualified as his executor. The testator had one brother, who died in his lifetime without issue, and one sister, who intermarried with Thompson Mason, and died also in the life-time of the testator, leaving three sons, H. T. M., A. B. T. M., and J. T. M., and one daughter, A. T. M., one of the complainants, who intermarried with R. W. Chichester. The rights of the said A. T. Chichester are conveyed, by deed, to trustees, for the benefit of herself and children. J. T. M. had no son living at the death of the testator, but has two after-born sons, who are now alive.

The Circuit Court dismissed the bill, and the cause was brought by appeal to this court.

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ing a present interest, in a will making no other disposition of the property, on a condition that may be performed at any time, the condition is subsequent. Finley v. King, 3 Pet. 376.

Where a testator devises his estate to his wife "to hold the same to her and her heirs forever, on condition, however, that my said wife shall support and maintain in a comfortable and suitable manner my aged and infirm mother, should my mother survive me," the devise is upon a condition subsequent, and the estate is subject to forfeiture for neglect of performance. Marwick v. Andrews, 25 Me. 525.

The devisee becomes entitled to enter upon and enjoy the estate until forfeited; and no one can take advantage of a breach of such condition, and make an entry to create a forfeiture of the estate, but an heir at law of the devisor. Ib.

Where a devise of real estate is made on a condition subsequent, and, after the devisee becomes lawfully seized, a breach of the condition happens, the estate thereby passes to the residuary devisee, and not the heirs at law. And on the death of the residuary devisee before condition broken, the estate passes to his heirs. Hayden v. Stoughton, 5 Pick. 528; Brigham v. Shattuck, 10 Pick. 306; Clapp v. Stoughton, 10 Pick. 463.

The testator devised a farm to his son in fee, upon condition that the son should support the testator's daughters. Held, that the condition attached to the estate, and that a breach would work a forfeiture, and vest the title in the testator's heirs. Hogeboom v. Hall, 24 Wend. 146.

Conditions precedent and subsequent differ considerably in regard to the effect of events rendering the performance of them impracticable. 2 Story, Eq. Jur. s. 1306; 1 Jarman on Wills, 2 Am. ed. 677, marg. p. 805.

It is clear, that where a condition precedent becomes impossible to be performed, even though there be no default or laches on the part of the devisee himself, the devise fails. Ib.; Rounded v. Cuner, 2 Bro. C. C. 67; S. C. 1 Wils. 159; Bertie v. Falkland, 3 Ch. Cas. 129; 2 Vern. 340; 1 Eq. Ca. Abr. 110, pl. 10; Wells v. Smith, 2 Edw. 78; 4 Kent, 5th ed. 125.

On the other hand, it is clear, that if performance of a condition subsequent be rendered impossible, the estate to which it is annexed becomes, by that event, absolute. Thomas v. Howell, 1 Salk. 170; Laughter's case, 5 Rep. 22; 2 P. Wms. 626; 2 Story, Eq. Jur. s. 1304, et seq.; 4 Kent, 7th ed. 124 to 127; McLachlan v. McLachlan, 9 Paige, 534; Merrill v. Emory, 10 Pick. 507; Hughes v. Edward, post, 489.

It is far from clear, however, that this principle applies even to conditions subsequent, if the property be given over on non-performance. 1 Jarm.

The appellants made the following points in this court:

1. That the third will, whether its disposi- *330*] tion *be valid or not revokes the other two, since it expresses a clear intention on the part of the testator, to dispose differently of the whole estate.

2. That it gives no estate for life or years, absolute or in trust, to John Thompson Mason, the respondent, but merely the custody and care of the property, during his life, as agent or curator, with a salary for his services.

3. That no estate, for life or years, can be raised for him by implication, because the original estate did not move from him, and never was in him.

4. Consequently, that he has no estate of freehold, with which a subsequent limitation in fee could unite, so as to create a fee in him, under the rule in Shelley's case.

5. That if he takes a life estate, it is merely fiduciary, and not beneficial, for which reason it could not unite with a limitation over in fee, if there were one, so as to give him a fee under the rule.

6. That the words in this will, "the male heir of my nephew, John Thompson Mason, lawfully begotten, forever," as explained and modified by the subsequent expressions, designate the "male heir of the body of J. T. Mason," as the person who is to take the estate, and thus operate as a "descriptio personæ," and not as a "limitation." Consequently, that they do not create such an estate of inheritance, as is capable of uniting with a life estate, under the rule; but must operate, if at all, as a devise, per se, of an estate *331*] *in possession or remainder, or as an executory devise.

7. That this disposition cannot operate as the devise of an estate in possession, for want of some person, in existence at the testator's death, who could then take: 1st. Because the person designated, was to be "the heir" of John Thompson Mason, who was then alive, and nemo est hæres viventis. 2d. Because, as he had then no issue male, or heir male of his body, there was no person who answered the description, taken in its largest and most general sense.

8. That the disposition in question cannot operate as a remainder, vested or contingent, because there was no preceding estate to support it; none having been directly given to John Thompson Mason by the will, or being raised for him by implication.

9. That, admitting John Thompson Mason to have a life estate under the will, which might support a remainder, this disposition cannot operate as a vested remainder, because, at the testator's death, there was no person in existence who answered the description; nor as a contingent remainder, because it depended on two distinct and successive contingencies: 1st. That John T. Mason should have a son. 2d. That this son should live to the age of twenty-one years, then assume the name of Abraham Barnes, by legislative authority, and take the oath prescribed by the will, which is a possibility too remote.

10. That this disposition cannot be supported as an executory devise, because it was to take *effect on two remote and con- [*332 tingent events: 1st. That the eldest son of John T. Mason should voluntarily, and after he attained the age of twenty-one years, change his name to that of Abraham Barnes, through the operation of a legislative enactment; and, 2d. That he should take an oath, as prescribed by the will; which events, if they took place at all, might not happen within the life-time of John Thompson Mason, and twenty-one years and nine months afterwards.

The cause was fully argued, upon all these points, by Mr. Jones and Mr. Harper for the appellants, and by the Attorney-General and Mr. Emmet for the respondents; but, as the questions whether an estate tail vested in John Thompson Mason, and whether the last will revoked those which preceded it, were not considered and determined by the court, it has not been thought necessary to report that part of the argument.

The counsel for the appellants stated, that as to whether a condition be precedent or subsequent, it is always a matter of construction, depending on the intention of the testator. The principle is, that where an intention appears to create an estate at all events, and merely to annex a condition to it,

on Wills, 2d Am. ed. 679, marg. p. 807; 2 Atk. 16; Peyton v. Bury, 2 P. W. 626; King v. Withers, 1 Eq. Ca. Ab. 112, pl. 10.

A condition, in view of the common law is regarded as impossible, only when it cannot, by any human means, take effect. But if it be only in a high degree improbable, and such as it is beyond the power of the obligee to effect, it is then not deemed impossible. 2 Story, Eq. Jur. s. 1305.

If a grant is made on a condition subsequent, and the performance becomes impossible by the act of the grantor, the condition is void. United States v. Arredondo, 6 Pet. 691, 745; Whitney v. Spencer, 4 Cow. 39.

Where, in the event of the testator's lawful heir not being found within a year after his decease, he devised certain lands to A, "upon condition he changes his name to S." A did not change his name to S, within the year, but did so after a final decree in chancery, which gave him the possession of the property; and this was adjudged sufficient. Davies v. Lowndes, 2 Scott, 67.

Conditions that are repugnant to the estate to which they are annexed, are absolutely void. Stockton v. Turner, 7 J. J. Marsh. 192; Att'y-Gen'l v. Hall, Jacob, 395; Tibbetts v. Tibbetts, 19 Ves. 656; 1 Jarm. on Wills, 2d ed. 680, marg. p. 809, 810.

A power of alienation is necessarily and inseparably incidental to an estate in fee. If, therefore, lands be devised to A and his heirs, upon condition that he shall not alien, the condition is void. Co. Litt. 206, b, 223, a; Newkirk v. Newkirk, 2 Caines, 345; Byng v. Lord Stafford, 5 Beav. 558; McWilliams v. Nisley, 2 Serg. & R. 513; Hall v. Tuft, 18 Pick. 445; Schemerhorn v. Negus, 1 Denio. 448; Ware v. Cann, 10 Barn. & C. 433.

A condition in a devise of land, that the land shall not be subject to conveyance or attachment, is void. Blackstone Bank v. Davis, 21 Pick. 42; Howley v. Northampton, 8 Mass. 3, 6.

But such a partial restraint on the disposing power of the tenant in fee may be imposed, as that he shall not alien to such a one, or to the heirs of such a one, or that he shall not alien in mortmain. Co. Litt. 223, a; McWilliams v. Nisley, 2 Serg. & R. 513.

A condition in a devise for life, whereby it is to be devested by the marriage of the devisee, is void. Parsons v. Winslow, 6 Mass. 169.

But if the devise be given over, so as to create an interest in another immediately on the breach of such condition, the condition is valid. Parsons v. Winslow, 6 Mass. 169, 178.

Where there is an absolute devise, a subsequent void provision will not defeat it. Martin v. Ballou, 13 Barb. 119.

by which it may be defeated, this is a condition subsequent; and if followed by a limitation over, in case the condition be not fulfilled, it makes a conditional limitation. But if the intent appear to be, that the vesting or 333*] creation *of the estate shall depend on the condition, then it is precedent.[1] There could be no dispute as to general principles, which were incontrovertibly settled by all the authorities. The only question was, as to the application of them to the particular case. They entered into a critical examination of the words of the last will, to show that the conditions annexed to the estate devised to the oldest male heir of J. T. M., were precedent and not subsequent.

The counsel for the respondents considered the conditions as subsequent and not precedent; or rather, they considered them as conditional limitations, attached to, and defeating, in each instance, the preceding estate, on refusal to perform the acts required, and thus creating a new estate in tail male. It was said to be laid down by the authorities, that there are no precise technical words required in a deed (a fortiori in a will) to make a stipulation a condition precedent or subsequent.[2] Neither does it depend on the circumstance whether the clause was placed prior or posterior in the deed, so that it operated as a proviso or covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the trans- 334*] action.[3] Thus, *Lord Eldon says,[4] "I take it to be fully settled that a condition is to be construed to be precedent or subsequent, as the intention of the testator may require." And Heath, J., in the same case, adds, "It has been truly said, that there are no technical words by which a condition precedent is distinguishable from a condition subsequent; but that each case is to receive its own peculiar construction, according to the intent of the devisor." Now, let that test be applied to the point in question. It is clear that the testator intended the estate for the benefit of the sons of J. T. M., after his death, and successively for the heirs male. If this be a condition precedent, as is contended by the appellants, and the will of 1789 be entirely revoked, the fee will be in the heirs-at-law, from the death of J. T. M., till the condition be performed, and the rents, issues and profits belong to them. Suppose the first heir male an infant of tender years; the rents, etc., do not go to his maintenance and education, nor yet accumulate for his benefit, as was directed, even in the lifetime of his father. Let him die under twenty-two, without having performed the condition, leaving an infant son; that son must take by inheritance, if at all, and not by purchase. Can he take by inheritance from his father, an estate tail that never vested in his father? But suppose he can, there is still another long enjoyment of the estate by the heirs-at-law, for their own benefit. The appellants seek, by 335*] making this a condition precedent, *entirely to defeat the testator's bountiful intentions in favor of J. T. M.'s family; for they say, this being a condition precedent, the limitation cannot take effect as a contingent remainder; for then there would be three contingencies, and a possibility on a possibility necessary to its vesting. It is clear, then, that to preserve the testator's primary or general intention, or, indeed, any part of his intention towards that family, the terms must not be considered as a condition precedent. In a will, no words of condition are too strong to bend to the testator's intention. Thus, "if a man devises a term to A, and that if his wife suffers the devisee to enjoy it for three years, she shall have all his goods as executrix, but if she disturbs A, then he makes B his executor, and dies; his wife is executrix presently; for though in grants, the estate shall not vest till the condition precedent is performed, yet it is otherwise in a will, which must be guided by the intent of the parties; and this shall not be construed as a condition precedent, but only as a condition to abridge the power of the executrix, if she perform it not."[5] Although the conditions over may be void, their existence may be used to illustrate the testator's intention, and to show that this was intended to operate only as a limitation. It was intended that every one having the right, should change his name, and take the oath, before he had possession; "so that no act of intention to defeat his will should be *allowed of." [*336 Those, then, taking by inheritance through the first heir male, were to be subject to this condition, and on their refusing, the estate was to go over. It is impossible to contend that those so taking by inheritance should be regarded as purchasers, or that, with them, this should be considered as a condition precedent; and why should not the same construction of the testator's intention, that must be given with respect to them, be given in the first instance, where the same proviso is used, viz., that it is a conditional limitation, on the refusal to perform which, the antecedent estate is defeated, and a new one arises? Unquestionably the limitation, on refusal to comply, is a conditional limitation. If, then, between such conditional limitation and a condition precedent, bearing on the same object (let the words be ever so clear), there be a positive incompatibility, the principle must be applied, that if words be so inconsistent that they cannot possibly stand or be reconciled, those words shall be rejected which are least consistent with the general intention of the testator.[6] The incompatibility between conditions and conditional limitations, results from this: "Conditions can only be reserved to the feoffer, donor, lessor, or their heirs, but not to a stranger;"[7] and this by implication, without any words of reservation; and for *every condition broken, the heir of the [*337 donor shall enter, and by so doing, restore the original estate. So that, except in gavelkind[8] and borough-English,[9] and a husband's alienat-

1.—2 Cruise Dig. 3, 4, 5; Cas. temp. Talb. 165; 1 T. R. 645; 2 Bos. & Pull. 295; 2 Vern. 620; Fearne Cont. Rem. 424, 425, 502; Coll. Jurid. 378.
2.—1 Plowd. 23; 2 Vern. 660; Cas. temp. Talb. 164; 1 Burr. 38; 4 Burr. 1929.
3.—Hotham v. East India Co. 1 T. R. 645.
4.—In Planner v. Scudamore, 2 Bos. & Pull. 295.
5.—Jennings v. Gore, Cro. Eliz. 219.
6.—2 Fonbl. Eq. c. 3, s. 3, Note l. p. 69; Haws v. Haws, 3 Atk. 524; 1 Ves. 14; Perkins v. Bayntum, 1 Bro. Ch. Cas. 118; Doe v. Aplyn, 4 T. R. 88.
7.—1 Co. Litt. 214 b.
8.—Co. Litt. 11, 12.
9.—Godb. 3.

ing his wife's estate on condition,[1] the heir-at-law enters and holds for his own benefit. This applies to conditions subsequent. As to conditions precedent, the estate remains in the heir-at-law, and never vests till the performance of the condition, and, during all that time, the heir-at-law holds it beneficially. But the effect of a conditional limitation is, that the next devisee alone can enter, and he takes and enjoys for his own benefit. Now, it is incompatible, that the heir-at-law should have the right to hold the estate for his own benefit; and the devisee to hold it for his benefit; and in these incompatible results, the question, which shall prevail, must depend upon which is conformable to the intention of the testator. Thus, it is laid down that "words of an express condition shall not ordinarily be construed into a limitation; but where an estate is to remain over for breach of a condition, which is by express words a condition, yet it ought to be intended as a limitation."[2] And the contrary doctrine in Mary Portington's case[3] has been often denied to be law.[4]

338*] *The expression "before he has possession," is much relied on, as showing a condition precedent. But it must, like other equally strong expressions, bend to the testator's general intent, and to the words "who has the right." How "has the right," if obtaining an act of the legislature and changing the name after twenty-one, be a condition precedent? For then no estate can vest, and no right be had, till the condition be performed. So, it is said, the will shows the right is not to commence till he has arrived at twenty-one. But the age of twenty-one connects itself, both in sense and grammar, with the act to be done, and not with the vesting of the right. The expression "refusing to comply," and the giving over the estate to others, show the refusal to be the definite act, by which one estate was to be determined, and the other to commence. Thus, where similar words were used, "on condition that he should in twelve months after the testator's death, or in twelve months after he attained the age of twenty-one years, suffer a recovery of an estate in the county of Warwick, and settle it to certain uses," they were clearly taken to be a condition subsequent, and not a conditional limitation.[5] Indeed, the words "before he has possession," are susceptible of another interpretation, consistent with the previous vesting of the estate. The testator did not view all possible contingencies accurately. He clearly took for granted that the one to take would be an infant, and meant to make a provision accordingly. He probably 339*] used those words to distinguish *the time when a guardian would receive the rents, issues and profits, from that when the minor would come into the actual possession of his estate.

The cause was continued, for advisement, to the present term.

Mr. Chief Justice **Marshall** delivered the opinion of the Court, and, after stating the case, proceeded as follows:

If the estate should yield any surplus profits, after satisfying the charges placed on it by the testator, J. T. M. is directed to account for those profits, and they are the property of "the person that may have the right," according to the language of the will.

Are the heirs-at-law the persons "who have the right," according to this language?

Certainly not. The plain intention of the will is to exclude them. They admit this; and support their claim by alleging that the will, so far as respects the devises which are to take place after the death of J. T. M., is utterly void, the limitations over being too remote.

The first limitation is to "the male heirs of my nephew, J. T. M., lawfully begotten, forever, agreeably to the law of England;" that is, the oldest male heir to take all.

If the clause stopped here, there could be no question in the case. The person who should be the eldest male heir of J. T. M. at the time of his death, would take the estate. But the testator proceeds to prescribe the "terms" on which such *eldest male heir should [*340 take. They are, "that the name of the one that may have the right, at the age of twenty-one, with his consent, be changed to Abraham Barnes, by an act of public authority of the state, without any name added, together with his taking an oath before he has possession," "that he will not make any change during his life in this my will, relative to my real property. And on his refusing to comply with the above-mentioned terms, to the next male heir, on the above-mentioned terms, and so on, to all the male heirs of my nephew, J. T. M., as may be, on the above terms; and all of them refusing to comply in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, if in that time it can be done, so that no act of intention to defeat my will shall be allowed of; and on their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, J. T. M." etc.

The time allowed the eldest male heir of J. T. M. to perform the condition on which his estate would, according to the words of the will, become absolute, is twelve months after he shall attain his age of twenty-one years. As J. T. M. might die, leaving no son alive at his death, but leaving his wife enciente of a son, it is obvious that the contingency on which the estate depended might not happen within a life, or lives, in being, or within twenty-one years and nine months after the death of J. T. M. If, therefore, the estate did not vest until the contingency should happen, the limitation over to the eldest male heir of J. T. M., depends on *an event which [*341 is too remote to be tolerated by the policy of the law, and the remainder is consequently void. If, on the contrary, the estate is to vest on the death of J. T. M., to be devested on the non-performance of the condition, the limitation in remainder is valid, and the plaintiffs are not entitled to the account for which the bill prays.

The inquiry, then, is, whether the conditions

1.—8 Co. 43.
2.—Page v. Hayward, 11 Mod. 61; 2 Salk. 578.
3.—10 Co. 35.
4.—Brownl. 65; Roll. Abr. 412; Ventr. 200; 3 Lev. 132; 2 Show. 398; 1 Bos. & Pull. 313.
5.—Duke of Montague v. Beaulieu, 3 Bro. Parl. Cas. 277.

annexed to the devise of the remainder, be precedent or subsequent; and this, it is admitted, must be determined by the intention of the testator, which intention is to be searched for in his will.

All the instruments of writing purporting to be his last will, show that his firm and continuing purpose, from the 31st day of October, in the year 1789, to the term of his death, in the year 1804, was to preserve his estate entire for the benefit of a single devisee, and not to permit it to be divided among his heirs. The same papers, likewise, show that the first object of his affection and bounty was J. T. M.; and the second was the eldest male heir of J. T. M. An ample and unconditional provision, perhaps equivalent to the whole value of his real estate, is made for J. T. M. during his life; and on his death, the whole real estate, with any residuum of profit which might possibly be accumulated during his life, is given to his eldest male heir. If these devises should be expressed in ambiguous language, this obvious and paramount intention ought to serve as a key to the construction.

The language of the devise in remainder, imports an intention that it should take effect on 342*] the *determination of the particular estate. So soon as J. T. M., the first object of his bounty, is removed, the eldest male heir of J. T. M., the second object of his bounty, comes into view: "I give the whole of my property" "to the male heirs of my nephew, J. T. M., lawfully begotten, forever, agreeable to the law of England; that is, the oldest male heir to take all, on the following terms," etc. These words postpone the interest of the devisee no longer than till he can be ascertained; that is, till the death of J. T. M., who was to occupy the premises for his life. The eldest male heir of J. T. M. would be known at his death, at which time the particular estate which was carved out of this general devise, would determine, or at farthest, within nine months afterwards. The language is not such as a man would be apt to use who contemplated any interval between the particular estate and the remainder. The words import the same intention as if he had said, I give to the eldest male heir of J. T. M. all my property, on condition that, at the age of twenty-one years, his name be changed to that of Abraham Barnes, by an act of public authority of the state, etc. Such words, it seems to the court, would carry the estate immediately to the devisee, without waiting for the performance of the condition.

With this general intent, manifested in each of these instruments, and this language, showing the expectation that no interest would intervene between the particular estate devised to J. T. M. and that to his eldest male heir, the conditions on which that devise was made 343*] must be expressed *in language to show very clearly that they were to be performed before the estate could vest, to justify the court in putting that construction on this will.

Let that language be examined. The devise is of the whole property to the male heirs of J. T. M., in succession, the eldest to take first. The condition is to be performed by "the one that may have the right." In the mind of the testator, then, the right was to precede the condition, not be created by it. He would not have described the person who was to perform the condition, as already having "the right," if the impression on his mind had been, that no person would have the right until the condition should be performed.

This expression is entitled to the more influence, from the consideration that the condition is to be performed by the person having the right at the age of twenty-one, or in a convenient time afterwards. The devisee might be an infant at the time of the death of J. T. M. The person who has the right, if an infant, is allowed till he attains his age of twenty-one years, and a reasonable time afterwards, to perform the condition. This is inconsistent with the idea that the condition must be performed before the estate vested, before the right accrued.

The testator then directs, in addition to the change of name, that an oath, prescribed in his will, shall be taken, and then proceeds, "and on his (the person that may have the right) refusing *to comply with the [*344 above-mentioned terms, to the next male heir on the same terms."

The property is, in the first instance, devised to all the male heirs of J. T. M., the oldest to take first. The testator then proceeds to describe the state of things in which the next oldest is to take. That state of things is the refusal of the oldest to comply with the terms annexed to the estate given to him. Upon this refusal, the devise is immediate. No intervention of the heir-at-law is necessary to defeat the title of the oldest, and to vest the property in the next male heir. But, until this refusal, the rights of the oldest remain unchanged.

Although the words "refusing to comply" may, in general, have the same operation in law as the words "failing to comply" would have, yet, in this case, they are accompanied and explained by other words, which show that the word "refusing" was used in a sense which might leave the estate in the devisee, though his name should not be changed. Where the condition to be performed depends on the will of the devisee, his failure to perform it is equivalent to a refusal. But where the condition does not depend on his will, but on the will of those over whom he can have no control, there is a manifest distinction between "refusing" and "failing" to comply with it. The first is an act of the will, the second may be an act of inevitable necessity.

In this case, the name is to be changed by a legislative act. Now, the eldest male heir of J. T. M. may petition for this act, but the legislature *may refuse to pass it. In such [*345 a case, the devisee would not "refuse" to comply with the terms on which the estate was given to him; those terms would neither be literally nor substantially violated. If there were nothing in the words of the will to give additional strength to this construction, the refusal of the legislature to pass the act would not be a refusal of the devisee to comply with the terms, and would seem in reason to dispense with the condition, as effectually as the passage of an act to render the condition illegal. Its performance would be impossible, without any default of the devisee.

But there are other words which show conclusively that the testator intended, by this ex-

pression, to make the devise to the next and other devisees to depend entirely on a willful and voluntary disregard, on the part of the eldest, of the terms on which the property was devised to him.

After giving the estate to the male heirs of J. T. M., in succession, the testator proceeds: "And all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, if in that time it can be done, so that no act of intention to defeat my will shall be allowed of, and of their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, H. T. M." etc.

These words expressly refer to all the male heirs of J. T. M., including the oldest, apply to each particular devise, and fully explain the intention of the testator on the subject of the [*346 change of *name. It is to be changed in twelve months after the devisee attains his age of twenty-one years, "if in that time it can be done;" and this provision is made, that "no act of intention to defeat his will may be allowed of." The devise over is on "refusing" to comply with the terms on which the estate is given in the first instance, and this "refusing to comply," takes place only "if it can be done"—exists only where there is "an act of intention to defeat his will." If it "cannot be done," if there be "no act of intention to defeat his will," then there is not that "refusing to comply with the terms" on which the devise over is to take place.

All these provisions appear to the court to demonstrate that the testator intended the devise to take effect immediately, to be defeated by the devisee's refusing to comply with the terms on which the property was given.

The devisees are, all of them, the co-heirs of the testator, and the whole purpose of the will is to prevent their inheriting any part of his estate as his heirs. J. T. M. takes an interest for life, beneficially, to a considerable extent, perhaps to the whole extent of the profits, certainly to the whole extent, if he chooses to expend the whole, except $1,600 per annum, in repairs, buildings, and the support of himself and family; and is to take the surplus profits, if there be any, as trustee; but as trustee for whom? for his eldest male heir, not for the heirs of his testator.

That eldest male heir takes the whole property, including these possible surplus profits, on [347*] *certain conditions, one of which is, the change of his name by act of assembly. He might possibly, nay probably, be an infant, for J. T. M. had no male heir at the death of the testator. The event of his being an infant is particularly contemplated, and provided for, in the will. Such infant devisee is allowed twelve months, after attaining his full age, to perform the condition. No provision whatever, if the estate does not vest immediately, is made for his education and maintenance. Not even these surplus profits, which are so carefully to accumulate for his use, are given to him. The infant orphan, heir of an enormous estate, who was the particular favorite, and whose future grandeur constituted the pride of his ancestor, is cast, by this construction, on the world, without the means of subsistence, while the whole profits of his estate pass, without account, to those for whom the testator intended nothing.

The estate is devised, in succession, to each of the heirs of the testator, on the same condition; and, if it be a condition precedent, the consequence is, that the same persons who could not take it in succession, as he wished it to pass, would take it in common, as we wished it not to pass. The whole scheme of the will would be defeated, and an object be effected, which all his ingenuity had been exerted to prevent.

In this view of the case, it may be proper again to observe, that the devise over to the second male heir of J. T. M., is limited to take effect on the refusal of the oldest to perform the terms on which the estate is given to him. This must be a voluntary *refusal, an [*348 "act of intention to defeat his will." Now, a failure to perform the condition may take place, although the devisee may have used his utmost endeavors to perform it; the Legislature may refuse to pass the act required.

If it be a condition precedent, the estate, in that event, can never vest, and the whole intention of the testator may be defeated, without the fault of the devisee. But the will was framed with very different views. The testator declares, that each devise over is to take effect on the previous devisee's "refusing" to comply with the terms on which the devise was made to him; on his obtaining the act of assembly, "if it can be done;" on there being no "act of intention to defeat his will." This construction would make the devise to depend on the will of the legislature, although the testator declares that it shall depend on the devisee himself.

To take the oath not to make any alteration in the will, so far as respects the real property, is completely within the power of the devisee, and this is directed to be taken "before he has possession." This direction shows the opinion of the testator, that the estate vested immediately, otherwise there could be no necessity for the clause suspending the possession. It would be a very useless declaration to say that the devisee should not take possession of an estate to which he had no right. This assists, too, in marking more clearly the distinction taken by the testator, between a condition annexed to the estate, which was in the power of the devisee, and one not in his power. The possession *is not postponed until he shall [*349 obtain an act of the legislature for the change of his name, but is postponed until he shall take the oath directed by the will.

In the case of Gulliver v. Ashby, 4 Burr., 1929, William Wykes devised his estate to several persons in succession, after the death of his wife, and added the following clause: "Provided always, and this devise is expressly on this condition, that whenever it shall happen that the said mansion house, and said estates, after my wife's decease, shall descend or come to any of the persons hereinbefore named," (that) "the person or persons to whom the same shall, from time to time, descend or come," (that he or they) "do or shall then change their surname, and take upon them and their heirs the surname of Wykes only, and not otherwise."

In giving his opinion on this case, Lord Mansfield said, "First, that this is not a condition precedent. It cannot be complied with instantly. It is 'to take the name for themselves and their heirs.' Now, many acts are to be done in order to oblige the heirs to take it, such as a grant from the King, or an act of parliament. It is not, therefore, a condition precedent, but, being penned as a condition, it must be a condition subsequent."

All the judges concurred in the opinion that it was not a condition precedent. Mr. Justice Yates, thought it no more than a recommendation. The other judges considered it as a condition subsequent.

To the reason given by Lord Mansfield, for 350*] *considering the conditions on which the testator, in the case in Burrow, devised his estates, as conditions subsequent, are superadded, in the case at the bar, others of great weight, which have been mentioned and relied on.

The case put at the bar, that the eldest male heir of J. T. M. might die within twelve months after attaining his age of twenty-one years, leaving an infant son, deserves serious consideration. If the estate vested in the ancestor, it would descend to him. If the condition be precedent, the estate did not vest, and cannot descend to him. This would be contrary to the general spirit of the will.

If the change of name constituted the whole condition of the devise, the proofs furnished by the will of its being a condition subsequent, are so strong as to dispel all reasonable doubt. But there is another condition, respecting which the intention is less obvious.

The person "that may have the right" is to procure an act of assembly for the change of his name, "together with his taking an oath, before he has possession, before a magistrate," etc., "that he will not make any change during his life in this my will, relative to my real property."

It has been truly said, that this condition is against law, is repugnant to the nature of the estate, and consequently void. But if this be a condition precedent, its being void will not benefit the devisee. It becomes necessary to inquire, therefore, whether this also be a condition subsequent, or must be performed before the estate can vest.

351*] *In making the devise, the testator uses the words, "I give the whole of my property." Immediately afterwards, he describes the person who is to perform the conditions on which the property is given, as "the one that may have the right;" and, after directing the change of name, adds, "together with his taking an oath, before he has possession, before a magistrate of St. Mary's county," etc.

The person who "has the right," is to take the oath "before he has possession." Title, then, is distinguished from possession. The most attentive perusal of the will furnishes no reason for the opinion that the testator has confounded possession with title. All those parts of the will which respect change of name, dispose of the whole property, and dispose of it in such terms as to show, we think, a clear intention that the right should vest in the devisee on the death of J. T. M., to be defeated on the nonperformance of the condition annexed to the estate. The change of language, and the adoption of the word "possession," indicate very strongly that the word was used in its popular sense, to denote the taking actual and corporal possession of an estate. The testator was contemplating the event of an infant becoming entitled to his property, and providing for that event. Such infant was, within twelve months after attaining his age of twenty-one years, "if in that time it could be done," to obtain an act of the legislature for the change of his name; and moreover to take the oath prescribed, "before he has possession;" alluding, we think, clearly, to that possession which an infant devisee takes of *his estate, [*352 when he attains his majority. A different construction would make this devise repugnant to itself. It would make the devise to depend on two conditions, to be performed at the same time, and yet the one to precede the vesting of the estate, and the other to be capable of being performed more than twenty years after it had vested. The word possession cannot be construed as equivalent to right, for the purpose of producing such consequences as these.

After disposing of his estate in fee-tail, the testator proceeds to carve out a particular estate for his favorite nephew, J. T. M.; and it is not entirely unworthy of notice, that he continues the use of the word "possession," with the obvious intent to affix to it the meaning of simple occupancy. It is impossible to read these wills without perceiving a continuing and uninterrupted desire to bestow his whole estate on J. T. M. and his family. The first will gives him the estate absolutely. His desire to preserve it in mass, and to connect it with his name, increased with his age; and his second will gives his estate to J. T. M. for life, remainder to his eldest son in tail male, remainder to the heirs of J. T. M., the oldest to take all, on condition of their changing their surname to that of Barnes. The last will contains intrinsic evidence that, preserving the same intention with respect to his estate, he had been alarmed by the suggestion that the remainder in tail to the heirs of J. T. M. might coalesce with his life estate, and, vesting in him, might enable him to break the entail and divide the estate. To reconcile *his [*353 kindness to J. T. M. with his pride, he endeavors to give his nephew the advantages of an estate for life, in such form as to leave him no power over the fee. It is not unworthy of remark, that in endeavoring to accomplish this object, he continues the use of the word "possession." "My will is," he says, "that he (J. T. M.) shall keep the whole of my property in his possession during his life, with full power," etc. Whether the legal effect of this clause be the same with an express devise to J. T. M. for life, remainder to his heirs in tail, is unimportant with respect to the present inquiry. It shows the intention of the testator, and the sense in which he used the word. It shows that he distinguished between possession and title.

The court is of opinion, that were the paper which is supposed to have been executed in 1803 to be considered as constituting singly the will of Richard Barnes, and were it to be admitted, that an estate tail did not vest in J. T. M., still the conditions annexed to the estate devised to his oldest heir male are subsequent,

and not precedent; and, consequently, the contingency on which the devise is to take effect is not too remote. This opinion renders it unnecessary to decide the questions, so elaborately discussed at the bar, whether the last will revoked those which preceded it, and whether an estate tail is vested in J. T. M. It would be improper to decide those questions at this time, because persons may be interested in them who are not now before the court.

Decree affirmed.

354*] [*Descent. Alien.]

M'CREERY'S LESSEE v. SOMERVILLE.

The statute of 11 and 12 Wm. III. c. 6. which is in force in Maryland, removes the common law disability of claiming title through an alien ancestor, but does not apply to a living alien ancestor, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural born subject or citizen.

Thus, where A died seized of lands in Maryland, leaving no heirs, except B, a brother, who was an alien, and had never been naturalized as a citizen of the United States, and three nieces, the daughters of the said B who were native citizens of the United States; it was held, that they could not claim title by inheritance, through B, their father, he being an alien, and still living.

ERROR to the Circuit Court of Maryland.

The case agreed, stated that William M'Creery was seized and possessed of a tract of land in Baltimore county, in the State of Maryland, called Clover Hill, and died possessed thereof about the 1st of March, 1814. He had previously executed an instrument of writing, purporting to be his last will and testament, by which he devised the above tract of land to those under whom the defendant, Somerville, claimed; but it was witnessed by two persons only, and was, therefore, inoperative to pass lands in Maryland, the laws of which require three witnesses to a will for that purpose. W. M'Creery left at his death no children, but a brother, Ralph M'Creery, a native of Ireland, who it still living, and who has not been naturalized, and three nieces, Letitia Bardwell, Jane M'Creery, and Isabella M'Creery, the latter being the lessor of the plaintiff, who are the daughters of the said Ralph, and native born 355*] citizens of the United States. *The devisees under the will applied by petition to the legislature of Maryland to confirm the will, and the legislature, accordingly without the knowledge or consent of the lessor of the plaintiff, passed an act for that purpose; saving, nevertheless, the rights of all persons claiming title to the lands devised, by conveyance from any of the heirs of W. M'Creery. The action was brought to recover an undivided third part of Clover Hill.

Upon this case, judgment was rendered by the court below for the defendant, and the cause was brought by writ of error to this Court.

The cause was argued by Mr. Winder[1] for the plaintiff in error, and by Mr. D. B. Ogden for the defendant, and continued to the present term for advisement.

Mr. Justice Story delivered the opinion of the court:

The title of the lessor of the plaintiff to recover in this case, depends upon the question whether she can claim as one of the co-heirs of her deceased uncle, her father being an alien, and alive at the commencement of the present suit. It is perfectly clear that, at common law, her title is invalid, for no person can claim lands by descent through an alien, since he has no inheritable blood. But the statutes of 11 and 12 Wm. III. ch. 6, is admitted *to [*356 be in force in Maryland; and that statute, beyond all controversy, removes the disability of claiming title by descent, through an alien ancestor. The only point, therefore, is, whether the statute applies to the case of a living alien ancestor, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural born subject.

We have not been able to find any case in England in which this question has been presented for judicial decision. In the case of Palmer v. Downer, 2 Mass. Rep. 179, in the State of Massachusetts, the facts brought it directly before the court, but it does not appear to have attracted any particular attention, either from the bar or the bench. It may, then, be considered as a question of new impression, and is to be settled by ascertaining the true construction of the statute of William.

That act is entitled, "An act to enable His Majesty's natural born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens." The title is not unimportant, and manifests an intention merely to remove the disability of alienage. It proceeds to enact, "that all and every person or persons, being the King's natural born subject or subjects, within any of the King's realms or dominions, should and might, thereafter, inherit and be inheritable, as heir or heirs, to any honors, etc., lands, etc., and make their pedigrees and titles, by descent, from any of their ancestors, lineal or collateral, although the father and mother, or father or mother, or other ancestor, *of such person or persons, by, from, [*357 through or under whom he, she or they should or might make or derive their title or pedigree, were, or was, or should be, born out of the King's allegiance, and out of His Majesty's realms and dominions, as freely, fully and effectually, to all intents and purposes, as if such father and mother, or father or mother, or other ancestor or ancestors, by, from, through or under whom he, she or they should or might make or derive their title or pedigree, had been naturalized, or natural born subjects." In construing this enactment, it ought not to escape observation that the language is precisely such as parliment might have used, if the intention were confined to the mere removal of the disability of alienage. It declares that persons might lawfully inherit and be inheritable, as heirs, and make their titles and pedigrees, by descent, from any of their ancestors, although their parents were born out of the realm; plainly supposing that they might take

1.—He cited Co. Litt. 3 b; 1 Sidlf. 193; 2 Bl. Com. 226, 249, 250, 257; Bac. Abr. Alien, C. 132; 4 Wheat. Rep. 453; 2 Mass. Rep. 179.

NOTE.—Alien's right to inherit, see note to 31 L.R.A. 177.

as heirs by descent, but for the circumstance of the alienage of the intermediate ancestors, through whom they must claim. It speaks of such intermediate ancestors, as persons who were or should be born out of the realm, and it enables the party to take, as heirs, as effectually as if such ancestors had been natural born subjects. Now, this language imports no more than a removal of the defect, for want of inheritable blood. It does not, in terms, create a right of heirship, where the common law, independently of alienage, prohibits it; it puts the party in the same situation, and none 358*] *other, that he would be in, if his parents were not aliens. If his parents were natural born subjects, and capable to take as heirs of the deceased ancestor, it is clear that he could not inherit by descent through them, as they would intercept the title, as nearer heirs. The only cases in which he could inherit, living his parents, are those where the common law has prohibited the parents from taking, although they have inheritable blood. Such are the cases of a descent from brother to brother, and from a nephew to an uncle, where the common law has disabled the parents of the deceased brother or nephew from taking the estate by descent, upon the ground that inheritances cannot lineally ascend. 2 Bl. Comm. 208, 212, and Christian's note. If the legislature had intended, not only to create inheritable blood, but also to create absolute heirship, some explanatory language would have been used. The statute would have declared, not only that the party should make title by descent, in the same manner as if his parents were natural born subjects, but that he should be deemed the heir, whether his parents were living or dead. No such explanation is given or hinted at; and if we are to insert it, it is by expounding the language beyond its obvious meaning and limitations. We do not feel at liberty to adopt this mode of interpretation, in a case where no legislative intention can be fairly inferred, beyond the ordinary import of the words.

This construction is not impugned by the explanatory act, afterwards passed in 25 Geo. 359*] II. *ch. 39. It seems that inconveniences were apprehended, in case persons should be held by the statute of William, to gain a future capacity to inherit, who did not exist at the death of the persons last seized. The statute of Geo. II., therefore, after reciting the act of William, declares that it shall not be construed to give any right or title to any persons to inherit as heirs, etc., by enabling any such persons to claim, or derive their pedigree, through any alien ancestor, unless the persons so claiming "were, or shall be, in being, and capable to take the same estate as heir or heirs, etc., by virtue of the said statute, at the death of the person who shall last die seized," and to whom they shall claim to be heir or heirs. Then follows a proviso, "that in case the person or persons who shall be in being, and capable to take, at the death of the ancestor, so dying seized, etc., and upon whom the descent shall be cast, by virtue of this act, or of the said recited act, shall happen to be a daughter or daughters of an alien, and that the alien father or mother, through whom such descent shall be derived by such daughter or daughters, shall afterwards have a son born within any of His Majesty's realms or dominions, the descent, so cast upon such daughter or daughters, shall be devested in favor of such son; and such son shall inherit and take the estate, in like manner as is allowed by the common law of this realm, in cases of the birth of a nearer heir." Then follows a provision for the case of the subsequent birth of a daughter, who is enabled to take as a co-heir with the other *daughters. It has been argued that [*360 this proviso includes the cases of all children born after the descent cast in the life-time of their alien parents, and, therefore, supposes the descent may be cast, notwithstanding their parents are living. Admitting this to be the true construction of the proviso, and that it is not restrained to posthumous children, the case of the plaintiff is not aided by it; for the clause, that the son shall take, in like manner as is allowed by the common law, in cases of the birth of a nearer heir, shows that parliament had in view cases where the children might, at common law, take as heirs, although their parents were living; and yet the common law devested the title, so cast by descent, upon the birth of a nearer heir. For instance, if lands are given to a son, who dies, leaving a sister his heir, if the parents have, at any distance of time afterwards, another son, the common law devests the descent upon the sister in favor of such son, and he is entitled to take the estate as heir to his brother. 2 Bl. Comm. 208; Christian's note; 5 Co. Lit. 11; Doct. & Stud. 1 Dialog. c. 7. We think, then, that this proviso does not shake the construction, already given by us, to the statute of William. For, here, the case of after-born children is expressly provided for, which would otherwise be excluded by the declaratory clause of the statute; and if it was contemplated that the act of William created a new title by heirship, independently of alienage in the parents, beyond the rules of the common law, the natural presumption is, that the declaratory clause would, *in some manner, have ex- [*361 pressed that intention. So far from affirming a new title, by heirship, it asserts that the true construction of that statute excludes all persons who were not in being at the time of the descent cast, and then "capable to take the estate as heir or heirs, etc., by virtue of the said statute of William;" and we have already seen that the terms of that statute give no other capacity that would exist if the parents were natural born subjects. The exception, then, of after-born children, out of the declaratory clause of the act of George II., carries no implication that the legislature was dealing with any other cases except those where, if the alien parents were living at the time of the descent cast, the children were capable of taking, as heirs at common law, in thier own right, independently of the alienage. Mr. Justice Blackstone, in his learned commentaries (2 Bl. Comm. 251), gives no explanation of these statutes, which extends them beyond such cases; and his omission to notice the larger construction, now contended for by the plaintiff, would be somewhat remarkable, if that had been deemed the true interpretation of the statutes.

In the absence of all authority, we do not.

feel ourselves at liberty to derogate from the general doctrine of the common law as to descents, by incorporating into the statute of William a case which is not within its terms, and is not called for by any clear legislative policy.

Judgment affirmed with costs.

362*] [*Instance Court.]

THE APOLLON. Edon, Claimant

A decree of acquittal, on a proceeding in rem, without a certificate of probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other court, that there was no justifiable cause of seizure.

The French tonnage duty act of the 15th of May, 1820, c. 125, inflicts no forfeiture of the vessel for the non-payment of the tonnage duty. The duty is collectable in the same manner as by the collection act of 1799, c. 128.

The 29th section of the collection act of 1799, c. 128, does not extend to the case of a vessel arriving from a foreign port, and passing through the conterminus waters of a river, which forms the boundary between the United States and the territory of a foreign state, for the purpose of proceeding to such territory.

The municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regards its own citizens.

A seizure for the breach of the municipal laws of one nation cannot be made within the territory of another.

It seems that the right of visitation and search, for enforcing the revenue laws of a nation, may be exercised beyond the territorial jurisdiction, upon the high seas, and on vessels belonging to such nation, or bound to its ports.

A municipal seizure cannot be justified or excused, upon the ground of probable cause, unless under the special provisions of some statute.

The probable profits of a voyage, either upon the cargo or freight, do not form an item for the computation of damages, in cases of marine torts.

Where the property is restored, after a detention, demurrage is allowed for the detention of a ship, and interest upon the value of the cargo.

Where the vessel and cargo have been sold, the gross amount of the sales, with interest, is allowed; and an addition of 10 per cent. sometimes made, where the property has been sold under disadvantageous circumstances.

363*] *Counsel fees may be allowed, either as damages or costs, both on the instance and prize side of the court.

THE cause was argued by the Attorney-General[1] for the respondent, and by Mr. Harper and Mr. Clay,[2] for the appellant.

1.—He cited Church v. Hubbart, 2 Cranch, 187, 234; Locke v. U. S. 7 Cranch, 339; 1 Mass. Rep. 27; 1 Gall. Rep. 111, 315; 5 Cranch, 311.

2.—They cited 2 Cranch, 122; 3 Cranch, 490; 3 Dall. 335; 3 Rob. 208; 5 Rob. 43; 4 Rob. 72; 1 Gall. Rep. 427; 3 Wheat. Rep. 559; 3 Dall. 133; 1 Rob. 241.

Mr. Justice Story delivered the opinion of the Court:

This is a libel, brought by the master of the French ship Apollon, against the collector of the district of St. Mary's, for damages occasioned by an asserted illegal seizure of the ship and cargo, by the respondent, while she was lying in Belle River, a branch of the St. Mary's, within the acknowledged territories of the King of Spain.

There is no dispute as to the national character of the ship. It appears that she sailed from France, bound to Charleston, in South Carolina; but as apprehensions were then entertained, that the proposed tonnage duty on French vessels might be passed by Congress, an alternative destination was given to her for a Spanish port, the object of the voyage being to land her cargo in the United States, and to take a return cargo of cotton to France. The cargo was partly owned by French subjects, and partly by a Mr. Le Maitre, a domiciled *merchant at Charleston, who was also [*364 the consignee. Upon her arrival off the port of Charleston, the master ascertained that the French tonnage duty act had passed (act of 15th of May, 1820, ch. 125), and, therefore, declined entering the port. He had on board some specie belonging to the Bank of the United States, which, by the permission of the collector, was brought on shore by the revenue cutter. Having obtained information from the collector, that Amelia Island was not deemed an American territory, he sailed for that place, under the direction of the consignee; and there the ship lay for a considerable time, while the master proceeded to St. Augustine, a distance of about eighty miles, where he entered his ship and cargo, and paid the regular duties required by the Spanish authorities. While at this port, he ascertained that the local authorities had it in contemplation to establish a new port of entry, to be called St. Joseph's, on Belle River, within the Spanish territory, and to appoint officers of the customs to reside there. The unquestionable object of this establishment, as disclosed in some correspondence between the immediate agents, which is inserted in the transcript, was to have a convenient depot, for the purpose of carrying on an illicit trade, in fraud of the revenue and navigation laws of the United States. Indeed, it is manifest that there could be no other object, for there was no commercial population in the neighborhood whose wants were to be supplied in the regular course of commerce. Of this object, perhaps, Captain Edon was not ignorant; but he *does not appear to have participated in [*365 any of the schemes connected with it. His own avowed object was, to tranship his cargo into the United States, and to receive from thence

NOTE.—Seizures.

A seizure beyond the limits of the territorial jurisdiction, for breach of municipal regulation, is not warranted by the law of nations. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign. Rose v. Himely, 4 Cranch, 241.

American ships offending against our own laws, may be seized upon the ocean, and foreign ships thus offending within our territorial jurisdiction, may be pursued and seized upon the ocean, and brought into our ports for adjudication. But in such cases the party seizes at his peril and is liable to costs and damages if he fails to establish the forfeiture. The Marianna Flora, 11 Wheat. 1.

The right of a nation to seize vessels attempting an illicit trade, is not confined to their harbors, or to the range of their batteries. Church v. Hubbart, 2 Cranch, 187.

The seizure of an American vessel by another, also American, within the jurisdiction of a foreign government, for an infringment of our revenue or navigation laws, is a violation of the territorial authority of the foreign government. No such

a cargo of cotton, without subjecting himself to the payment of the French tonnage duty. Part of the cargo was sold at St. Augustine, probably to pay duties and charges; and upon Captain Edon's return to Amelia Island, under the advice and instructions of the Spanish officers of the customs, he removed his vessel from Amelia Island up Belle River, about six or eight miles; and after having lain at anchor near St. Joseph's for eighteen days, the ship with her cargo was there seized by the collector of St. Mary's, and carried to the latter port for adjudication. Admiralty proceedings were instituted by the attorney for the United States, in the District Court of Georgia, to subject the ship to the payment of the tonnage duty, and the cargo to forfeiture; but upon the hearing of the cause, the court awarded a decree of restitution of the ship and cargo. From this decree the government interposed an appeal, but the appeal was finally abandoned before any hearing of the appellate court. In the meantime the present libel for damages was instituted, and some difficulty arose as to the propriety of entertaining it during the pendency of the other suit, because in that suit it was competent for the court to award damages, if the seizure was without reasonable cause. The objection was well founded; but it was withdrawn, from the anxious desire of the government to have the cause speedily adjudged in 366*] the proper tribunal, upon *the substantial merits. Upon the hearing of this cause, the District Court pronounced a decree for damages, from which an appeal was taken to the Circuit Court; and from the decree of the Circuit Court, confirming the decree of the District Court, with an addition of thirty three and a third per cent. to all demurrage allowed by the latter, the present appeal was taken, and the cause now stands for a final decision.

The questions arising upon the record have been argued with great zeal and ability, and embrace some considerations which belong more properly to another department of the government. It cannot, however, escape observation, that this court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We cannot enter into political considerations, on points of national policy, or the authority of the government to defend its own rights against the frauds meditated by foreigners against our revenue system, through the instrumentality and protection of a foreign sovereignty. Whatever may be the rights of the government, upon principles of the law of nations, to redress wrongs of this nature, and whatever the powers of Congress to pass suitable laws to cure any defects in the present system, our duty lies in a more narrow compass; and we must administer the laws as they exist, without straining them to reach public mischiefs which they were never designed to remedy. It may be fit and proper for the government, in the exercise of the high discretion confided to the Executive, for great public purposes, *to act on a [*367 sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the legislature will doubtless apply a proper indemnity. But this court can only look to the questions, whether the laws have been violated; and if they were, justice demands that the injured party should receive a suitable redress.

The first question is, whether there was a justifiable cause of seizure. This question has been already decided in the proceedings in rem, and the decree of acquittal, not having been appealed from with effect, is conclusive evidence in every inquiry before every other tribunal, that there was no such cause. This point was decided upon great consideration, in the case of Gelston v. Hoyt, 3 Wheat. Rep. 246, and is not believed to be susceptible of any legal doubt. In the present case, however, as the parties have been induced to waive objections to this libel, for damages pending the former suit, upon the supposition that the same questions might be as open here as there, it may not be amiss to examine the ground upon which the right of seizure is now attempted to be maintained. As to any forfeiture, or supposed forfeiture, under the act of 1820, ch. 125, it is very clear that it cannot be maintained. That act simply authorizes a tonnage duty of eighteen dollars per ton, to be collected on all French ships which shall be entered in the United States, *and provides for the col- [*368 lection of the duty, in the same manner as tonnage duties are to be collected by the collection act of 1799, ch. 128; but this act inflicts no forfeiture for the non-payment of the tonnage duty, nor did the libel in rem even affect to proceed for any such forfeiture. The consideration of this act may then be at once dismissed. But the 29th section of the collection act of 1799 is supposed to contain a direct authority for the seizure. That section provides, "that if any ship or vessel, which shall have arrived within the limits of any district of the United States, from any foreign port or place, shall depart, or attempt to depart from the same, unless to proceed on her way to some interior district, to which she may be bound, before report or entry shall have been made by the master, etc., with the collector of

authority to seize for such an offense can be rightfully exercised within the jurisdictional limits of a foreign power. 4 Op. Att.-Gen. 285.

The seizure of an American vessel within the territorial jurisdiction of a foreign power is certainly an offense against that power, which must be adjusted between the two governments. The Supreme Court can take no cognizance of it. The Ship Richmond v. U. S. 9 Cranch, 102.

At common law, any person may, at his peril, seize for a forfeiture to the government; and if the government adopt his seizure and the property is condemned, he is justified. Gelston v. Hoyt, 3 Wheat. 346; Taylor v. U. S. 3 How. 205; The George, 1 Mas. 24; Burke v. Trevitt, 1 Mas. 96.

When property is forfeited, it does not vest in the government until after a seizure, and then it relates back to the time of the forfeiture. Clark v. Prot. Ins. Co. 1 Story, C. C. 109.

To justify an officer in making a seizure of goods as forfeited, there must be reasonable ground to believe that some offense has been committed. U. S. v. Cook, 1 Sprague, 213.

Whether a seizure of goods for a violation of the revenue laws has been rightful or tortious, cannot be ascertained until the matter has been adjudged by the Court. Hall v. Warren, 2 McLean, 332.

This case, The Apollon, is not an authority for the doctrine that the probable cause is not an excuse or justification of any seizure or capture except in cases of jure belli. The Palmyra, 12 Wheat. 1; 1 Abb. Nat. Dig.; Cases criticised, XXII.

some district of the United States, the master, etc., shall forfeit and pay the sum of $400; and it shall be lawful for any collector, etc., to arrest and bring back, or cause to be arrested and brought back, such ship or vessel, to such port of the United States, to which it may be most conveniently done." It is observable that no forfeiture is here inflicted upon the vessel or cargo; but the penalty is personal upon the master. There was no pretense, then, to institute proceedings in the District Court, in rem, for the forfeiture, and the delay occasioned by such proceedings was clearly unjustifiable; in fact, the original libel did not proceed for any forfeiture, except against the cargo. But it is said that the arrest and bringing into port was 369*] justifiable, because *the ship had entered the district of St. Mary's, and had departed therefrom, without making any report or entry. The district of St. Mary's, by law, comprehends "all the waters, shores, harbors, rivers, creeks, bays and inlets, from the south point of Jekyl Island, exclusive, to St. Mary's River, inclusive." St. Mary's River formed, at this period, the boundary between the United States and the Spanish territory, the boundary line, by the treaty of 1795, running through the middle thereof, in its whole course to the Atlantic Ocean. The only access from the ocean to the Spanish waters running into the St. Mary's, as well as to the adjacent Spanish territories, was through this river. So that, upon the general principles of the law of nations, the waters of the whole river must be considered as common to both nations, for all purposes of navigation, as a common highway, necessary for the advantageous use of its own territorial rights and possessions. There is no doubt that the Apollon did not enter the St. Mary's for the purpose of going into any American port, for trade or intercourse. Her avowed destination was for the Spanish waters and Spanish territories; and she never anchored in the St. Mary's, except upon the Spanish side of the river. Her proceeding up Belle River was still more decisive of this intention. Under such circumstances, the question arises, whether a mere transit through the waters of the St. Mary's, for the purpose of proceeding to the Spanish territory, is to be deemed an arrival within the limits of the United States from a foreign port, within the 370*] sense of the 29th section *of the act already referred to. We are decidedly of opinion that it cannot be so considered. The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction. In the present case, Spain had an equal authority with the United States over the river St. Mary's. The attempt to compel an entry of vessels, destined through those waters to Spanish territories, would be an usurpation of exclusive jurisdiction over all the navigation of the river. If our government had a right to compel the entry at our custom-house, of a French ship, in her transit, the same right existed to compel the entry of a Spanish ship. Such a pretension was never asserted; and it would be an unjust interpretation of our laws, to give them a meaning so much at variance with the independence and sovereignty of foreign nations. The true exposition of the 29th section is, that it means to compel an entry of all vessels coming into our waters, being bound to our ports; and the very exception of vessels bound to some interior district, demonstrates the sense of the legislature, by indicating the entire stress laid upon the destination of the vessel. But, even supposing, for a moment, that our laws had required an entry of the Apollon, in her transit, does it follow *that the power to arrest her [*371 was meant to be given, after she had passed into the exclusive territory of a foreign nation? We think not. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations. The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said that there is a revenue jurisdiction, which is distinct from the ordinary maritime jurisdiction over waters within the range of a common shot from our shores. And the provisions in the collection act of 1799, which authorize a visitation of vessels within four leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory, in the exclusive jurisdiction of another sovereign? Certainly not; for the very terms of the act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this, would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by *other [*372 nations, and would be resisted by none with more pertinacity than by the American. Assuming, then, the distinction to be founded in law, it is inapplicable to a case where the visitation and arrest have been in a foreign territory. It appears to us, then, that the Apollon was not bound to make entry at our custom-house; and that the arrest was, under the circumstances, wholly without justification under our laws.

The next question, which has been argued at the bar, is, whether there was, in this case, probable cause of seizure. The most that can, with correctness, be argued on this point, is, that there was probable cause to arrest the vessel, under the 29th section of the collection act; but neither that section, nor any other law, authorized a seizure as for a forfeiture in this case, much less a prosecution in rem, to enforce a forfeiture; and so, indeed, the original libel in rem considered the case. But before adverting to the facts urged in support of the

suggestion of probable cause, it may not be improper to consider, how far the existence of probable cause can be inquired into, or constitutes matter of defense in a suit like the present. Some obscurity arose at the argument, from not distinguishing between the effect of probable cause in cases of capture jure belli, and the effect in cases of municipal seizures. In respect to the former, no principle is better settled in the law of prize than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right, to an exemption from damages; and 373*] if *the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther, and gives the captors their costs and expenses in proceeding to adjudication. But the case is far different in respect to municipal seizures. Probable cause has never been supposed to excuse any seizure, except where some statute creates and defines the exemption from damages. The party who seizes, seizes at his peril; if condemnation follows, he is justified; if an acquittal, then he must refund in damages for the marine tort, unless he can shelter himself behind the protection of some statute. The very act under which the present seizure is sought to be justified, contains an express provision on the subject, and shows the clear opinion of the legislature. It declares, in the 89th section, "that when any prosecution shall be commenced, on account of the seizure of any ship or vessel, goods, etc., and judgment shall be given for the claimants, etc., if it shall appear to the court, before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate, or entry, to be made thereof; and in such case, the claimant, etc., shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit, or judgment, on account of such seizure or prosecution." By a subsequent act (act of the 24th of February, 1807, ch. 74), the like provision is extended to all seizures "under any act of Congress authorizing such seizures." It is ap- 374*]parent, from *the very language of this clause, that unless the certificate be obtained in the manner prescribed by the law, the seizing officer is liable to a suit for damages. And it was adjudged by this court, in the case of Gelston v. Hoyt (3 Wheat. Rep. 246), that the denial of such certificate was conclusive evidence that there was no probable cause of seizure. No certificate was given upon the original libel instituted against the Apollon and cargo, and restitution having been decreed without it, it follows, of course, that probable cause can, in point of law, form no excuse against damages in this case. It is true, that if vindictive damages were sought, the circumstances of suspicion might properly go in mitigation; but where, as in the present case, compensation only is sought, the inquiry into the existence of such probable cause can have no legal operation upon the merits of the controversy.

But how stands the fact as to the existence of probable cause? It has been very justly observed at the bar, that the court is bound to take notice of public facts and geographical positions; and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be gathered from the public documents of the government. But the question, whether the Apollon designed to engage in this unlawful traffic, must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources. It is somewhat remarkable, that no act or attempt of smuggling is charged upon her by any testimony *in the record. Her avowed [*375 intention was to send her cargo into the United States; but in what manner? It was perfectly lawful to tranship the cargo, in American or other foreign vessels, to our ports; no law was violated thereby, and no evasion of the French tonnage duty accomplished; for the expense of the transhipment must have been supposed by Congress to be, in ordinary cases, a full equivalent to the increased duty. It has been very justly observed at the bar, that the act of Congress was not intended to operate as a nonintercourse or non-importation law, but merely as an additional and onerous tax upon French navigation, in retaliation of the restrictions of France upon our navigation. The policy of the act was, therefore, as completely effected by compelling French ships to perform circuitous voyages, and thus to incur the disadvantages of transhipments, as by payment of the tonnage duty. Now, it is principally from the declarations and admissions of Capt. Edon himself, that the designs of his voyage are known; and if we take part of his testimony, we ought in fairness to call in aid every explanation that he gives on the subject. He utterly disclaims any intention of fraud; and his declarations on this point have not been discredited. But, admit that he had an intention of illegal trade, how could that intention, not carried into effect within our jurisdiction, afford probable cause of seizure in a foreign territory? It was not matter of doubt, that Belle River was within the limits of Florida; and how can there be probable cause of seizure under our laws, when *the vessel is in a place [*376 exempt from our jurisdiction?

It is unnecessary to pursue this subject farther, as, in point of law, probable cause, if it existed, would not, under the circumstances of this case, constitute a valid defense. The remaining question is, as to the damages. The District Court allowed the following items of damage: (1) Demurrage of the ship for 175 days, at $30 per day. This item, upon the appeal, was enhanced by the court, as has been already stated, to $40 per day. (2) The difference between the amount of the sales of the cargo (which was sold under a perishable monition) being $3,523.10, with ten per cent. thereon; and the net proceeds of the sales, which had been restored to the claimants, that difference being $1,215.99, together with six per cent. interest thereon. (3) The allowance of $250 to the libelant, for traveling expenses to Washington. (4) The allowance to the second captain of $100, for his traveling expenses to Savannah, on the business of the ship. (5) The allowance of $500, as necessary counsel fees.

The principal arguments against this decree, have been directed to the allowance of demurrage, as a just measure of compensation. The Attorney-General contends that it ought to be disallowed, as far too high a compensation; the counsel for the libelant, as an allowance unreasonably low. This court, on various occasions, has expressed its decided opinion that the probable profits of a voyage, either upon the ship 377*] or cargo, cannot furnish *any just basis for the computation of damages in cases of marine tort. The basis has accordingly been, in every instance, rejected. Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, together with interest upon the amount, from the time of the trespass. Where there has been a partial injury only, that loss being ascertained, a similar rule has been applied. Where the property has been restored after detention, demurrage during the period has been generally allowed for the vessel, and interest upon the value of the cargo. Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted, as a fair recompense, and the addition of ten per cent. has been sometimes made where the property was sold under disadvantageous circumstances, or had not arrived at the country of its destination. Such, it is believed, have been the rules most generally adopted in practice, in cases which did not call for aggravated or vindictive damages. And it may be truly said, that if these rules do not furnish a complete indemnification in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation, upon principles of public policy.

But it is now said, that demurrage always arises ex contractu, and, therefore, cannot furnish any rule of compensation in cases of tort. The practice in courts of admiralty has certainly been otherwise; and the very cases cited 378*] at the bar *show that no distinction has been taken, as to its application, between cases of contract and cases of tort. In truth, demurrage is merely an allowance or compensation for the delay or detention of a vessel. It is often a matter of contract, but not necessarily so. The very circumstance that in ordinary commercial voyages, a particular sum is deemed by the parties a fair compensation for delays, is the very reason why it is, and ought to be, adopted as a measure of compensation, in cases ex delicto. What fairer rule can be adopted than that which founds itself upon mercantile usage as to indemnity, and fixes a recompense upon the deliberate consideration of all the circumstances attending the usual earnings and expenditures in common voyages? It appears to us that an allowance, by way of demurrage, is the true measure of damages in all cases of mere detention, for that allowance has reference to the ship's expenses, wear and tear, and common employment. Every other mode of adjusting compensation would be merely speculative, and liable to the greatest uncertainties. In respect to the quantity of the allowance in the present case, there is a diversity of evidence on the record. Two of the witnesses examined upon the appeal speak of $30, and one of $40, as a reasonable demurrage. The Circuit Court, upon this new testimony, allowed the latter; and as it is perfectly clear, that every judge, in his own circuit, must have better means of weighing the testimony of creditable witnesses, from a more exact acquaintance with their experience and extent of business, than we can *pos- [*379 sibly derive from the bare inspection of the records; and as we perceive no reason to be dissatisfied with his judgment, we think that the decree, on this point, ought to be confirmed.

The second item is perfectly correct, except as to the allowance of the ten per cent. The cargo was sold at the market, though not at the port, of its destination; and from the appraisement, it appears to have sold for a higher price than it was valued at. The ground of the allowance of the ten per cent., then, fails, for that is given for supposed losses upon a forced sale, or a falling market.

The third item, though small, does not appear to us proper to be allowed upon principle. It was no necessary expense in the prosecution of the suit; and, as it has been objected to, it must be struck out. The fourth item is not open to the same objection, and, therefore, may well stand.

The fifth item, allowing $500 as counsel fees, is, in our opinion, unexceptionable. It is the common course of the admiralty to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice is very familiar on the prize side of the court; it is not less the law of the court in instance causes, it resting in sound discretion to allow or refuse the claim.

Upon the whole, the decree of the Circuit Court is to be reformed in these not very important particulars; in all other respects it is affirmed, and interest is to be allowed, at the rate of six per cent., upon the amount of the decree thus reformed, *from the time [*380 of the appeal from the Circuit Court, until it shall be carried into effect in the same court, pursuant to the mandate of this court.

Decree.—This cause came on to be heard, etc. On consideration whereof, it is ordered and decreed by the Court, that the decree of the Circuit Court, awarding the sum of $8,695.37, damages, to the libelant, with his costs of suit, be in part reversed, to wit, for the sum of $602.31, and be affirmed in all other respects; and that the libelant do recover of the respondent the said amount of damages decreed in the said Circuit Court, deducting the said sum of $602.31, to wit, the sum of $8,093.06, together with interest, at the rate of six per cent. per annum, on the same sum, from the date of the decree in the Circuit Court, to the period of carrying this decree into effect in the Circuit Court, pursuant to the mandate of this Court.

Decree in Circuit Court, ...		$8,695.37
Deduct 10 per cent. on sales of cargo, ...	$352.31	
Allowance for Washington journey, ...	250.00	
	$602.31	602.31
		$8,093.06

381*] [*Instance Court. Slave Trade Acts.]

THE EMILY and THE CAROLINE.

Broadfoot, Claimant.

A libel of information does not require all the technical precision of an indictment at common law. If the allegations describe the offense, it is all that is necessary; and if founded upon a statute, it is sufficient if it pursues the words of the law.

An information, under the slave trade act of 1794, ch. 187, XI. s. 1, which describes, in one count, the two distinct acts of preparing a vessel and of causing her to sail, pursuing the words of the law is sufficient.

Stating a charge in the alternative, is good, if each alternative constitutes an offense for which the thing is forfeited.

Under the above act, it is not necessary, in order to incur the forfeiture, that the vessel should be completely fitted and ready for sea. As soon as the preparations have proceeded so far, as clearly to manifest the intention, the right of seizure attaches.

APPEAL from the Circuit Court of South Carolina.

In each of these two cases, a libel of information was filed in the District Court of South Carolina, against the ship Emily and the brig Caroline, under the 1st section of the act of the 22d of March, 1794, c. 187 (XI.), prohibiting the carrying on the slave trade, from the United States to any foreign place or country; and on the 2d section of the act of the 2d of March, 1807, c. 77 (LXVII.), to prohibit the importation of slaves into the United States, after the 1st day of January, 1808. Each libel contained three counts, two upon the act of 382*] 1794, and one upon that of 1807, *which are the same in their provisions, so far as respects this case; and the libels described the offense in the alternative, pursuing the words of the law, "that the said vessel was fitted out within a port or place of the United States, to wit, the port of Charleston, or caused to be sailed from a port or place within the United States, to wit, the said port of Charleston, etc., for the purpose of carrying on trade or traffic in slaves," etc. A decree of condemnation, was pronounced, in each case, in the District Court, which was affirmed in the Circuit Court, and the causes were brought by appeal to this court.

The causes were argued by Mr. Harper for the appellant, and by the Attorney-General and Mr. M'Duffie for the respondent.

On the part of the appellant it was contended, (1) That the informations were fatally defective; inasmuch as in all the counts, they charge alternatively, the commission of one or the other of two distinct and separate acts, each of which constitutes, under the statute of Congress, a distinct substantive offense; thus leaving it wholly uncertain to which of the charges the claimant was to direct his defense and proof.[1] (2) That the proof did not sustain any of the counts, because it showed that neither of the vessels was actually sent from the port of Charleston, before the seizure; and did not show that either of them was so fitted 383*] out *there, previous to the seizure, as to be in a condition to be sent. That the offense of fitting out was not complete when the seizure took place, and that a mere inceptive fitting out, or an attempt to fit out, did not constitute the offense created by the acts of Congress.

For the respondents it was argued, (1) That the charge, with the alternative, was sufficient, both of the alternatives being illegal. The note of the reporter, correcting the account of the decision, when one of these cases (The Caroline) was formerly before this Court, was referred to, in order to show that the Court did not mean to decide in that case, that stating the charge in the alternative would not have been sufficient if each alternative had constituted an offense for which the vessel would have been forfeited by the law.[2] The informations had been amended, and studiously avoided the difficulty heretofore made on account of the alternativeness of the charges. As they now stand, they are in conformity with the language of the statute which creates the forfeiture, and though still alternative in form, they are not so in substance; since both the facts charged are equally penal, and the latter part of the section merely makes either of the facts evidence of the illegal intention. The legislature has thought fit to depart, in this instance, from the general principle of penal enactments; it aims at punishing *the [*384 intention, and makes either of the two facts evidence of the illegal intention. Both, then, being illegal, the information has correctly charged the offense. (2) The law requires nothing more to consummate the offense than distinct acts, showing the quo animo. The offense is complete when there is any overt act clearly indicative of the attempt to commit it. If this were not the case, and the crime were not to be considered as consummated until the preparations were complete, it would be impossible to define what was a complete preparation. Many articles might be purposely left unfinished, and completed at sea; so that the construction contended for would furnish an effectual recipe for a fraudulent evasion of this part of the law.

Mr. Justice Thompson delivered the opinion of the court:

These cases come before the court on appeals from decrees of the Circuit Court, for the district of South Carolina, affirming the decrees of the District Court, by which the vessels in question were condemned as forfeited, under the laws of the United States, in relation to the slave trade.

The information in both cases are the same, except as to the name and description of the vessels; and the proofs differ in no respect, but in the state of preparation in which the vessels were found at the time of seizure; but this circumstance, according to the view taken by this court of the law under which these forfeitures have been incurred, is unimportant, and cannot vary the result. The *cases [*385 have been argued together, and it is unnecessary that they should be considered separately by the court.

The informations are founded upon the first

1.—The Caroline, 7 Cranch, 496.

NOTE.—What constitutes a violation of the laws against the slave trade, see note, post, 268.

2.—The Caroline, 7 Cranch, 496; note of errata at the beginning of the volume.

section of the act of the 22d of March, 1794, c. 187, (XI.), to prohibit the carrying on the slave trade from the United States to any foreign place or country; and on the second section of the act of the 2d of March, 1807, c. 77, (LXVII.), to prohibit the importation of slaves into the United States after the 1st of January, 1808. Each information contains three counts; two upon the act of 1794, and one upon that of 1807. These acts, however, are precisely the same in those parts which are brought under consideration in these cases, and will not require to be separately noticed.

The objections on the part of the claimant, to the decree of the Circuit Court, are,

1. The insufficiency of the informations; and

2. That the proofs fall short of what is required, under the statutes, to work a forfeiture of the vessels.

The law (2 U. S. L. 383) declares, that no citizen of the United States, or any other person coming into, or residing within the same, shall, for himself or any other person whatsoever, either as master, factor or owner, build, fit, equip, load or otherwise prepare any ship or vessel, within any port or place of the United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, etc. And if any vessel shall be so fitted out as aforesaid, for the said 386*] *purpose, or shall be caused to sail so as aforesaid, every such ship or vessel shall be forfeited, etc. The first branch of the prohibiting part of this section is very broad and comprehensive, using various terms appropriate to the preparation for a voyage. "Shall not build, fit, equip, load or otherwise prepare any ship," etc. In the forfeiting part of the section, these various terms are not repeated, but doubtless intended to be co-extensive, and included under the words so fitted out as aforesaid. Under this law, then, the forfeiture is incurred, either by fitting out, or, in other words, preparing a vessel, within the United States; or by causing a vessel to sail from the United States for the purpose of carrying on the slave trade; two distinct acts, either of which draws after it the same consequence—the forfeiture of the vessel. The informations embrace both acts in the same count, pursuing the words of the law; and it is contended that, on this account, they are fatally defective; that one or the other of the acts should have been alleged, and not both stated in the alternative, as has been done. Objections of this kind, made at so late a period, if not entirely precluded, are not entitled to much indulgence; they ought, if well founded, to be made at an earlier day, when the information might be amended, and great expense and delay avoided. But the exception would, at no time, be available. In admiralty proceedings, a libel in the nature of an information does not require all the formality and technical precision of an indictment at common law. If the allegations are such as plainly and 387*] *distinctly to mark the offense, it is all that is necessary. And where it is founded upon a statute, it is sufficient if it pursues the words of the law. And this is not at all at variance with what fell from the court when these cases were formerly before it, as explained by the note referred to by the reporter (7 Cranch, 496, and note at the beginning of the vol.), which states, "that the court did not mean to decide that stating the charge in the alternative would not have been sufficient, if each alternative had constituted an offense for which the vessel would have been forfeited." In the information now before the court, it is so stated. One alternative is, fitting out, and the other, causing the vessel to sail; either of which, if proved, would induce a forfeiture. It is said that this mode of alleging two separate and distinct offenses, leaves it wholly uncertain to which of the accusations the defense is to be directed. This objection, if entitled to consideration, would apply equally to an information laying each offense in a separate count. This might, undoubtedly, be done; and yet no one interested in the proceedings could know to which accusation to direct his defense. This kind of uncertainty is no objection, even to an indictment at common law. Distinct offenses may be laid in separate counts, and the accused may not know upon which he is to be tried. The objection, if available at all, must go the full length of limiting every information to a single offense. This, we think, is not required by any principle of justice, *or sanctioned by any rule of [*388 practice, applicable to admiralty proceedings.

2. It is, in the second place, contended that the proof does not sustain any of the counts, or show that any acts have been done which can, under a just construction of the law, work a forfeiture of the vessels. These vessels, although cleared out, were seized before leaving the port of Charleston; of course there can be no proof applying to one of the offenses laid in the information, viz., causing the vessels to sail from a port or place within the United States, etc. The proof is only applicable to the offense, which relates to the preparation of the vessels. And to incur the forfeiture under this branch of the act, it is said the vessel must be completely fitted and ready for sea; that no state of preparation, short of this, will satisfy the terms of the law, or furnish any certain rule by which to determine when the offense has been committed, and the penalty incurred. We cannot, however, think that even applying to this law the most rigid rules of construction applicable to penal statutes, it will admit of the interpretation contended for on the part of the claimant. In construing a statute, penal as well as others, we must look to the object in view, and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction.

The object in view, by the section of the law now under consideration, was to prevent the preparation of vessels in our own ports, which were intended for the slave trade. Hence is connected *with this preparation, whether [*389 it consists in building, fitting, equipping or loading, the purpose for which the act is done. The law looks at the intention, and furnishes authority to take from the offender the means designed for the perpetration of the mischief. This is not punishing, criminally, the intention merely; it is the preparation of the vessel, and the purpose for which she is to be employed,

that constitute the offense, and draws after it the penalty of forfeiture. As soon, therefore, as the preparations have progressed so far as clearly and satisfactorily to show the purpose for which they are made, the right of seizure attaches. To apply the construction contended for on the part of the claimant, that the fitting or preparation must be complete, and the vessel ready for sea, before she can be seized, would be rendering the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner. The intention or purpose for which the vessel is fitting, must be made out so as to leave no reasonable doubt as to the object. This is matter of proof, and, generally speaking, to be collected from the kind of preparation that has been made. It is unnecessary to notice minutely the evidence taken in these cases. It shows conclusively, and beyond the possibility of doubt, that both the Emily and the Caroline were fitting out for the slave trade. In this the witnesses, both on the part of the United States and the claimant, concur. All the preparations were such as were peculiarly adapted to what the witnesses call slaving vessels, and not to 390*] those for the merchant *service. The ship-carpenter, a witness on the part of the claimant, and who, of all others, was best qualified to give information on this subject, says the vessels were fitting in a manner similar to that in which vessels generally are for the slave trade; that the Emily was almost complete, and the work in which he was engaged on the Caroline was of the same character and description. There was no attempt whatever by the claimant to explain the object of these particular fitments, or to show that the destination of the vessels was other than that of the slave trade. Nor has his counsel, on the argument, here, set up for him any such pretense. We may, therefore, safely conclude that the purpose for which these vessels were fitting, was the slave trade; and if so, the right of seizure attached. We can discover no sound reason for delaying the seizure until the vessels were on the point of sailing. It could only be necessary to render more certain, from their complete fitment, the purpose for which they were to be employed; and if that be satisfactorily ascertained, at an earlier stage of the preparation, the delay would be useless, and evasion of the law rendered almost certain.

Decrees affirmed.

391*] [*Instance Court. Slave Trade Acts.]

THE MERINO, THE CONSTITUTION, THE LOUISA.

Barrias et al., Claimants.

The technical niceties of the common law are not regarded in admiralty proceedings. It is sufficient if an information set forth the offense so as clearly to bring it within the statute upon which the information is founded. It is not necessary that it should conclude contra formam statuti.

The District Court of the district where the seizure was made, and not where the offense was committed, has jurisdiction of proceedings in rem for an alleged forfeiture.

If the seizure is made on the high seas, or within the territory of a foreign power, the jurisdiction is conferred on the court of the district where the property is carried and proceeded against.

A municipal seizure, within the territory of a foreign power, does not oust the jurisdiction of the District Court into whose district the property may be carried for adjudication.

The prohibitions in the slave trade acts of the 10th of May, 1800, c. 205, LI. and of the 20th of April, 1818, extend as well to the carrying of slaves on freight, as to cases where the persons transported are the property of citizens of the United States; and to the carrying them from one port to another of the same foreign empire, as well as from one foreign country to another.

Under the 4th section of the act of the 10th of May, 1800, c. 205, LI. the owner of the slaves transported contrary to the provisions of that act, cannot claim the same in a court of the United States, although they may be held in servitude according to the laws of his own country. But if, at the time of the capture by a commissioned vessel, the offending ship was in possession of a non-commissioned captor, who had made a seizure for the same offense, the owner of the slaves may claim, the section only applying to persons interested in the enterprise or voyage in which the ship was employed at the time of such capture.

APPEAL from the District Court of Alabama. These were the cases of several vessels, and their *cargoes of African [*392 slaves. The information filed in the case of The Constitution was, as well on behalf of the United States, as of George M. Brooke, a colonel in the army of the United States. The first count, after stating the seizure of this vessel, with a valuable cargo on board, and eighty-four African slaves, by the said Brooke, on waters navigable from the sea by vessels of ten tons burden and upwards, alleges that the said vessel, being a vessel of the United States, owned by citizens of the United States, was employed in carrying on trade, business or traffic, contrary to the true intent of an act of Congress, passed on the 10th of May, 1800, entitled, "An act to prohibit the carrying on of the slave trade from the United States to any foreign place or country," that is to say, was employed or made use of in the transportation of slaves from one foreign country to another, viz., from Havana to Pensacola, both places belonging to the King of Spain, contrary to the form of the said act, whereby the said vessel and her cargo became forfeited.

It was admitted by the counsel for the respondents, that the second and third counts were unsupported by the evidence, and they were, therefore, abandoned.

The fourth count charges, that certain citizens of the United States did, in June, 1818, take on board, or transport from one foreign place or country to another, certain negroes, in a vessel, for the purpose of holding, selling or otherwise disposing of them as slaves, or to be held to labor or service. In the case of The Merino, the information *contains three [*393 counts, the second of which alone was relied upon by the counsel for the respondent, and this states, that on the —— day of June, 1818, certain citizens of the United States received on board of the said vessel, belonging to

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NOTE.—As to jurisdiction of the District Court in admiralty, see note to 1 L. ed. U. S. 489.

citizens of the United States, and transported from one foreign place or country, viz., from Cuba to Pensacola, a certain number of negroes, for the purpose of holding the said negroes as slaves; and that the said vessel, with her cargo, and the negroes, were, on the 21st of June, 1818, seized on the high seas by Capt. M'Keever, commander of the United States ketch Surprise, and were brought into the district of Mobile, for a violation of the laws of the United States, and particularly of the 4th section of the act of 1818.

The information in the case of The Louisa and her cargo was substantially the same as the one last mentioned, the second count being also founded on the 4th section of the act of 1818.

The evidence in these cases established the following facts, viz.: That the above vessels, owned by citizens of the United States, and registered as such, sailed from certain ports in the United States to Havana, where they each received on board certain goods, as also a number of slaves, newly imported from the coast of Africa, the latter belonging to the subjects of Spain, residents either of Havana or Pensacola, to be transported from the former to the latter place. The Merino cleared out at Havana on the 2d of June, 1818, for Mobile, and the Constitution and Louisa, on the 10th of the 394*] same month, for New Orleans. *The owners of these vessels, however, engaged to land the slaves at Pensacola, on their respective voyages to New Orleans and Mobile. On their arrival within, or near to, the bay of Pensacola, that place was found in possession of the American army, under the command of Gen. Jackson. The Merino was seized by the United States ketch Surprise, commanded by Capt. M'Keever, within a mile and a half of Fort Barancas, inside the bar, and within the harbor of Pensacola. The Constitution was taken possession of by Col. Brooke of the United States army, under the guns of Fort Barancas, then in possession of the United States forces. The Louisa was captured by Capt. M'Keever, in the ketch before mentioned, outside of the bar at Pensacola, standing in. These vessels, with their goods on board, and the negroes, were sent to the district of Mobile for adjudication. The Constitution, having on board an agent of Col. Brooke, was boarded off Mobile point by the United States revenue boat, and was carried in and reported by Capt. Lewis, commanding said boat, to the collector, as having been seized by him, the agent reporting the seizure as having been made by Col. Brooke.

The informations against these vessels and their cargoes, were filed in the general court for the territory of Alabama, from whence the proceedings were removed into the District Court of Alabama, where the vessels and their cargoes were severally condemned as forfeited to the United States, but the distribution was reserved for the future order of the court. 395*] From these *sentences of condemnation, the claimants of the vessels and the cargoes appealed to this court.

Mr. C. J. Ingersoll, for the appellants, (1) argued upon the facts, to show that the transactions were in good faith; that Pensacola was the real destination of the persons transported, who were slaves by the laws of Spain established in the Island of Cuba; that there was no intention of introducing them into the United States, contrary to our laws, but that they were bound from one Spanish colony to another, under a license from the local government. (2) That the temporary occupation of Pensacola, in 1818, by the troops of the United States, under Gen. Jackson, was not such a conquest in war as changed the national character of the province of Florida, but was a mere incursion into the country, for the purpose of chastising the Indian savages, and depriving them of succors and a place of refuge. The principle, that a lawful conquest in war has the effect of suspending the operation of the local laws of the place, and of establishing such others as the conqueror thinks fit to substitute, was incontestable, but could not apply to such a case as that before the Court.[1] The United States were not at war with Spain; and even if they had been, the occupation of the Spanish territory by their arms would not change the jurisdiction, until its possession was confirmed by a *treaty [*396 of peace.[2] But, according to our municipal constitution, even if the territory had been ceded by treaty, it would require an act of Congress to apply the laws of trade for its government. (3) The slave act of 1800, c. 205, does not affect the slaves transported, unless they belong to the owner of the vessel. Besides, it merely prohibited their transportation from one foreign country to another, and not from one place of the same country to another. This was the case of a removal of slaves, who were such by the laws of the island, from Cuba to another Spanish colony. Since the enactment of the first law on the subject, in 1794, down to the present time, the policy of the national legislature has been limited to the suppression of the slave trade (properly so called), and to prevent, as far as could be done, the bringing into a state of servitude those persons who were free in their own country; and since the condition of persons who are already slaves, cannot be changed or made worse, by their removal from one slave-holding country to another, the statutes ought not to be so construed as to prohibit citizens of the United States from being concerned in such removals. (4) The District Court of Alabama had no jurisdiction of these causes, under the judiciary act of 1789, c. 20, s. 9, since the seizure was made, neither upon the high seas, nor upon waters navigable from the sea, within the district, but it was made within *the [*397 territorial jurisdiction of a foreign power. The waters where this seizure was made, form no part of the "high seas."[3] He also insisted that no regular admiralty process had issued in the court below, and that the informations were defective in not concluding contra formam statuti, and, at the same time, not containing any express reference to the statutes under which the proceedings were commenced.

1.—The United States v. Hayward, 2 Gall. Rep. 501; United States v. Rice, 4 Wheat. Rep. 246; The Foltina, Dodson's Adm. Rep 450.

2.—Grotius de S. B. ac P. lib. 3, c. 6, s. 4, 5, par Barbeyr, tom. 2, p. 786; Mably, Droit de l'Europe, tom. 1, c. 2, p. 144.

3.—United States v. Wiltberger, 5 Wheat. Rep. 93; United States v. Pirates, Id. 200.

The Attorney-General and Mr. Kelley, contra, (1) insisted that there was no ground for limiting the operation of the slave trade acts in the manner proposed on the part of the appellants. Foreigners cannot be permitted, with impunity, to employ our shipping in the transportation of slaves. The acts of Congress may attach to American vessels, wherever they may be, or however, employed. Both the vessels and the slaves had here committed an offense, in the eye of the law, for which it pronounced a forfeiture, without regard to the national character of the owners of ship or cargo. Foreigners are bound to know, and are supposed to know, our laws of trade, in all cases where those laws may be justly applied; and they may be justly applied to the conduct of our vessels, whether in our own ports, in foreign ports, or on the high seas. Under the statutes now in question, it is not necessary that the two foreign ports or places, between which the traffic is car- [*398 ried on, should be in *different foreign countries or empires. Much of the slave trade was carried on from European factories on the coast of Africa to the colonies of the same nation in the West Indies or South America; and could there be a doubt that this trade was meant to be prohibited by Congress? It is sufficient to satisfy the words of the statute, if the two places are foreign with respect to the United States. Nor is it material whether the American owner of the vessel has any proprietary interest in the slaves or not. Whether they are carried as his property for sale, or to be held to service, or are transported on freight for the slave merchant, or owner, the forfeiture equally attaches to vessel and cargo. (2) By the 4th section of the act of 1800, c. 205, the claimants, if interested in the enterprise or voyage in which the vessel is employed, are expressly excluded from restitution of the slaves which belong to them. But here it may be doubted whether they have proved any proprietary interest which will entitle them to restitution. The onus probandi was on them. They must show, by positive evidence, that those persons were slaves according to the laws of Spain, and that they had a right to carry them from one colony to another, by those laws. Foreign laws are matters of fact, and as such, must be proved, according to the rules of evidence applicable to them, whether written or unwritten. (3) It was not meant to be contended that the United States acquired any sovereignty or jurisdiction over the Spanish territory, by its temporary occupation. It was unnecessary to [*399 maintain such a position. Here was a fraudulent attempt to violate our laws, by transporting those persons from the Island of Cuba, with a colorable destination, for another Spanish colony, but with the real intention of introducing them into the United States. In order to give the District Court of Alabama jurisdiction, it is immaterial where the offense was committed; and it is equally immaterial where the seizure was made, provided it was not made in any other district of the United States. In any other case, jurisdiction is given to the court within whose district the property is carried for adjudication. The trespass on the Spanish territory cannot be so connected with the subsequent seizure, under the process of the court below, as to invalidate the seizure.[1] If there was any offense against the sovereignty of Spain in the original seizure, that is a matter to be adjusted between the two governments.[2]

Mr. Justice Washington delivered the opinion of the court, and, after stating the case, proceeded to enumerate the objections made by the counsel *for the appellants, to [*400 the several decrees of the court below:

1. That the regular admiralty process was not issued in these cases.

2. That the informations do not conclude against the form of the statute.

3. That the District Court of Alabama had not jurisdiction, the seizures having been made, not within the waters of that state, or on the high seas, but within the jurisdiction of a foreign nation.

4. That the acts of Congress, on which these informations are founded, were intended to apply exclusively to the suppression of the slave trade, from the coast of Africa, or elsewhere, for the purpose of holding or disposing of the subjects of the trade, as slaves, and not to the carrying of them, when in a state of slavery, from one foreign country to another.

1. That the proceedings in these cases were not conducted with the regularity usually observed in admiralty causes, must be admitted. But the court is of opinion that all objections of this nature were waived, by the appearance of the parties interested in the property seized, and filing their claims to the same. In each case, a warrant issued to the marshal to seize the property libeled, and to cite and admonish all persons claiming an interest in the same, to appear before the court, and to show cause why the same should not be condemned, as forfeited to the United States. This process was returned executed, and claims were interposed for the several vessels and their *car- [*401 goes, by the asserted owners thereof. Upon the strictest rules which govern in courts of common law, objections to the regularity of the process, to enforce an appearance, would be considered as removed by the appearance of the party, and pleading to the merits.

2. The second objection is without foundation in fact, in relation to the information against the Constitution and her cargo; and we think it inadmissible in point of law, in the other two cases; the count relied upon in those informations stating expressly that the seizure was made for a violation of the 4th section of the act of 1818, the title of which is accurately set forth. For all the purposes of justice, and of notice to the claimant of the charge which he was called upon to answer, this must be deemed sufficient; and the addition of the technical words, contra formam statuti, is altogether formal and unnecessary.

1.—The Richmond, 9 Cranch, 102.

2.—The counsel was proceeding to argue the question as to the rights of Colonel Brooke, as a non-commissioned captor, or seizor, but was stopped by the court, upon the suggestion that the decrees of the court below had reserved the question of distribution of the proceeds of the seizure, for its further directions, as in cases of prize and other admiralty proceedings; and that nothing was before this court upon the present appeal, but the question of forfeiture.

In the cases of The Samuel, 1 Wheat. Rep. 9, and The Hoppet, 7 Cranch, 389, it was observed by this court that technical niceties of the common law, as to informations, which are unimportant in themselves, and stand only on precedents, are not regarded in admiralty information; the material inquiry in the latter cases being, whether the offense is so set forth, as clearly to bring it within the statute upon which the information is founded.

3. The objection raised to the jurisdiction of the District Court of Alabama is principally grounded upon the 9th section of the judiciary act of 1789, c. 20, which provides, "that the district courts shall have exclusive original [*402 cognizance *of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas." It is contended that the seizures in these cases were not made upon the high seas, or upon waters within the district of Alabama, and, therefore, the jurisdiction was not conferred on that court. The section above recited, marks out, not only the general jurisdiction of the district courts, but that of the several district courts in relation to each other, in cases of seizures on waters of the United States, navigable from the sea, by vessels of a particular burthen. If made within the waters of one district, the jurisdiction attaches to the court of that district, and the suit must be there prosecuted. The jurisdiction, in these cases, is given to the court of the district, not where the offense was committed, but where the seizure is made. But where the seizure is made on the high seas, the jurisdiction is conferred upon no particular district court, and it may, therefore, be exercised by the court of any district into which the property is carried, and there proceeded against. In like manner, if the seizure be made within the waters of a foreign nation, as was done in these cases, cognizance of the cause is given, under the general expressions of the section, as to civil cases of admiralty and maritime jurisdiction, to the court of the district into [*403 which the property *is conducted, and on which the prosecution is instituted. The illegality of the service in this latter case has nothing to do with the question of jurisdiction, as was decided by this court in the case of The Richmond. 9 Cranch, 102.

4. The last objection involves the merits of these causes. In the case of The Constitution, the counsel for the appellees rely upon the first and fourth counts in the information; and, in the two other cases, on the second count. But, we think that the first count, in the first of these cases, must be put out of view; because, although it charges a violation of the act of 1794, it states the offense within the words of the act of the 10th of May, 1800, and yet it alleges it to have been committed contrary to the form of the act of 1794, the title of which is specially recited. This was, no doubt, a mistake of the proctor; but it partakes too much of substance to be the foundation of a sentence of condemnation, in a case so highly penal as this is. But, that count is not, in the opinion of the court, material to the decision of that case, because, we are all of opinion that the fourth count is fully supported by the evidence in the cause, and warrants the sentence of condemnation pronounced by the inferior court. This count is strictly within the 4th section of the act of 1818; and so is the second count in the informations against the Merino and Louisa, and their cargoes.

The argument relied upon by the counsel for the appellants was, that the policy of our laws, from the year 1794 down to the latest act of legislation, had been confined to the suppression of *the slave trade, and to pre- [*404 vent, as far as could be done, the bringing into bondage those persons who were free in their own country; and, that since the condition of persons already slaves cannot be changed or made worse, by their removal from one slave-holding country to another, the acts of 1800 and 1818, ought not to be so construed as to prohibit citizens of the United States being concerned in such removals.

It may well be doubted, whether even the act of 1794, the first which passed upon this subject, can fairly receive the narrow construction which is contended for, since it prohibits the fitting of vessels within the United States, not only for the purpose of procuring from any foreign kingdom the inhabitants thereof, to be transported to some foreign country, to be disposed of as slaves, but also for the purpose of carrying on any trade or traffic in slaves, to any foreign country, apparently embracing the two cases of free persons of color, whose condition is changed by being brought into a state of slavery, and also persons already slaves, and intended to be used as subjects of traffic. Be this as it may, the language of the acts of 1800 and 1818 leaves no reasonable doubt that the intention of the legislature was to prevent citizens of, or residents within, the United States, from affording any facilities to this trade, although they should have no interest or property in the slaves themselves, and although they should not be immediately instrumental to the transportation of them from their native country. By the former of these laws, the offense is made to consist *in the employment of [*405 a vessel belonging to citizens of the United States, or to persons resident within the same, in carrying slaves from one foreign country or place to another, no matter for what purpose. By the latter, it consists in taking on board, or transporting from Africa, or from any foreign country or place, any negro, etc., in any vessel, for the purpose of holding or disposing of such person as a slave, or to be held to service, etc., where those acts are performed by citizens of, or residents within the United States.

It cannot be questioned, but that the case of The Constitution, as stated in the information, and proved by the evidence, is literally within the provisions of the latter act. The slaves seized in that vessel, were taken on board of her by a citizen of the United States, in one foreign place, for the purpose of their being held to service or labor. The court do not feel themselves justified in restraining the general expression of this law, upon the ground

of a supposed policy, the reality of which, to say the most of it, is very questionable. The sentence, therefore, of the court below, in the case of this vessel and her cargo, must be affirmed.

The same decision would, of course, be made in the cases of The Merino and The Louisa, and their cargoes, if it were not for the circumstance that the second count in the informations against those vssels alleges that the citizens of the United States, who took the slaves on board at the Havana, did so for the purpose of holding them as slaves, which allegation is not proved by the evidence in those 406*] cases. They were taken on board *merely as passengers, to be delivered at Pensacola to their owners, or to those to whom they were consigned. The sentences in these two cases must therefore be reversed, and the causes remitted to the District Court, with directions to permit the libelants to amend, it being obvious to this court, from the evidence, that the negroes taken on board of those vessels were transported for the purpose of their being held to service.

The three remaining cases present the claims of the asserted owners of the slaves transported in the above vessels, from Havana to Pensacola, which were brought before the court below, in the form of libels for restitution. To these libels no claims were filed, and the sentence of the court in each of the cases was, "that the slaves remain subject to the laws of Alabama;" from which decision appeals were taken; and as they amount, substantially, to a dismission of the libels, it becomes necessary to examine their correctness. The ownership of the slaves, as claimed by the respective libelants, appears to the court to be sufficiently established. It is in proof, that slavery was, and is, permitted to exist in the Island of Cuba, either by particular ordinances of the Spanish government, or by custom; that the slaves in question were imported into that island from Africa by Antonio de Frias, and were shipped at Havana for Pensacola by these libelants, as their property, under a passport regularly granted by the Governor-General of Cuba; the slaves claimed by the libelants, other than Frias, having been purchased from 407*] him by those libelants. It would *seem unreasonable to require other or better proof of ownership, in property of this description, than these facts furnish.

The only question, then, is, whether these persons are prevented from claiming restitution of these slaves by any law of the United States. The only act which bears upon this subject, is that of the 10th of May, 1800, the 4th section of which, after declaring that it should be lawful for any of the commissioned vessels of the United States to seize any vessel employed in carrying on trade, business or traffic, contrary to the intent and meaning of that act, or the act of 1794, enacts, that "all persons interested in such vessel, or in the enterprise or voyage in which such vessel shall be employed, at the time of such capture, shall be precluded from all right or claim to the slaves found on board such vessel, and from all damages or retribution on account thereof." There can be no question but that this section is strictly applicable to the claimants of the slaves on board the Merino and Louisa, those vessels having been seized whilst employed in carrying on trade forbidden by the act of 1800, by a commissioned vessel of the United States. The case of the claimants of the slaves on board of the Constitution is different. That vessel, with her cargo, was seized in the bay of Pensacola by a military officer, and was conducted by his agent to Mobile, for the purpose of being libeled for his use. The 1st section of this act, which declares the forfeiture of any vessel belonging to a citizen of the United States, employed in transporting slaves from one foreign country to another, *contains [*408 a provision, that the said vessel may be libeled and condemned for the use of the person who shall sue for the same. The right to seize the vessel, and slaves on board, would seem to be a necessary consequence of the right to enforce the forfeiture. The possession of the vessel, then, being lawfully vested in Col. Brooke, at the time she was boarded by the revenue boat, off Mobile Point, it could not, with any propriety, be asserted that she was employed in carrying on trade, contrary to law, at the time she was so boarded. Her employment in such trade was completely terminated by the first seizure, and she was on her way for adjudication when the second seizure was made. If, under these circumstances, a capture of the vessel could not be legally made by the revenue boat, then the claims of the owners of the slaves on board is not precluded by the 4th section of the act of 1800; the sentence above quoted applying only to persons interested in the voyage in which the vessel was employed at the time of such capture.

The court is therefore of opinion, that in the case of Antonio de Frias and David Nagle against eighty-four African slaves, the sentence of the court below is erroneous, and ought to be reversed, and that a decree of restitution ought to be made.

Sentence in the case of The Constitution affirmed. Sentences in the case of The Louisa and Merino reversed, with leave to amend. Sentence reversed as to the claim of Frias and Nagle, and restitution decreed.

[*Instance Court. Slave Trade Acts. [*409
Lien of Material Men.

THE ST. JAGO DE CUBA.

Vinente et al., Claimants.

A question of fact, under the slave trade acts. Condemnation pronounced.

The claim of seamen, for wages, on a voyage, undertaken in violation of the slave trade acts, out of the proceeds of the forfeited vessel in the registry, rejected.

The claims of seamen, for wages, and of material men, for supplies, where the parties were innocent of all knowledge of, or participation in, the illegal voyage, preferred to the claim of forfeiture on the part of the government.

Material men have a lien, which may be enforced by a proceeding in the admiralty, in rem, for necessaries or supplies, furnished in a port to which the vessel does not belong.

APPEAL from the Circuit Court of Maryland.

This cause was argued by the Attorney-Gen-

NOTE.—As to lien of material men, for supplies furnished in foreign port, see note to 70 L.R.A. 309.

eral for the appellants, and by Mr. Winder for the respondents and claimants.

Mr. Justice Johnson delivered the opinion of the court:

This vessel, with her lading, found on board at the time of seizure, was libeled for an infraction of the laws prohibiting the African slave trade.

The causes of forfeiture alleged in the libels comprised all those contained in the 1st section of the act of 1794, and those of the 2d section of the act of 1818, with the exception of the offense of being laden for the prohibited trade. 410*] *The claims filed to this libel were,

1. That one Vinente, a Spanish subject, who alleges her to be a regularly documented Spanish vessel, engaged in traffic sanctioned by the laws of Spain. This claim goes both to vessel and cargo.

2. Of certain seamen, who demand compensation for their wages from the proceeds of the vessel.

3. And, lastly, of several material men, who claim the payment of their bills, alleging the vessel to be foreign, and their being employed in her equipment and repairs by the captain, and one Strike, as his agent.

The court below condemned the vessel, but restored the cargo, and from that decree the Spanish claimant has not appealed. The fate of the vessel, therefore, is irrevocably fixed; but the United States having appealed from the decree of restitution in favor of the cargo, that appeal gives rise to a complicated inquiry.

The court below repelled every other charge against the vessel, except that of having been "caused to sail," with a view to be employed in the prohibited traffic. But "being caused to sail" is not among the offenses enumerated in the latter part of the 2d section of the act of 1818, under which alone the lading of the vessel is subjected to forfeiture. That offense is among those enumerated in the enacting clause of the section, but in the forfeiting clause it is dropped; and if, therefore, the case of this vessel exhibits no other offense than that which 411*] in the decree below was *made the ground of her condemnation, the decree restoring the cargo would be well sustained; hence it becomes necessary to review the whole case.

One John Gunn, it appears, built and equipped this vessel in the port of Norfolk, as a packet, intending her for sale; but falling in debt, it became necessary to raise a sum of money upon her hull, and he accordingly took her to Baltimore for that purpose. When there, he addressed himself to one Maher, who advanced him the money, and instead of an hypothecation in ordinary form, Gunn executed a bill of sale to Maher, admitted, on all hands, to have been intended to serve only as the means of enabling Maher to expedite the vessel on a voyage to Cuba, there to be sold, and to account with Gunn for the proceeds, as well of freight as of sale.

This purpose Maher appears soon to have abandoned, for an enterprise of a very different nature. The vessel was put up for freight, and various applications issued; but Maher undertook himself to load her for St. Jago de Cuba, and Gunn left Baltimore under the persuasion that her destination was fixed. Some time, however, having elapsed, and not hearing of her sailing, he writes to Maher on the subject, and is then informed that he had dispatched her, in ballast, to St. Jago de Cuba, under the care of Strike, a personage who, from that time, makes a conspicuous figure in the res gestæ. For no sooner does she arrive at St. Jago, than she is colorably conveyed to Vinente, but still under the absolute control of Strike; and without having *shipped [*412 an article, appears at once with a valuable cargo on board, the property also of Strike, furnished with a Spanish coasting license, on a voyage to Havana, thence to Matanzas, where a part of her cargo is sold, and she is completely equipped, colorably a Spaniard, but really an American, for the African trade.

On her voyage thence to the coast of Africa, she is pursued by hostile vessels, and in the chase sustains damage, which compels her to put into Baltimore to refit. There she encounters Gunn, her original and equitable owner, but who finds in her nothing of her original character, but what served to identify his vessel, and expose to him how his confidence had been abused, and his property forfeited, through his own indiscretion, in conveying her to Maher. In the present cause, his interests are out of the question, and he appears only as a witness, on behalf of the prosecution.

It is immaterial to inquire whether this vessel was in the inception of her voyage, "laden" for the illegal purpose for which she was caused to sail. The court below has attached much importance to the omission of this allegation; and, certainly, as a substantive offense, the vessel could not have been condemned for that cause, unless comprised among the allegations in the libel.

But as to the liability of the lading, found on board at the time of the seizure, to forfeiture under the act, that consequence is made to depend upon the liability of the vessel herself to condemnation; and, although this court is not *prepared to carry that forfeiture be- [*413 yond the limits of an intimate connection with the prohibited voyage, they are of opinion that, in this case, that connection is so intimate as to leave no doubt of its liability, to the full extent of the liability of the vessel. If, then, the evidence will sustain any one of the offenses alleged in the libel, which offense is made a ground of forfeiture by law, the cargo must share the fate of the vessel.

One of those allegations is, that she was fitted out; and, contrary to the opinion of the court below, we think the evidence establishes that she was fitted out for the prohibited trade. This conclusion we place on the ground assumed in the cases of The Emily and Caroline, decided at the present term. The general purposes of the enterprise, in its inception, are affirmed by the ground on which the court below founded its sentence against the vessel, and are fully made out by her subsequent conduct. This point being established, it follows that acts, which otherwise would be indifferent, and might be intended as well for an innocent as a prohibited enterprise, become offenses with a view of their purpose. Besides these, the utter improbability that this voyage could have been undertaken from Baltimore to St. Jago, without many acts which would amount to a fitting

out, we have the positive words of Maher himself, the dux facti in the transaction, in his letter of the 28th of October, to Gunn, in which, when speaking of having dispatched the 414*] *vessel to St. Jago, he says: "Mr. Strike has an account of all her expenses in fitting out."

This charge, therefore, we consider as established against her; and this is one of the enumerated offenses which subject vessel and lading to forfeiture.

The court below having subjected the vessel to forfeiture, and the proceeds being in the registry, was then called on to distribute those proceeds among the various claimants, the seamen and material men. Among the former, it dismissed all except that of Pietro Rosso. From the decree, as to those whose claims are dismissed, there is no appeal, and the Court is not called on to pass an opinion upon the grounds of the decision as relates to their claims. But the decree in favor of Pietro Rosso is appealed from by the United States, and it becomes necessary to examine that part of the decree which awards him both his account, and precedence in payment of it.

We think it erroneous, and that it must be reversed, since it is impossible to believe that he entered this vessel without a perfect knowledge of her character and destination. Spanish masters, in common with all others, may commit infractions of the act of 1818, within the ports of the United States; and it is easy to conceive, that engaging a crew, as well as many other acts of preparation for this trade, may be committed by a vessel coming lawfully into the ports of this country. If the plea of stress of weather, and other incidental embarrassments, be set up, as taking a vessel 415*] *out of the action of the laws against the slave trade, it is incumbent on the party who claims benefit of the excuse, to establish it. In the present instance, this seaman was engaged in the port of Baltimore, and so far was the vessel from a want of seamen, that we find the master actually refusing recruits, when offered by Strike to be put on board his vessel. If one seaman may be engaged, why may not a crew? the offense is the same in essence, though not in magnitude. The general policy of the law is, to discountenance every contribution, even of the minutest kind, to this traffic in our ports; and the act of engaging seamen, is an unequivocal preparatory measure for such an enterprise. This part of the decree, therefore, must also be reversed.

The next question arises on the claims of the material men, or rather of those whose claims were sustained in the court below. From those which were rejected there is no appeal.

On this point, the material facts are these: That this vessel, although appearing under the character of a foreign vessel, was, in reality, in her home port; and this, whether considered as the property of Gunn, or of Maher and Strike. The questions then arise, on what does the privilege of material men depend? On the state of facts, or on their knowledge or belief of facts? On the actual absence of a vessel from her home port, or the power given to the ship-master, in another port, to subject his vessel to admiralty process and implied lien, in favor of material men? And, lastly, whether the prior forfeiture of the *vessel to the [*416 United States precludes their general rights, and places them on the footing of subsequent purchasers, whether with or without notice of the forfeiture.

These questions are all solved by a reference to the nature, origin, and objects of maritime contracts. The precedence of forfeiture has never been carried further than to overreach common law contracts entered into by the owner; and it would be unreasonable to extend them further. The whole object of giving admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage.

There are two considerations that fully illustrate this position. It is not in the power of anyone but the ship-master, not the owner himself, to give these implied liens on the vessel; and, in every case, the last lien given will supersede the preceding. The last bottomry bond will ride over all that precede it; and an abandonment to a salvor will supersede every prior claim.

The vessel must get on; this is the consideration that controls every other; and not only the vessel, but even the cargo, is sub modo subjected to this necessity.

For these purposes, the law maritime attaches the power of pledging or subjecting the vessel to material men, to the office of ship-master; and considers the owner as vesting him with those powers, by the mere act of constituting him ship-master. The necessities of commerce require, *that when remote from his [*417 owner, he should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests. But when the owner is present, the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived. From this view of the subject, this court will be best understood when it speaks of the home port of the vessel, an epithet which, it is very easy to perceive, has no necessary reference to State or other limits. And from this view of the subject it results, both that the forfeiture does not ride over the rights derived under maritime contracts, whether they be called liens or privileges, and that the real owners of a vessel, who have themselves contributed to give her a foreign aspect or character, hold out the foreign captain to material men, as one legally authorized to exercise the rights and powers over his vessel which appertain to a foreign vessel. They are thus precluded by their own act from denying her foreign character. In cases of wreck and salvage, it is unquestionable that forfeitures would be superseded; and we see no ground on which to preclude any other maritime claim, fairly and honestly acquired.

We concur, then, in the opinion of the court below, that the fair claims of seamen, and subsequent materialmen, are not overreached by the previous forfeiture; and that, even in the home port, a vessel may be subjected to the liabilities of *a vessel in a [*418 strange port, by being falsely held up as foreign

by her owners. And the question will now be considered, whether these material men have sustained their claims against this vessel upon that principle.

With this view the claims must be examined separately.

The large claim of Maher himself, the real owner, but effected agent, of the vessel, has been properly rejected, and he has not appealed.

That of Despreux, for $1,856, was sustained in the court below, and from that the United States appeal.

This item, we are of opinion, is effected by express notice. Guion swears, that upon the arrival of the vessel at Baltimore, he gave notice to Despreux of her American character, warned him against repairing her, and received for answer that he was secured for the repairs. There is nothing in the transcript to repel this evidence, but many circumstances to corroborate it. He, therefore, does not bring himself within the rule.

There is, however, one item in this account, to the amount of $300 or $400, which was certainly good against all the world. This was for wharfage; but the credits in the account will more than cover it, and having been paid by Maher, or Strike, his employer, it is but reasonable that the payments should be applied to the item entitled to precedence.

The three claims of Hubbard & Co., for 419*] $72.04, James Ramsey, for *$645.99, and Richard Coleman, for $256.03, have nothing in their circumstances to distinguish them from each other. They all allege the vessel to be foreign, and as she was, in fact, not foreign, the question is, whether there was an imposition practiced upon them, under circumstances calculated to deceive and mislead men of ordinary vigilance.

We are of opinion there was not. It appears, that immediately on the vessel's arrival she was libeled by Gunn, and although some difficulty has existed in the cause, in consequence of Gunn's libel not having been inserted in the transcript, yet there are documents connected with it inserted, which sufficiently explain the tenor and purport of the libel, if any doubt could be entertained what that tenor was. These are, the answer and claim to it, and a retraction of that claim, from which it appears, that during the whole time these material men were furnishing this vessel, she was under arrest by the court of admiralty, under a libel, claiming her as American property, in her home port, which claim, the retraction of the answer filed to the libel fully admits. There was, then, to say the least of the facts, enough to put reasonable men upon inquiry. Despreux, it appears, was put upon inquiry, and obtained security, and with ordinary prudence or vigilance these material men may have done the same. Many facts in the case concur to affect them with suspicion of positive knowledge of her real character. We think they have not sustained the exception made in the court below 420*] in their favor, *from the general doctrine, that such claims cannot be sustained against a vessel in her home port.

The decree of the court below, therefore, so far as the appeal of the United States brings it before this court, will be reversed, and the proceeds of the vessel and cargo adjudged to the United States.

Decree reversed.

Decree.—This cause came on to be heard, etc. On consideration whereof, it is adjudged, ordered and decreed, that so much of the decree of the Circuit Court as affirms the decree of the District Court, dismissing so much of the libel as relates to the lading of said vessel, and also so much thereof as sustains the several claims of Pietro Rosso, Joseph Despreux, Hubbard & Carr, James Ramsay, and Richard Coleman, be, and the same hereby is annulled. And it is further decreed and ordered, that the proceeds of the cargo or lading of the said schooner St. Jago de Cuba, and so much of the proceeds of the sale of the said schooner as is embraced in the appeal to this court, be, and the same are hereby condemned as forfeited to the United States, and that the proceeds of the said schooner St. Jago de Cuba, and her cargo, be distributed according to law; for which purpose, this cause is remanded to the said Circuit Court, with instructions to make such distribution.

[*Instance Court. Ship Registry Act.] [*421

THE MARGARET, alias CARLOS FERNANDO. Haley, Claimant.

A transfer of a registered vessel of the United States, to a foreign subject, in a foreign port, for the purpose of evading the revenue laws of the foreign country, with an understanding that it is to be afterwards reconveyed to the former owner, works a forfeiture of the vessel, under the 16th section of the ship registry act of the 31st of December, 1792, c. 1, unless the transfer is made known in the manner prescribed by the 7th section of the act.

The statute does not require a beneficial or bona fide sale; but a transmutation of ownership, "by way of trust, confidence, or otherwise," is sufficient.

Quære, Whether, in such a case, a reconveyance would be decreed by a court of justice in this country.

The proviso in the 16th section of the ship registry act, being by way of exception from the enacting clause, need not be taken notice of in a libel brought to enforce the forfeiture. It is matter of defense to be set up by the party in his claim.

The proviso applies only to the case of a part owner, and not to a sole owner of the ship.

The trial, in such a case, is to be by the court, and not by a jury, in seizures on waters navigable from the sea by vessels of ten tons burthen and upwards.

A registered vessel, which continues to use its register, after a transfer under the above circumstances, is liable to forfeiture under the 27th section of the act, as using a register without being actually entitled to the benefit thereof.

APPEAL from the Circuit Court of Maryland.

This cause was argued by the Attorney-General for the appellants, and by Mr. D. B. Ogden for the respondent and claimant.

422*] *Mr. Justice Story delivered the opinion of the court:

This is a case of seizure, for an asserted forfeiture under the ship registry act of the 31st of December, 1792, c. 1. The libel contains five counts, the four first of which are founded on the 16th section, and the last on the 27th section of the act. The former declares, "that if any ship or vessel heretofore registered, or which shall be hereafter registered, as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence, or otherwise, to a subject or citizen of any foreign Prince or state, and such transfer shall not be made known, in manner hereinbefore directed, such ship or vessel, together with her tackle, apparel and furniture, shall be forfeited." The manner of making known the transfer here referred to, is found prescribed in the 7th section of the act; and, so far as respects the present case, would have been a delivery of the certificate of registry by the master of the vessel to the collector of the district, within eight days after his arrival in the district, from the foreign port where the transfer was made.

It appears, from the evidence, that the claimant was the sole owner and master of the schooner under seizure. She was duly registered at the port of Baltimore; and on the 4th day of May, she was duly transferred at Havana, by procuration, to a Spanish subject domiciled in Cuba, and received the proper documents evidencing her Spanish character. The schooner was, at this time, lying at Matanzas, 423*] and soon afterwards sailed *on the homeward voyage, under her American papers, still having the Spanish documents on board, in the custody of a person who assumed the character of a passenger, but who was, in fact, the Spanish master, and kept them concealed. The name of the vessel had been blacked out of the stern, which was the first circumstance that excited suspicion of her character. On further inspection, it was found that her name, "Margaret, of Baltimore," was inserted on a movable sheet of copper; and upon a close search, directed by the captain of the revenue cutter, the Spanish documents were discovered, and delivered up to the collector of Baltimore.

The fact of the transfer of the schooner to a Spanish subject, and the assumption of the Spanish character, are not denied; and the defense is put upon this point, that it was a mere colorable transfer, for the purpose of evading the Spanish revenue laws, the real American ownership not having been bona fide changed. There is certainly nothing in this record that shows that the intention might not also have been to evade the American revenue laws; for the obvious purpose of keeping the Spanish master and papers on board, was to assume the American character in our ports, and to re-assume the Spanish character on the next voyage, so that the parties might obtain the fullest benefit of the double papers. But, assuming that the sole object of the transfer was a fraud upon the laws of Spain, it was, nevertheless, a transfer binding between the parties, and changing the legal ownership. It was completely, within *the words of [*424 the law, a transfer, "by way of trust and confidence," to a foreign subject; the trust and confidence being, that the vessel should be reconveyed to the American owner when the special purposes of the transfer were entirely consummated. That a reconveyance would be decreed in an American court of justice, upon such a transaction with a foreign subject, in a foreign port, in violation of the municipal laws of his country, is a point which we are by no means disposed to admit. It is sufficient for us, however, that the case is brought within the very terms of the act of Congress, which does not require a beneficial or bona fide sale, but a transmutation of ownership, "by way of trust, confidence, or otherwise." But it is said that the case is not within the policy of the act. What the policy of the act is, can be known only by its provisions; and every section of it betrays a strong solicitude on the part of the legislature to trace and inspect every change of ownership; and, for this purpose, to require a public avowal of it, and an alteration of the ship's documents, so as to exhibit, at all times, the names of all persons who are the legal owners. The policy evinced by this course of legislation, is the encouragement of American navigation and American ship-building, to the exclusion of foreign navigation and foreign ownership, and securing to American registered ships a preference, in all our revenue transactions, over all vessels which were not strictly entitled to the character. The legislature foresaw that it would be impossible for the officers of government to ascertain the secret intentions of *parties, or the object of ostensible [*425 transfers of ownership. Whether such transfers were bona fide, or colorable, for meritorious or illegal purposes, were matters of private confidence, and could rarely be ascertained by competent and disinterested proof. To admit secret transfers of ownership to any persons, and especially to foreigners, and allow, at the same time, to the ships the full benefit of the American character, would be hazarding the main objects of the act; it would invite all sorts of contrivances to evade the laws, and disable the government from possessing means to detect frauds. The correct course of legislation was, therefore, obvious. It was to lay down a strict and plain rule, requiring all transfers to be made known, from time to time, as they occurred; and a surrender of the American documents, when the legal ownership passed to a foreigner, whatever might be the secret trusts with which it was accompanied. The words of the section now under consideration are direct to this purpose; and so far from contravening, they support, in the fullest manner, the general policy of the act. They are not, then, to be construed in a more limited sense than their obvious purport indicates.

But it is agreed that the proviso of this section shows that the forfeiture inflicted by the enacting clause is not absolute, and that the trial ought not to have been by the court, as a cause of admiralty and maritime jurisdiction, but by a jury, as upon an exchequer information, since a verdict alone can fix the forfeiture.

426*] The words of the *proviso are: "Provided, that if such ship or vessel shall be owned in part only, and it shall appear to the jury, before whom the trial for such forfeiture shall be had, that any other owner of such ship or vessel, being a citizen of the United States, was wholly ignorant of the sale or transfer to, or ownership of, such foreign subject or citizen, the share or interest of such citizen of the United States shall not be subject to forfeiture; and the residue only shall be forfeited." Now, in the first place, this being a mere proviso, by way of exception from the enacting clause, it constitutes properly matter of defense, and need not be taken notice of in a libel, brought to enforce the forfeiture. The party who seeks the benefit of it, must, in his claim, insist upon it, so as to bring it as matter cognizable in the issue to the jury. In the next place, the very terms of the proviso apply only to the case of a part owner, and not to a sole owner, of the ship. The case put is, where the ship "shall be owned, in part only," by a person ignorant of the transfer, such part shall not be subject to forfeiture. In the case before the court, the claim is by Haley, as sole owner of the schooner, and all her American documents establish him as sole owner. He does not assert an ignorance of the transfer, nor claim in any way the benefit of the proviso. So that, whatever may be the true construction of the proviso, in other respects it is plain that it is inapplicable to his predicament, and might, on this account, be dismissed from the consideration of the court.

But the other suggestion, in respect to juris- 427*] diction *is entitled to scrupulous attention. The 29th section of this act, declares that all penalties and forfeiture incurred for offenses against it, "shall and may be sued for, prosecuted, and recovered, in such courts, and be disposed of in such manner as any penalties and forfeitures, which may be incurred for offenses against an act entitled, 'An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of vessels,' may be legally sued for, prosecuted, recovered and disposed of." The act here referred to is the revenue act of the 4th of August, 1790, ch. 35, which, in the 67th section, provides for the prosecution for penalties, and libeling for forfeitures, in the same general terms which are employed in the revenue act of the 2d of March, 1799, ch. 128, on the same subject. Now, the judiciary act of 1789, ch. 20, in express terms, and as has been repeatedly adjudged, upon the most solemn consideration, by this Court, rightfully includes all seizures for forfeitures made under laws of impost, navigation, and trade, on waters navigable from the sea, by vessels of ten tons burthen and upwards, as causes of admiralty and maritime jurisdiction, which are to be tried by the court, and not by a jury. And seizures made under the revenue act of the 4th of August, 1790, ch. 35, as well as under that of 1799, ch. 128, had been uniformly tried in this manner. Where the seizures have been made on land, or on waters not so navigable, the trial has been by jury. It is true, that the first case in which the question 428*] as to *the admiralty jurisdiction under the judiciary act of 1789 came under consideration, did not arise until after the enactment of the ship registry act,[1] and, therefore, it may have escaped the attention of Congress, that such was the legal construction. But such a supposition is not lightly to be indulged, not only from the direct and unequivocal language of the judiciary act of 1789, but also from the reference in the registry act to the revenue act of 1790, for the mode of suing for penalties and forfeitures. The latter act (s. 67) takes an express distinction between penalties and forfeitures, confining the trial of any fact put in issue in suits for penalties, to the judicial district in which such penalties shall accrue, and then providing, in general terms, for libels, to enforce forfeitures, to be brought "in the proper court having cognizance thereof;" thus pointing to the judiciary act, for the tribunal which is to exercise jurisdiction, and for the mode in which it is to be exercised. It certainly cannot be admitted that the obscurity of a proviso like the present ought to repeal, by implication, the deliberate act of the legislature, in settling the general jurisdiction of its courts, and placing, with so much solicitude, causes of this nature on the admiralty side of the courts. The proviso is still applicable, in its terms, to all cases of seizures, on land and on waters, where the trial is to be by a jury; and, perhaps, taking the whole language, it ought to be construed to include within its equity, cases where the trial is by the court, *and the for- [*429 feiture is not intended to be inflicted by the act. The probability is, that the words court or were omitted before the word "jury," by mistake, in the draft of the act. But this omission, if it is to have any effect, is not to oust the jurisdiction of the court, but to take from the party a benefit, which is not within the words of the proviso. It is the opinion of the court, that the present seizure, which is averred in the libel to have been made upon waters navigable from the sea by vessels of ten tons burthen and upwards, is a cause of admiralty and maritime jurisdiction, and was rightfully tried by the District Court, without the intervention of a jury.[2] This objection cannot, therefore, avail the claimant.

The view that has already been taken of the cause upon the merits, as applicable to the four first counts in the libel, render it unnecessary to go into a particular examination of the fifth count. That count is founded, as has been already stated, upon the 27th section of the act, which declares, "that if any certificate of registry, or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture." We think that there are facts enough in the proofs before us, to establish the forfeiture also under this clause. By the transfer at Havana, the schooner lost her American character, and the title to *use her certificate of registry [*430 for the return voyage. She, however, did use it, and sailed under its avowed protection,

1.—La Vengeance, 3 Dall. 297.

2.—Vide ante. Vol. VIII. p. 391; The Sarah, and note 1, p. 396.

"not being entitled to the benefit thereof, according to the intent of the act."

The judgment of the District Court is reversed, and a decree of condemnation awarded against the schooner and her appurtenances.

[Instance Court.]

TWO HUNDRED CHESTS OF TEA. Smith, Claimant.

In a libel of information, under the 67th section of the collection act of 1796, c. 128, against goods, on account of their differing in description from the contents of the entry, it is not necessary that it should allege an intention to defraud the revenue.

A question of fact, as to the rate of duties payable upon certain teas, imported as bohea. That term is used in the duty act in its known commercial sense; and the bohea tea of commerce is not usually a distinct and simple substance, but is a compound, made up in China, of various kinds of the lowest priced black teas.

But, by the duty acts, it is liable to the same specific duty, without regard to the difference of quality and price.

APPEAL from the Circuit Court of Massachusetts.

This was a libel of information, filed in the District Court of Massachusetts, against two hundred chests of tea, alleging that on the 8th of September, 1819, the collector of the customs for the port of Boston seized at that port the 431*] said chests of *tea, as forfeited, for having been unlawfully imported at the port of New York, in the ship Ontario, on the 29th of June, 1819, from Canton, in China, as being that kind and denomination of teas commonly called bohea teas, and afterwards transported coastwise to Boston, in the original chests and packages, and there entered as bohea; and that, on such seizure and examination, according to law, the chests and packages were found to differ in their contents from the entries, and the teas contained in them to be of a different kind and quality of black teas, and not bohea teas, as represented in the entries.[1] The claim interposed by T. H. Smith, stated that the teas 432*] in question *were imported and entered by him, at the port of New York, as bohea teas, and that they are of the kind and denomination called bohea teas, and not of a different kind or quality of teas. The District Court pronounced a decree of condemnation, upon the testimony taken in the cause, which was affirmed, pro forma, in the Circuit Court, upon appeal; and the cause was, thereupon, brought to this court.

The cause was argued by Mr. Webster and Mr. D. B. Ogden for the appellant, and by Mr. Blake for the respondents.

On the part of the appellant, it was contended that the examination and seizure authorized by the 67th section of the duty act of 1799, c. 128, are limited to the collector of the district, where the goods were originally entered, and the duties secured upon importation; and that, consequently, the case made out by the libel was not within the purview of the act, even supposing the collector might, by his general authority, make a seizure, and assert the forfeiture in a libel properly framed for that purpose. The United States were concluded, by the entry and inspection of the teas, at the port of New York, where the importation from a foreign port was made, and the duties paid and secured. Besides, the libel contains no allegation of an intention to defraud the revenue. By the terms of the statute, no forfeiture is incurred if the difference between the entry and the packages proceeded from accident and mistake, and not *from an intention to de- [*433 fraud the revenue. The want of such an allegation must, therefore, be considered as a substantial defect in the libel. The counsel also minutely examined the evidence, and insisted that the statute meant to describe the different kinds of teas in ordinary commercial language, and not with scientific precision. The tea now in question is the bohea of commerce, whatever might be its botanical designation, or its Chinese name.

For the respondents it was argued that the construction of the 67th section of the act, which had been contended for by the claimant, would, if adopted by the court, be fatal to the whole system of revenue laws. There was nothing in the terms of the section, or in other parts of the statute, which restricted it to the collector of the port and district where the original importation from abroad was made. On the contrary, the terms, "a collector," and "the collector," are used promiscuously throughout the act, where an authority is intended to be given to, or a duty imposed on, the collectors of the customs generally; and wherever it is intended to confine the authority or duty to the collector of any particular port, appropriate words are used for that purpose. It was altogether an erroneous supposition that an entry of goods, brought coastwise from the collection district where they were originally imported to another, was not required by the revenue laws. On the contrary, whenever the value of such goods exceeds $400, and they are contained *in the original packages as [*434 imported, an entry is required, upon their being transported from one port to another, al-

1.—The 67th section of the collection act of 1799, ch. 128, upon which this information was founded, provides "that it shall be lawful for the collector, naval officer, or other officer of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof; and if, upon examination, they shall be found to agree with the entries, the officer making such seizure and examination shall cause the same to be repacked, and delivered to the owner or claimant forthwith; and the expense of such examination shall be paid by the said collector or other officer, and allowed in the settlement of his accounts; but if any packages so examined, shall be found to differ in their contents from the entry, the goods, wares or merchandise contained in such package, or packages, shall be forfeited, provided, that the said forfeiture shall not be incurred, if it shall be made appear to the satisfaction of the collector and naval officer of the district where the same shall happen, if there be a naval officer, and if there be no naval officer, to the satisfaction of the said collector, or of the court in which a prosecution for the forfeiture shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue."

though that precise term may not be used in the various revenue and navigation laws.[1] All the formalities required by these acts were complied with on bringing these teas from the port of New York to the port of Boston, and consequently an entry was made with the collector of the latter port, so as to authorize him to make the examination and seizure under the 67th section of the collection act. Nor was any allegation of an intention to defraud the revenue necessary, since the libel pursues the language of the enacting clause of the act, by which the forfeiture is inflicted whenever the packages are found to differ in their contents from the entry; and the exemption from forfeiture, where the difference proceeds from accident or mistake, is contained in a separate proviso to the section, which is matter of defense for the claimant. By the act of April 16, 1816, c. 107, and by several preceding statutes, the first of which was enacted in 1789, a specific duty was imposed on "bohea tea." All these acts make a discrimination in terms, between "bohea" and "souchong and all other black teas." The Legislature must necessarily have had in view, in both cases, a certain commodity, known by those names respectively. Had this not been the fact, an ad valorem duty would long since have been imposed, in order to prevent the gross frauds upon the revenue which must be 435*] *the inevitable consequence of permitting such teas as those now in question to be imported as bohea. The same distinctive term is used in the British revenue laws, and is supported by the authority of various writers on commerce.[2] It is exclusively applied to the common bohea tea, sometimes called moji or moee by the Chinese; and, consequently, the various instances of the mixtures of teas in China, which are spoken of by the witnesses, as being composed ordinarily of not more than one-third part of that species, and the residue of old souchong, congo, and others of the higher order of teas, and thus imported into this country under the name of bohea, must be regarded, in a legal point of view, as being an evasion of the several statutes on that subject.

Mr. Justice Story delivered the opinion of the Court:

The two hundred chests of tea in controversy in this suit, were imported into the city of New York, in the ship Ontario, from China, and entered there at the custom-house, and the duties regularly secured as bohea teas. They were afterwards transported coastwise to Boston; and upon examination there, under the direction of the collector of the district, they were seized as forfeited, under the collection act of the 2d of March, 1799, ch. 128, s. 67, on account of their differing in description from 436*] *the contents of the entry. The libel states the facts specially, but contains no allegation of an intention to defraud the revenue. Upon this state of the case, the libel is assailed for a supposed defect, arising from the absence of such an allegation. But we think this objection cannot be sustained. The libel follows the language of the enacting clause of the act, which inflicts the forfeiture; and the exemption from forfeiture, when the collector or the court shall be satisfied that the difference between the entry and the packages "proceeded from accident or mistake, and not from an intention to defraud the revenue," being found in a separate proviso, is properly matter of defense, to be asserted and proved by the claimant, and is not, according to the course of adjudications in this court, essential to the structure of the libel itself. This objection, then, may be dismissed without further observation.

Another question, of more serious importance, is, whether the examination and seizure authorized by the 67th section of the act are not limited to the collector of the district where the goods were originally entered and the duties secured, upon importation; and so the case made by the libel is not within the purview of the act, whatever might be the authority of the collector to seize for forfeitures generally, and to assert the claim in a libel, properly framed for such a purpose. The decision of this question would require a very minute and critical examination of the whole revenue and coasting acts; and as the court can satisfactorily *dispose of the cause [*437 upon the merits, in point of fact, it is deemed unnecessary to institute so laborious an inquiry.

The claim admits that the teas were imported and entered as bohea teas; and asserts, that they are of the kind and denomination called bohea teas, and not of a different kind or quality of teas; and this forms the main point in controversy between the parties. One of the earliest acts of Congress (the act of the 20th of July, 1789, ch. 2), imposes duties on teas in the following words: "On bohea tea, per pound, six cents; on all souchong or other black teas, per pound, ten cents; on all hyson teas, per pound, twenty cents; on all other green teas, per pound, twelve cents." The act of the 10th of August, 1790, ch. 39, varied the duties, but retained the same descriptions. The act of the 29th of January, 1795, ch. 82, declared that "teas commonly called imperial, gunpowder, or gomee," should "pay the same duties as hyson teas." The act of the 3d of March, 1797, ch. 64, laid an additional duty of two cents "upon all bohea tea." And the act of the 27th of April, 1816, ch. 107, under which this cargo was imported, levies duties on "bohea, twelve cents per pound; souchong and other black, twenty-five cents per pound; imperial, gunpowder, and gomee, fifty cents per pound; hyson, and young hyson, forty cents per pound; hyson skin, and other green, twenty-eight cents per pound." The legislation of Congress here detailed, exhibits a progressive discrimination in the kinds of green teas, but leaves *the black teas with no other specific [*438 discrimination than that of bohea and souchong.

The argument on behalf of the United States, is, that the two hundred chests of tea, now in controversy, are in reality simple congo tea, and not bohea; that the latter is a pure unmixed

1.—Act of Feb. 18, 1793, for enrolling and licensing ships and vessels to be employed in the coasting trade, etc., c. 153, viii, s. 16, 17, 19.

2.—Stat. 43 Geo. II. c. 12; 24 Geo. III. c. 28: Milborne's Oriental Commerce, Vol. II. p. 521, Ree's Cyclopedia, art. Tea. Thea.; Morrison's Chinese Dict. art. Tea.

tea, entirely distinct from congo, and known in China by an appropriate name; that it is to this pure and unmixed bohea tea, that the successive act of Congress refer, and not to any other mixed tea, though known by the common denomination of bohea. If we were to advert to scientific classifications for our guide on the present occasion, it is most manifest, from the works cited at the bar, that bohea is a generic term, including under it all the black teas, and not merely a term indicating a specific kind. But it appears to us unnecessary to enter upon this inquiry, because, in our opinion, Congress must be understood to use the word in its known commercial sense. The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article were designated by one name or another, in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic. And it would have been as dangerous as useless, to attempt any 439*] other *classification than that derived from the actual business of human life. Bohea tea, then, in the sense of all our revenue laws, means that article which, in the known usage of trade, has acquired that distinctive appellation. And even if the article has undergone some variations in quality or mixture, during the intermediate period from 1789 to 1816, when the last act passed, but still retains its old name, it must be presumed that Congress, in this last act, referred itself to the existing standard, and not to any scientific or antiquated standard.

The true inquiry, therefore, is, whether, in a commercial sense, the tea in question is known, and bought, and sold, and used, under the denomination of bohea tea. We think the evidence on this point is altogether irresistible. It establishes that the bohea tea of commerce is not usually a distinct and simple substance, but is a compound made up in China of various kinds of the lowest priced black teas, and the mixture is of higher or lower quality, according to the existing state of the market. Indeed, from the uniformity of its price in the midst of great fluctuations in the prices of all other teas, it seems rather to indicate the lowest quality of black teas, than any uniform compound. It is accordingly in proof, that old congo teas are often sold as bohea, and have sometimes been imported into our market under that denomination. In short, whenever black teas are deteriorated by age, or are of the lowest price, they are mixed up to form bohea for the market, and are suited to the demand and wishes of the 440*] *purchasers. It is not meant to affirm that there is no such simple and distinct tea known as bohea. All that the evidence justifies us in saying is, that this is not the common bohea of commerce. The latter may or may not be a simple substance, according to circumstances. The generic name, bohea, comprehending under it all the varieties of black teas, whenever they are at the cheapest price in the market, or are of a very inferior quality, or are mixed up for sale, they lose their specific names, and sink into the common denomination.

Such is the conclusion which, in the opinion of the court, the evidence in this record justifies and requires. It is true, that the Boston witnesses very strongly state that the present teas are pure unmixed congo; and their testimony is entitled to very great consideration, from their personal respectability as well as their long experience. But the New York witnesses speak with equal positiveness and point, that the present teas are the common bohea of the market, and have been bought and sold as such without hesitation. These witnesses, also, are entitled to entire credit, for the same reasons; they have had great experience, and are of unquestioned credibility. In this apparent conflict of competent and credible witnesses, the only way of reconciling the testimony, is to suppose that they do not speak ad idem; that the Boston witnesses speak to the specific nature of the particular teas in controversy, and the New York witnesses to their known commercial denomination in their actual state. In *this way of considering the testimony, [*441 the conflict exhibits more a matter of apparent than real diversity of opinion. But if it be not thus reconcilable, it appears to us that the weight of the evidence is so strong that teas of this description have been long imported into our market as bohea, that no court of justice would feel itself authorized to inflict the forfeiture under the statute, upon a presumed intentional violation of its provisions. There is, indeed, something that applies still more forcibly to the claimant, under these circumstances, than applies in common cases. He came into the tea trade since the peace of 1815, and has been most extensively engaged in it. At the time of his first commercial enterprise, teas of this description were publicly and commonly imported into New York as bohea, and had acquired a known commercial character. He acted upon this settled usage; and if the present seizure can be sustained, he is to suffer for a forfeiture, which he had no adequate means to avoid, and could not have foreseen.

Then, as to the intention of fraud. It is said that these teas were imported in congo chests, covered with a thin paper, for the purposes of disguise, and that, upon inspection, it is clear that the original congo still remained in the chests. The circumstances that these are congo chests, whose structure is perfectly known, would not justify the conclusion that there was an intention to defraud the revenue, since that structure might attract observation, and thus lead to immediate *detection. It would [*442 have been more natural to have disguised congo teas in bohea boxes. But the difficulty that lies in the argument derived from this source, is, that upon opening the chests, the contents are proved to be exactly what the New York witnesses call bohea, and the Boston witnesses congo. So that the question of fraudulent disguise depends upon the fact, whether the tea be or be not bohea; and if it be settled to be the latter, then the suspicion from this circumstance vanishes. The same answer may be given to all the other circumstances relied on as badges of fraud. They become utterly un-

important, if there was not a real misrepresentation of the quality of the tea.

There is one cogent fact, which presses with peculiar weight in the consideration of this part of the case. It is, that after the present seizure was made, and the whole train of suspicions disclosed, the remaining teas, of the same denomination and importation, which were yet in the public stores at New York, underwent a strict examination there under the authority of the officers of the customs. The result of that examination was an unequivocal opinion that they were the common bohea of commerce; and this result being communicated to the government, no farther proceedings were thought necessary to vindicate its rights.

But another fact, which is decisive against the supposition of a fraudulent intention, is, that the teas were purchased in China as bohea, at the usual bohea price, and upon their impor- 443*] tation into *New York were there sold at the usual bohea price. They were sold at prices from thirty-one to thirty-six and a half cents per pound, when, at the same time, and in the same place, congo sold at forty-eight cents per pound. This is not a matter of doubtful or equivocal evidence; it is admitted and proved in the most positive manner. What, then, could have been the inducement to fraud? Men do not perpetrate frauds upon the revenue from the mere love of mischief, or the wanton disregard of duty. There must be some leading interest, some enticing object in view, to lead them to such a violation of social law and moral sentiment. In the present case, no such motive could exist, for the whole conduct of the party is at war with the supposition. Nay, more, the perpetration of the fraud would have been against his interest. We do not here allude to his private reputation as an opulent merchant, engaged in an extensive commerce in teas, nor to the powerful influence that, under such circumstances, public opinion must have upon him, in its stern and severe, though silent rebukes. But his immediate interest in the same trade and in the same voyage, would be sacrificed by such unworthy proceedings. He would hazard large interests upon a paltry saving in duties, from which he could in the end derive not the slightest benefit.

It has been said, that unless the present libel can be maintained, a wide door will be opened for the admission of frauds in the importation of teas. If this be true, it forms no reason for a different judicial construction of the acts of 444*] Congress, *much less for the enforcing a forfeiture where the facts will not warrant it. Congress can provide an easy remedy, by changing the specific duty to a duty ad valorem, a policy which has already obtained the sanction of other nations.

It is unnecessary to go farther into the discussion of the merits of this case. The judgment of the court is, that the decree of the Circuit Court of Massachusetts, given pro forma, ought to be reversed, the libel of the United States be dismissed, and the 200 chests of tea be restored to the claimant. But the court are also of opinion that there was probable cause of seizure, and direct it to be certified upon the record.

Decree reversed.

[*Local Law.] [*445

JOHN MASON, Appellant,

v.

JOHN MUNCASTER, survivor of George Deneale and John Muncaster, Church-Wardens of Christ Church, Fairfax Parish, Alexandria, and the said John Muncaster and Edmund J. Lee, present Church-Wardens of the said church, et al., Respondents.

A bill in equity, brought to rescind a purchase made under the decree of this court, in Terrett v. Taylor, 9 Cranch, 43, upon the ground that the title to the property was defective, and could not be made good by the vestry and other persons, who were parties to the former suit. Bill dismissed.

The Vestry of the Episcopal Church of Alexandria, now known by the name of Christ's Church, is the regular vestry, in succession, of the parish of Fairfax, and, in connection with the minister, has the care and management of all the temporalities of the parish within the scope of their authority. A sale by them of the church lands, with the assent of the minister, under the former decree of this court, conveys a good title to the purchaser.

Although the church-wardens of a parish are not capable of holding lands, and a deed to them and their successors in office, forever, cannot operate by way of grant; yet, where it contains a covenant of general warranty, binding the grantors and their heirs forever, it may operate by way of estoppel, to confirm to the church and its privies the perpetual and beneficial estate in the land.

The parishioners have, individually, no right or title to the glebe lands; they are the property of the parish in its aggregate or corporate capacity, to be disposed of, for parochial purposes, by the vestry, who are the legal agents and representatives of the parish.

APPEAL from the Circuit Court for the District of Columbia.

*This was a bill brought by the [*446 appellant, Mason, to rescind a purchase made by him, jointly with W. Jones, of a part of the glebe land which was sold under the decree of this court, in the case of Terrett v. Taylor, reported in the 9th vol. of Mr. Cranch's reports, p. 43. After a confirmation by the court below, of the report of the sale made by the commissioners for this purpose, and after various intermediate negotiations, the appellant gave his promissory notes to John Muncaster, one of the respondents, and George Deneale, since deceased, who were at the time church-wardens of the Episcopal Church of Alexandria, in payment of part of the purchase money; and judgment having been obtained against the appellant, upon these notes, in the Circuit Court for the District of Columbia, the appellant also sought by his bill a perpetual injunction of this judgment. The grounds of the prayer of the bill were, that the title of the property was substantially defective, and could not be made good by the vestry, and other persons, who were parties to the bill in the former suit; that the same bill contained a material misrepresentation of the facts respecting the title, of which the appellant was, at the time of the purchase, wholly ignorant, and of which he had but recently acquired full knowledge.[1]

Upon the final hearing in the court below,

1.—The essential parts of the pleadings and evidence will be found fully stated in the opinion of the court.

the bill was dismissed, and the cause was brought by appeal to this court.

447*] *The cause was argued by the Attorney-General and Mr. Key for the appellant, and by Mr. Swann and Mr. Lee for the respondents.

On the part of the appellant it was contended, (1) That the respondents had no title, legal or equitable. It was admitted to be the rule of equity, that where a vendor comes in for a specific execution, he is bound to show a title free from all doubt; but where the vendee is the plaintiff, and comes in to rescind the sale, he must show the title to be bad. The onus probandi was, therefore, on the appellant, and the counsel argued at large, to show that the conveyance from Daniel Jennings and wife to the church-wardens, in 1770, was insufficient to pass his title in fee for the benefit of the parish. The exposition of this deed, in the former case of Terrett v. Taylor,[1] merely establishes, that inasmuch as the church-wardens were not a body corporate capable of holding lands, this deed did not operate by way of grant to convey the title; that its only legal operation results from the covenant of warranty, which creates an estoppel in favor of the church and its privies; i. e., that the legal title still remains in Jennings and his heirs, but that they are estopped by the warranty from the assertion of that title against the church and its privies. Now, suppose that the respondents are the regular successors of the vestry and church-wardens of Fairfax, still they have no title to the land; all that they hold is an estoppel 448*] against Jennings and *those claiming under him. What title have they which they could assert against a disseisor, or one claiming under a title foreign to that of Jennings? A mere estoppel against a particular grantor and his heirs, constitutes neither a legal nor an equitable title to lands. This court declares that the deed conveys no title, but merely an estoppel by force of the clause of warranty. But, even admitting that this estoppel is a title, it belongs to all the Episcopal members of the parish of Fairfax, whose rights are precisely the same as if no part of the parish had ever been separated from Virginia. It is quite clear, that the former decision of the court proceeded on the ground of the plaintiffs in that suit being considered as the regular successors of the original cestui que trusts; and that, if it had appeared otherwise, and that there was another church in the parish, or other parishioners who were not represented by them, the decree would have been different.[1] To connect themselves with this deed, therefore, the parties are bound to show that they are the successors. If they are not, the connection between them is broken, and they have no title under it. The parish of Fairfax forms about one-half of the county, which is equally divided into the parishes of Fairfax and Truro; the former comprehending the northern half, the latter the southern. This parish had but one vestry, but it was the vestry of the whole parish, elected by the whole body of the parishioners, charged with the common interests of 449*] the whole parish, *and of both the churches equally. The funds with which the glebe was bought were levied from the whole parish, and consequently belonged to the whole parish; and in the case of a vacancy of the parsonage, this court say, the parish was entitled to the profits of the glebe. It therefore follows, that previous to the separation of a part of this parish from the state of Virginia, its interests were one and identical throughout. No part of the parishioners could, by themselves, do any act affecting the interests of the whole without giving the whole a voice in the measure, either by themselves or their representative agents. It is laid down, that although the Church of England, in its aggregate description, is not deemed a corporation, yet the Church of England, of a particular parish, is a corporation for certain purposes, although incapable of asserting its rights and powers, except through its parson regularly inducted.[2] And in the judgment of this court in the former case, it is strongly intimated that the corporate character conferred on the vestries in 1784, could be taken away at pleasure, without any fault of the corporation.[3] If, then, the parish of Fairfax was a corporation, its name becomes a part of its identity, and those who call themselves successors, must have the same name. If it was a corporation, all the corporators have equal rights, and no part of them could exercise the rights which belong to the whole. But, suppose *it not to have [*450 been a corporation, it was a definite body; it had an unity and identity which separated it from all others. It had a technical identity.[4] It consisted of all the Episcopal members within the territorial limits. It was represented by a vestry chosen by the voice of the whole of that parish, in which election no other parish could interfere. Those who claimed to be their successors, must, before the separation of the District of Columbia from the state of Virginia, have shown these qualifications; and it is determined that the separation has produced no change in the unity and identity of the parish, so far as the rights of property are concerned.[5] The vestry and church-wardens of the Episcopal Church of Alexandria, cannot be the regular successors of the vestry and church-wardens of the parish of Fairfax, because they have a distinct name, which it would have been needless to assume, unless from a consciousness of a distinct origin and nature. In fact, they have a different origin, different powers, and different duties. In the period which intervened from 1796 to 1803, there was no incumbent. What, then, were the rights of the parties? This court has answered, that "the fee remained in abeyance, and the profits of the parsonage were to be taken by the parish for their own use."[6] What parish? Most certainly the *par- [*451 ish of Fairfax, to which it belonged. The vestries chosen in 1804, and subsequently, cannot be deemed the vestries of the parish of Fairfax, but must be considered as the vestries of the

1.—9 Cranch, 52, 53.

2.—Tow of Pawlet v. Clark, 9 Cranch, 292, 325.

3.—Terrett v. Taylor, 9 Cranch, 51, 52.

4.—2 Henn. Stat. at large, 218.

5.—Terrett v. Taylor, 9 Cranch, 53.

6.—Terrett v. Taylor, 9 Cranch, 47; Weston v. Hunt, 2 Mass. Rep. 502; See also, 1 Tuck. Bl. Com. Part 2, Appen. 113.

Episcopal Church of Alexandria, because, in the parish books, the entries constantly style them the Vestry of the Protestant Episcopal Church at, or in, or of, Alexandria, and not the vestry of the parish of Fairfax. The congregation of Christ's Church actually separated themselves, in 1803, from the parish of Fairfax, and formed a distinct Episcopal Church; and the elections were made by subscribers and contributors to the Episcopal Church in Alexandria, and not by the parishioners at large of the parish of Fairfax.

2. This defect in the title being thus made out, it follows that the appellant has a right to require that the contract should be rescinded, unless there be some special objection to preclude him. As to the sale being under a decree, the English practice on this subject relates to objections arising on the abstract which is presented to the purchaser. But defects subsequently discovered, may be objected, and if it appears that the vendor can make no title, the bill will be entertained.

As to notice, there is no proof of actual notice; and the circumstances are not sufficient to infer constructive notice. Nor has the objection to the title been varied by taking possession. The doctrine is, that if the vendee has knowledge of the defects before he takes possession, it is considered as a waiver of the objection, and it will be found that all the cases turn upon this distinction.

452*] *On the part of the respondents, it was insisted, 1. That the appellant had full notice, either actual or constructive, at the time of the sale, of all the facts and circumstances of which he now seeks to avail himself, in order to rescind the sale. The proceedings in the former case were alone sufficient to charge him with notice.

2. This being a judicial sale, under a decree, the party was bound to have applied to the court below, either before confirmation of the sale, or afterwards, to rescind the sale, and cannot now maintain an independent bill for that purpose, the effect of which would be, collaterally, to set aside the sale, as it stands confirmed by the report.[1]

3. The contract has been executed on the part of the appellant, by taking possession of the land, and it is now too late for him to make any objection to the sufficiency of the title.[2]

4. But a careful examination would show that there was not any defect in the title. The former decision of this court had put at rest the question as to the sufficiency of the deed from Jennings, to pass his title to the church-wardens, for the benefit of the parish. It was there determined that the conveyance could not operate by way of grant, but might operate by way of estoppel, to confirm to the church, and those claiming under it, the perpetual estate in the land.

453*] *The present Vestry of the Episcopal Church at Alexandria, called Christ's Church, are the legal successors of the vestry of the parish of Fairfax. From the year 1765 until 1801, the town of Alexandria was a part of the county of Fairfax, and the parish of Fairfax. After the year 1792, the vestry met exclusively in Alexandria; the congregation at the Falls Church, by degrees became extinct; and the vestry of the parish, with the church at Alexandria, has been constantly kept up, whilst the congregation that used to assemble at the Falls Church has ceased to exist. The consequence is, that the glebe land belongs to the Alexandria congregation, as much as if the two congregations had agreed to meet in the church at Alexandria, and had disposed of the other. There never was, and there never could be, two vestries in the parish, that is, one for each church. Since the year 1776, there have been no compulsory means used for the support of the church, and it has rested on the voluntary contributions of the parishioners; yet everything that has been done in respect to the property of the church, shows conclusively the regular succession of this church and vestry, as the church and vestry of the parish of Fairfax. The vestry has been elected by the members and contributors to the church, but the right of voting did not belong to the parishioners generally, it was confined to those members and contributors. At the same time, no inhabitant of the parish has been denied the privilege of becoming a contributor, with its consequent right of voting. All parties who had any title *to the property, were before the court [*454 in the former case, in which the sale was decreed.[4] It was unnecessary to make the whole body of parishioners parties to that suit. They have not individually any right or title to the property. It is the property of the parish, and the vestry are the legal agents and representatives of the parishioners, with authority to administer and dispose of it.

Mr. Justice Story delivered the opinion of the court:

Upon the very voluminous pleadings in this case, assuming more the shape of elaborate arguments than the simple and precise allegation of facts, which belong to chancery proceedings, the principal questions discussed have been, (1) Whether the Vestry of the Episcopal Church of Alexandria, now known by the name of Christ's Church, is the regular vestry in succession of the parish of Fairfax. (2) Whether the existence of another parish church, called the Falls Church, within the same parish, has any material bearing upon the title, either as to making parties, or settling the right to the glebe. (3) Whether the appellant had full notice of the true nature of the title before the purchase, and so took it with its infirmities, if any such existed. (4) Whether, this being the case of a judicial sale under a decree, the party was not bound to have applied to the court below, before confirmation of the sale, or *afterwards, to rescind the sale; and [*455 can now maintain an independent bill for that purpose, the effect of such bill being collaterally to set aside the sale, as it stands confirmed by the report. Another point was made at the bar, as to the sufficiency of the conveyance by Jennings to the church-wardens, in 1770, to pass his title in fee for the benefit of the parish. But that point was put at rest, in

1.—1 Fombl. Eq. 371, note 6; 1 Atk. 489; 3 Ves. Jr. 333; 3 P. Wms. 220, 306; 1 Rev. Code, 80, s. 34.
2.—1 Ves. Jr. 221, 226; 3 P. Wms. 191; 4 Dess. Ch. Rep. 134; 12 Ves. 25.
3.—Terrett v. Taylor, 9 Cranch, 53.
4.—3 Ves. Jr. 50.

the case of Terrett v. Taylor, and is not now open for discussion.[1]

456*] *If the first question is decided against the plaintiff, it will be unnecessary to consider the other question, for it is not denied that the vestry of the parish of Fairfax sufficiently represent the whole parish for all the purposes of the original bill, and that both by the former laws of Virginia and the canons of the Episcopal Church, they, in connection with the minister, have the care and management of all the temporalities of the parish within the scope of their authority. To the consideration of this question, the attention of the court has been mainly directed; and it is now my duty to explain the grounds upon which we have come to the conclusion that the Vestry of the Episcopal Church of Alexandria is the regular vestry in succession of the parish of Fairfax; and being so at the commencement of the former suit, the main objection to the title to the glebe falls, and the bill of the plaintiff ought to be dismissed.

By the laws of Virginia, passed antecedent to the revolution, each parish was authorized to elect a vestry of twelve persons, to manage their parochial concerns; and however many distinct Episcopal churches, or places of public worship, there were within the parish, the same vestry had the superintendence and direction of them all. In point of fact, there were two such places of worship within the parish of Fairfax, the church at Alexandria, and the Falls Church; but the cure of both belonged to the same minister, who was the rector of the whole of the parish, and the parochial concerns were managed by a single vestry. Not the least trace can be found of any other vestry until the

457*] *year 1819, when a vestry was chosen de facto, by persons purporting to belong to the Falls Church, and that portion of the parish of Fairfax which is not included within the District of Columbia. Up to the year 1796, it is not disputed that a vestry was regularly chosen for the whole parish; and the place of the choice of the vestry, as well as the vestry meetings, appears to have been usually, but not universally, at Alexandria. In April, 1796, a vestry was chosen for the parish, to serve for the usual period of three years, who continued to hold meetings until April, 1799; and from that time, there seems to have been an interregnum, so far as the minutes in the parish books afford information, until April, 1804, when a vestry was chosen, for the usual term of three years; and there has been a continuation of vestries from that election down to the present time. The validity of these elections, from 1804, as election of the vestry of the parish of Fairfax, forms the point in controversy, and will be presently considered. Since the year 1800, the Falls Church has fallen into a state of delapidation and decay, and public worship has not been celebrated there by the minister of the Episcopal Church, on account of its deserted state; but there has been a regularly inducted minister at the parish church in Alexandria, where divine services have been constantly performed.

The counsel of the plaintiff contend that the vestries chosen in 1804, and subsequently, are not to be deemed the vestries of the parish of Fairfax, but of the Episcopal Church (that is, of Christ's *Church) in Alexandria; and [*458 they support their argument upon the following grounds: (1) That in the parish books the entries constantly style them the Vestry of the Protestant Episcopal Church, at, or in, or of, Alexandria, and not the vestry of the parish of Fairfax. (2) That, in point of fact, the congregation of Christ's Church, in 1803, separated themselves from the parish of Fairfax, and formed a distinct Episcopal Church. (3) That the elections were made by subscribers and contributors to the Episcopal Church in Alexandria, and not by the parishioners at large of the parish of Fairfax.

Under some one of these heads, all the objections urged at the argument may be arranged.

As to the first point. It is true, that in general the style of the entries of the vestry meetings, since 1804, is as the plaintiff stated it to be. But it will scarcely be contended, that the errors of a recording clerk, in description, will change the nature or character of the vestry proceedings, or devest them of their authority, if, in point of fact, they constituted the vestry of the parish of Fairfax. The irregularities of merely ministerial officers, and especially of parish clerks, whose records are generally kept in a loose and inaccurate manner, have never been, hitherto, supposed to have such a controlling authority. Courts of justice will examine into the proceedings of ecclesiastical bodies with indulgence; and if, upon the whole, a consistent construction can be given to them, in conformity to existing rights, they will suppose them to be done in the exercise of those rights, rather *than in gross usurpa- [*459 tions of authority. Now, there is no pretense to say, that there existed any right on the part of the congregation of the Episcopal Church at Alexandria, to choose a vestry of its own, which should not be the vestry of the parish. The church itself, with the church-yard and appurtenances, belonged to the parish of

1.—Upon this point, the court says, in the former case: "Upon inspecting the deed, which is made a part of the bill, and bears date in 1770, the land appears to have been conveyed to the grantees, as church-wardens of Fairfax, and to their successors in that office, forever. It is also averred in the bill, that the plaintiffs, together with two of the defendants (who are church-wardens), are the Vestry of the Protestant Episcopal Church, commonly called the Episcopal Church of Alexandria, in the parish of Fairfax, and that the purchase was made by the vestry of said parish and church, to whom the present vestry are the legal and regular successors in the said vestry; and that the purchase was made for the use and benefit of the said church in the said parish. No statute of Virginia has been cited, which creates church-wardens a corporation for the purpose of holding lands; and at common law, their capacity was limited to personal estate. 1 Bl. Com. 394; Bro. Abr. Corp. 76, 84; 1 Roll. Abr. 393, 4, 10; Com. Dig. tit. Esglise, F. 3; 12 Hen. VII. 27, b; 13 Hen. VII. 7, 9, b; 37 Hen. VI. 6, 30; 1 Burns' Eccles. Law, 290; Gibs. 215. It would seem, therefore, that the present deed did not operate by way of grant, to convey a fee to the church-wardens and their successors; for their successors, as such, could not take; nor to the church-wardens in their natural capacity; for 'heirs' is not in the deed. But the covenant of general warranty in the deed, binding the grantors and their heirs forever, and warranting the lands to the church wardens and their successors forever, may well operate, by way of estoppel, to confirm to the church and its privies the perpetual and beneficial estate in the land." 9 Cranch, 52, 53.

Fairfax. It was the parish church. The vestry, which had a right to govern and manage its temporal concerns, was the parish vestry. It was an Episcopal Church, under the direction and authority of the General Episcopal Church of Virginia; and by the canons of that church, made in conformity with the laws of Virginia, and never repealed, the vestry were to be elected for the parish. It is not lightly to be presumed, therefore, that an election of a vestry was intended to be made in any other manner than the canons of the Episcopal Church and the rights of the parishioners would justify. The very fact of a total silence, and absence of any objection, through so long a period, would authorize the conclusion that the vestry was understood to be a parish vestry, and its acts were for the benefit of the whole, and not for the part connected with the Alexandria Church. It should also be recollected, that the Falls Church had fallen into decay, and was no longer used for purposes of public worship. It was considered in the same light as if totally destroyed; and then, as the Alexandria Church was the only worshipping church in the parish, nothing could be more natural than, in common parlance, and in parochial records, to designate the vestry as the 460*] Vestry of the Episcopal Church of, *in, or at, Alexandria. It was so in a strict sense, not because it was not the parish vestry, but because the church at Alexandria was the parish church, and its congregation, in an ecclesiastical sense, consisted of the Episcopalian parishioners of Fairfax. If we advert to the history of the Virginia legislation on this subject, there will be found a natural reason for this apparent change of style, without any intended change of character. That legislation is referred to, somewhat at large in the case of Terrett v. Taylor, and need not here be minutely examined. The act of 1784, ch. 88, created the minister and vestry of every parish a corporation, by the name of the Protestant Episcopal Church, in the parish where they respectively resided. When, by the subsequent act of 1786, ch. 12, this act was repealed, there was provision made, that all religious societies might, according to the rules of their sect, appoint, from time to time, trustees to manage their property, which trustees were, by the subsequent act of 1788, ch. 47, declared to be the successors to the former vestries. The General Episcopal Church of Virginia, in convention, adopted general regulations on this subject, conforming, in substance, to the act of 1784, and providing for the regular appointment of vestries, who should be trustees, for every Episcopal Church in every parish. Under such circumstances, the natural denomination of the vestry would be, the Vestry of the Episcopal Church in the particular parish. And when, in consequence of the separation of the county of Alexandria from the 461*] state of Virginia, *by the cession to the United States, the parish church fell within the boundaries of Alexandria, the embarrassment arising from this new state of things might well create doubts as to the proper designation, and introduce the new appellation. Whether this description was right or wrong, is of no consequence; for if there has been no legal change of character, in contemplation of law, the regular vestry of this church remains the vestry of the parish. It appears in proof, that a number of the congregation of the church at Alexandria are persons residing without the boundaries of the District of Columbia, and in the Virginia part of the parish; and there is not the slightest evidence that, in the election of vestries since 1804, a single parishioner of Fairfax has ever been refused his vote at any election, on account of his residence. We think, then, that the circumstance of a change of style in the parish records, furnishes no proof of the asserted change of character. In the election, however, of 1810, the entry in the books is, that the vestry were elected "to serve the parish as vestrymen;" and, immediately afterwards, in subscribing the test, they speak of themselves as the Vestry "of the Protestant Episcopal Church of Alexandria." Now, what parish is here spoken of? Plainly the parish of Fairfax, for no other parish is pretended to exist. And when the vestry subscribed the test, as Vestry of the Church of Alexandria, it is as plain that they understood that the parish and the church of Alexandria meant the same thing. If, then, the books of the *church are to furnish [*462 evidence against the defendants, they are entitled to the benefit of the same records, by way of explanation.

The second ground is, that the congregation of the church at Alexandria has separated itself from the parish, and formed a distinct society, and can no longer be deemed the parish church of Fairfax. This is principally attempted to be sustained by an agreement made in 1803, which is found fastened, by wafers, to the vestry-book. That agreement, after reciting that a committee was appointed by "the Protestant Episcopal Church of Alexandria," to adopt measures for insuring a competent salary for a minister, etc., and that the committee so appointed had reported, as an advisable mode, to rent out the pews to occupiers and others, at a fixed annual rent, amounting in the aggregate to $1,186, and further proposed soliciting a voluntary subscription to supply any deficiency; then proceeds to state that the subscribers agree to rent the pews, and to pay to the Rev. Thomas Davis (then the rector of the parish) the sums annexed to their names, in quarterly payments, etc., etc., reserving a right to surrender up their pews at the end of a year. Such is the substance of the agreement; and it is extremely difficult to perceive how it conduces to prove, in any shape, the establishment of a new society. It is to be considered that the church, whose pews were to be disposed of, was the parish church of Fairfax; and it cannot be pretended that the parish could be deprived of it, except by its own consent through its authorized agents. A *new society, composed part- [*463 ly of the parishioners, had no more right or power to dispose of the pews than utter strangers. It would be as gross an usurpation, and as tortious an act, in the one case as in the other. But there can be no doubt that a parish may regulate the sale or renting of the pews of the church, in such manner as may conduce to the general benefit. The parish is not the less the owner of the church, because the pews in it are rented or sold to others; for the right to the exclusive use of the pews is very different from the right to the freehold in the church itself. The agreement, in the present case, was noth-

ing more, and purports to be nothing more, than a mere agreement for renting the pews. It is made with persons who are the committee of the church, and who claim the right to use it. It is an act which might be done by authority of the parish, without in any respect transcending its rights or duties. How, then, is it to be deemed an act which indicates the creation of a new society, or a separation from the parish? What authority could any new society claim to the parish property? If such a claim had been made, it would have been resisted; and the very circumstance, that no resistance was made, is conclusive that the agreement was made in the exercise of ordinary parochial rights, and indicated no severance of interests. In point of fact, an agreement, in substance like the present, was made, respecting the pews in this very church, in the year 1785; and yet no one supposed that the church ceased to be the parish church, or 464*] that the *subscribers constituted a new society. There is another circumstance, which is too significant to be passed over in silence; it is, that the Rev. Mr. Davis, to whom the agreement in question refers, was regularly inducted, in the year 1792, as rector of the parish of Fairfax, and continued to officiate as such, in this very church, down to the year 1806, three years after this agreement was made. During all this period, the freehold of the glebe was vested in him, as persona ecclesiæ. How, then, is it possible to maintain, that the support of the rector of the parish in the exercise of his parochial rights and duties, and the continuance of the rector in possession of the glebe and the church, can be construed as an abandonment of all connection with the parish, and a renunciation of its privileges? It is a fact, also, corroborative of the view that has been already taken by the court of this agreement, that the possession and management of the temporalities of the church have always been in the vestries of the Alexandria Church since 1804. They have exercised the sole and exclusive control over them. They have never disclaimed, in any ecclesiastical assembly, their former connection. They have not applied to the bishop, or other proper authority, to be formed into a new and distinct society, separate from the parish. And yet it is not denied that, by the rules and customs of the sect, new Episcopal societies are not admitted to be formed within the bounds of existing parishes, without the consent of the proper ecclesiastical authority. In the act of consecration of the church in 465*] *1814, the vestry expressly declare the church to be the parish church of Fairfax, and in virtue of their authority, as the vestry thereof, they dedicate it to the public worship of God; and the bishop of the diocese then acknowledged and consecrated it as such. In the year 1807, the Rev. Mr. Gibson was elected rector of the parish, upon the resignation of the Rev. Mr. Davis; and on that occasion, the vestry resolved that he should be inducted as rector of the parish; and in the succeeding election of the vestry, in the same year, the vestry are stated in the records to be chosen "to serve the parish." So that, if in the records there are single expressions which, standing alone, might be of doubtful interpretation, the solemn acts of the vestry in consecrating the church, in choosing the minister, and in managing the temporalities, all point to their character as representatives of the whole parish. It may be added, that in the bill of Terrett v. Taylor, the vestry assume to be the parish vestry in succession; and that in the answer to the present bill, by the defendants, who are the existing Vestry of the Church of Alexandria, they assert, in the most positive and solemn manner, the same character, and utterly deny the allegations of the defendant's bill on this point. So that, unless the court were prepared to divert the clear purport of the evidence, and the solemn acts of the church, for a series of years, and the presumptions arising from long and undisputed possession of the property, and exercise of parochial authority, on account of some irregularities, which may occur in the transactions of *most public bodies, the conclusion can- [*466 not be arrived at, that the church at Alexandria has ceased to be the parish church of Fairfax, or that its congregation has become a distinct society.

The third ground of objection is, that the vestry were chosen, not by the parishioners of Fairfax, but by subscribers and contributors to the Episcopal Church at Alexandria. This objection proceeds upon the supposition, that if the vestry is de facto the vestry of the parish, the very mode of choice demonstrates that it cannot be the vestry de jure. Whether, in a case like that before the court, the inquiry can properly be gone into as to the mode and regularity of the choice of a vestry actually in office and exercising the duties thereof; and if the inquiry be proper, whether the legal distinction between a vestry de jure and de facto, could avail the plaintiff, are questions upon which it is not necessary for the Court to express any opinion. We think a short examination of the subject will put the objection at rest, whatever might be the conclusion drawn from such a legal distinction.

Before the revolution, the Episcopal Church was the established church of Virginia, and all the parishioners were liable to be rated for parish taxes, and were entitled to vote in the choice of the vestry. But the church establishment fell with the revolution, and the compulsive power of taxation ceased; and as no person could be compelled to worship in the Episcopal Church, or pay taxes for its support, the parishioners of the Episcopal Church, in the ecclesiastical sense of the term, afterwards consisted *only of the Episcopalian contributors [*467 and members. The act of 1784, ch. 88, provided that, at all future elections of vestries, no person should be allowed to vote who did "not profess himself a member of the Protestant Episcopal Church, and actually contribute towards its support." Although this act was repealed by the act of 1786, ch. 12, yet the same act saved the management of their property and regulation of their discipline, according to the rules of their own sect, to all religious societies. By the canons of the Episcopal Church, subsequently passed, the right to elect vestries is confined to the "freeholders and housekeepers, who are members of th Protestant Episcopal Church within the parish, and regularly contribute towards the support of the minister, and to the common exigencies of the church within the parish." These canons being assent-

ed to by the various parishes which they govern, and not being inconsistent with the laws of Virginia, are not denied to be in force for parochial purposes. Now, there is not in this record the slightest proof that any election of the vestry has been made in any other manner than that pointed out by the canons of the church; and the answer of the defendants expressly avers, that the choice has been constantly made according to the canons of the church, and that no person belonging to the Falls Church has ever been a contributor, or ever offered to vote at any election. It seems to the court, therefore, that, the elections being regularly made, by persons qualified according to the canons, the whole foundation of the objection is re-468*] moved. *No inference can be deduced from this circumstance, in proof of the Alexandria Church having separated itself from the parish, and become a distinct and independent society.

It has been said, that the parishioners of the whole parish are the cestuis que trust of the glebe and other parochial property, and ought to be parties to any bill to dispose of it. But in an accurate and legal sense, the parishioners are not the cestuis que trust, for they have, individually, no right or title to the property. It is the property of the parish, in its corporate or aggregate capacity, to be applied and disposed of for parochial purposes, under the authority of the vestry, who are its legal agents and representatives. Upon the sale of the glebe, the proceeds become parochial property, and must be applied for the common benefit, the maintenance of the minister, the repairs of the churches, and other parochial expenses, by the vestry, in good faith. But the mode, and extent, and circumstances, under which the fund is to be applied, are necessarily left to the discretion of the vestries, from time to time chosen. An abuse of their trust, or duty, is not to be presumed; and if it should occur, the same remedy will belong to the parishioners as in other cases, where money is wantonly misapplied to wrong purposes, which constitute a common fund for the benefit of the whole parish, and not for the benefit of a part. It will be sufficient to decide upon such a case when it shall arise in judgment. But the individual parishioners residing out of Alexandria county, were no more neces-469*] sary to be made *parties to the bill praying a sale of the glebe, than the individuals residing within the county. Both were represented in the only way known to the laws—by the vestry duly appointed to manage parochial concerns.

These are some of the reasons which have led the court to the conclusion that has been already stated, to wit, that the Vestry of the Church in Alexandria is, in succesSsion, the regular vestry of the parish of Fairfax.

This decision renders it unnecessary to consider the other points raised at the argument; and it remains only to declare, that the judgment of this court is, that the decree of the Circuit Court, dismissing the bill, be affirmed with costs.

[Local Law.]

DODDRIDGE v. THOMPSON et al.

Under the reserve contained in the cession act of Virginia, and under the acts of Congress of August 10th, 1790, ch. 67 (XL.), and of June 9th, 1794, ch. 238 (LXII.), the whole country lying between the Scioto and Little Miami rivers was subjected to the military warrants, to satisfy which the reserve was made.

The territory lying between two rivers, is the whole country from their sources to their mouths; and if no branch of either of them has acquired the name, exclusive of another, the main branch, to its source must be considered as the true river.

The act of June 26th, 1812, ch. 432 (CIX.), to ascertain the western boundary of the tract reserved for the military warrants, and which provisionally designate Ludlow's line as the western boundary, did *not invalidate the title to [*470 land between that line and Roberts' line, acquired under a Virginia military warrant, previous to the passage of that act.

The line between Ludlow's and Roberts' line was not withdrawn from the territory liable to be surveyed for military warrants, by any act of Congress passed before the act of June 26th, 1812, ch. 432, (XIX.)

ERROR to the Circuit Court of Ohio.

This cause was argued by Mr. Clay for the plaintiff, and by the Attorney-General for the defendants.

Mr. Chief Justice Marshall delivered the opinion of the court:

Both parties in this cause claim under grants made by the United States, in that tract of country which was reserved by Virginia, out of her cession to Congress, for the purpose of satisfying the claims of her officers and soldiers on continental establishment. The reserve was at first dependent on a deficiency of good land, to satisfy those claims, in a territory reserved for the same objects in Kentucky, which was then a part of Virginia; but the necessity of making this fact appear, was afterwards dispensed with, and the deficiency was admitted to exist. The plaintiff, having the oldest patent, has, of course, the better title, if his patent be valid.

A case was agreed in the Circuit Court, on which a pro forma judgment was rendered for the defendant, which is now before this Court on a writ of error.

*The plaintiff claims under a military [*471 warrant, issued to one of the officers of the Virginia line, on continental establishment; and the defendant, under a purchase made from the United States, subsequent to the emanation of the plaintiff's grant. The first question made in the cause is, whether the land in controversy be within the Virginia reserve. The words are, that if the quantity of land reserved, on the south-east side of the Ohio, "for the Virginia troops on continental establishment, should prove insufficient for their legal bounties, the deficiency should be made up to the said troops, in good lands between the Scioto and the Little Miami.

In 1790, Congress passed an act,[1] in which, after reciting that the agents for the troops of Virginia had reported to the Executive of that State, that there was a deficiency of good lands in the territory reserved on the south-east of the Ohio, and, after directing the Secretary of War to make a return to the Executive of that State of the number of officers, non-commissioned officers, and privates, who served in the Virginia line on continental establishment, it is enacted, "that it shall and may be lawful for

1.—2 U. S. L. 179.

the said agents to locate, to and for the use of the said troops, between the rivers Scioto and Little Miami, such a number of acres of good land, as shall, together with the number already located between the said two rivers, and the number already located on the south-easterly 472*] side of the river Ohio, be equal to *the aggregate amount so to be returned, as aforesaid, by the Secretary of the Department of War."

In June, 1794, Congress passed another act[1] on this subject, declaring that every officer and soldier of the Virginia line, on continental establishment, entitled to bounty lands, between the Scioto and Little Miami rivers, "shall, on producing the warrant, or a certified copy thereof, and a certificate under the seal of the office where the said warrants are legally kept, that the same, or a part thereof, remains unsatisfied; and on producing the survey, agreeably to the laws of Virginia, for the tract or tracts to which he or they may be entitled, as aforesaid, to the Secretary of the Department of War, such officer and soldier, his or their heirs or assigns, shall be entitled to, and receive a patent for the same, from the President of the United States."

Under these acts the plaintiff's patent was issued. It is not, we think, to be questioned, that under the reserve contained in the cession act of Virginia, and under the acts of Congress which have been recited, the whole country lying between the Scioto and Little Miami was subjected to the military warrants, to satisfy which the reserve was made, and any part of it might be surveyed for any person holding such warrant. What is the extent of this country?

The plaintiff contends that it is the territory between the Ohio, into which both rivers empty, and a line to be drawn from the source 473*] of the main *branch of one river to the source of the main branch of the other, and the rivers themselves, from their sources to their mouths.

The Scioto is a much longer river than the Little Miami, and the defendant has suggested, that the country reserved may be limited by the Ohio on one side, and a line drawn from the source of the Miami to the Scioto, which shall be parallel with the Ohio, on the opposite side. But this suggestion has not been pressed; and the idea it conveys is directly opposed to the words of the reserve, and the construction which has been uniformly given to the deed of cession by both the contracting parties. The territory lying between two rivers, is the whole country, from their sources to their mouths; and if no fork of either of them has acquired the name, in exclusion of another, the main branch, to its source, must be considered as the true river. Any other rule would be arbitrary, depending on caprice, not on principle; and the whole legislation of Congress upon the subject shows, we think, a disposition to be guided by this reasonable rule.

We are relieved from the inquiry respecting the main branches of these rivers, by the case agreed, which finds a map, certified by the commissioner of the land-office, dated the 26th of February, 1820; and that a line on the said map, marked and thereon described as Roberts' line, represents a line extending from the source of the Little Miami to the source of the Scioto, and that the sources of both rivers are truly shown thereon.

Admitting this line to constitute the true boundary *of the military reserve, the [*474 land in controversy lies within it; and the plaintiff's patent would, consequently, be valid, if it depended entirely on the original deed of cession, and the acts of Congress which have been recited. But the defendant's counsel contends, that as the plaintiff's title was to be derived from the government of the Union, it must have been obtained conformably to the laws of the United States, or is invalid.

It has been very truly observed, that, while the government of the Union is to be considered as holding the territory ceded by Virginia, in trust for the officers and soldiers of the Virginia line, so far as the reservation for their benefit extends, it is also to be considered as holding the lands not reserved, in trust for the nation; and as being bound by its high duties to execute that trust. Congress, therefore, found it necessary to provide for the sale of the territory not included within the reserve; and its laws made for this purpose may control, and have controlled, the original rights of the military claimants, and have established a line between the sources of the Scioto and Little Miami, different from that for which the plaintiff contends.

Without questioning the power of the government, the court will proceed to inquire whether Congress has passed any law, contracting the military reserve within narrower limits than are prescribed by the deed of cession, as herein construed, or has made any provision which, in any manner, affects the plaintiff's grant.

In May, 1785, Congress passed "an ordinance for ascertaining the mode of granting lands in the *western territory," in which, for [*475 the purpose of securing to the officers and soldiers of the Virginia line, on continental establishment, the bounties granted them by that State, it is ordained, "that no part of the land between the rivers called Little Miami and Scioto, on the north-west side of the river Ohio, be sold, or in any manner alienated, until there shall first have been laid off and appropriated for the said officers and soldiers, and persons claiming under them, the lands they are entitled to, agreeably to the said deed of cession, and act of Congress accepting the same."

In May, 1796, Congress passed an act[2] for the survey and sale of these lands, directing the appointment of a surveyor-general, whose duty it should be "to survey and mark the unascertained outlines of the lands lying north-west of the river Ohio, and above the mouth of the river Kentucky, in which the titles of the Indian tribes have been extinguished, and to divide the same in the manner hereinafter directed."

The 2d section enacts, "that the part of the said land which has not been already conveyed," etc., "or which has not been heretofore, and during the present session of Congress may not be, appropriated for satisfying military land bounties, and for other purposes, shall be divided," etc.

1.—2 U. S. L. 440.

2.—2 U. S. L. 533.

This law, then, which gives to the Surveyor-General his authority to survey the country generally, and to lay off the lands as prescribed in the act, excludes from this general authority 476*] all lands previously *appropriated for military land bounties, and for other purposes; and, consequently, excludes the lands between the Scioto and the Little Miami.

In May, 1800, Congress passed an act[1] providing further for the sale of these lands, and establishing for that purpose four land-offices. The places at which these offices shall be fixed are designated in the act, and the district of country attached to each is described. Neither of these districts comprehends any lands between the Scioto and the Little Miami. The Surveyor-General was not authorized to survey any lands within the military reserve, nor was the sale of such lands authorized at any of the land-offices. In the execution of this act, the Surveyor-General caused a line to be run from the source of the Little Miami towards what he supposed to be the source of the Scioto, which is denominated Ludlow's line, and surveyed the lands west of that line in sections, and parts of sections, as prescribed in the act of Congress.

In March, 1804,[2] Congress passed a law for ascertaining the boundary of the land reserved by the State of Virginia for military bounties, which enacts, "that the line run under the direction of the Surveyor-General of the United States, from the source of the Little Miami towards the source of the Scioto, and which binds, on the east, the surveys of the lands of the United States, shall, together with its course continued to the Scioto River, be considered and held as the westerly boundary 477*] *line, north of the source of the Little Miami, of the territory reserved by the state of Virginia, between the Little Miami and the Scioto rivers, for the use of the officers and soldiers of the continental line of that state. Provided, that the state of Virginia shall, within two years after the passing of this act, recognize such line as the boundary of the said territory." The line mentioned in this act is called Ludlow's line.

This act shows, we think, very clearly, that Congress did not mean to assert a power to fix the western boundary of the military reserve. The deed of cession, and the act of acceptance, were considered as forming a contract respecting a territory, the western line of which could not, at the time, be fixed with precision, and which was unavoidably described in terms requiring subsequent explanation and adjustment. This adjustment was to be made, not by one of the parties, but by both; and this act is an essay towards it. Congress makes a proposition to Virginia, by which the United States are to be bound, provided Virginia accepts it within two years. If it be not accepted within that time, the parties stand on their original rights, as if it had never been made. This is a very fair and equitable proceeding on the part of the government, and is founded on the idea that the rights of the parties are equal. Had Virginia accepted this proposition, it would have become a contract, and Ludlow's line would have been established as the western boundary of the military reserve; the land in controversy lying west of that line, would not have been liable to be surveyed to satisfy the plaintiff's warrant. *But Virginia did not accept [*478 the proposition, and the rights of the parties remained as if it had never been made.

In 1812,[3] Congress made another effort to establish this line. The President was authorized to appoint three commissioners, to meet commissioners to be appointed by Virginia, who were to agree on the western line of the military reserve, and to cause the same to be surveyed and marked out. Should commissioners from Virginia fail to meet them, they were to proceed alone, and make their report to the Executive. In the meantime, and until the line should be established by consent, Ludlow's line was to be considered as constituting the western boundary of the Virginia reserve.

The commissioners of the United States were met by those of Virginia, and they proceeded to ascertain the sources of the two rivers, and employed a Mr. Charles Roberts to survey and mark a line, from the source of one to that of the other. This line is called Roberts' line, is reported by the commissioners to the Executive, and is found, in the case agreed, to represent truly a line drawn from the source of the Little Miami to the source of the Scioto. The Virginia commissioners, however, refused to accede to this line, and claimed to run, from the source of the Scioto, a straight line to the mouth of the Little Miami, which would pass south of that river, and include a considerable tract of country not lying between that river and the Scioto. This demand prevented an agreement establishing *Roberts' line; [*479 and as the act of June, 1812, provisionally designated Ludlow's line as the western boundary of the reserve, until one should be finally established, with the consent of Virginia, it remains the boundary for the present. Had the plaintiff's title been acquired subsequent to the passage of this act, there would be much force in the objection to it; but it was acquired before this act passed, and cannot, we think, be affected by it. Congress cannot have intended to annul, by legislative act, a title which was valid at the time; and a law which does not express that intention ought not to have that effect given to it by construction. If the words of the act of 1804 were doubtful, which they are not, the act of 1812 would expound them, and show that not even a temporary boundary had been previously fixed. The appointment of commissioners to meet others to be appointed by Virginia, who were to agree upon and mark the true line, and the establishment of a temporary line till such agreement should be made, prove incontestably that Congress did not suppose the line to be established. Had the commissioners from Virginia assented to the equitable proposition made by those of the United States, the plaintiff's patent, founded on a survey made before that time, would be admitted to be unassailable. And yet the land was, in fact, within the territory actually reserved at the time the survey was made, and no law had then passed substituting any other line for the true one. The act of 1812 does not look back, and annul existing titles; it is en-

1.—3 U. S. L. 385.
2.—3 U. S. L. 592.
6 L. ed.

3.—4 U. S. L. 455.

480*] tirely prospective, and leaves *prior titles as it found them. If, then, there be no other act of Congress, which impairs this patent, it must be considered as valid.

The defendant contends that there are previous acts, by which the land between Ludlow's and Roberts' lines was withdrawn from the territory liable to be surveyed for military warrants. The act of 1804, already mentioned, enacts, "that all officers and soldiers, or their legal representatives, entitled to bounty lands within the above-mentioned reserved territory, shall complete their locations within three years after the passing of this act," and that the locations made within that part of the territory to which the Indian title has been extinguished, shall be surveyed, and the surveys returned to the Department of War, within five years. The 3d section provides, that such parts of the territory as shall not have been located, and such part as shall not have been surveyed, and the surveys returned to the Department of War, within the times prescribed by the act, shall be released from any claim for such bounty lands, and shall be disposed of in conformity with the laws passed for that purpose.

In March, 1807, an act passed, giving three years' farther time for making locations, and five years farther time for making and returning surveys; "Provided, that no locations, as aforesaid, within the above-mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless 481*] be obtained, for *land located contrary to the provisions of this section, shall be considered as null and void."

The time for making locations and surveys was farther extended, by subsequent acts containing the same proviso.

The defendant contends that this proviso comprehends the land previously surveyed by the Surveyor-General of the United States.

We do not concur in this opinion, for several reasons.

The words refer to the whole military reserve, and seem intended to apply to surveys which might be made throughout that entire tract of country, not to the land surveyed in townships, sections, and parts of sections, by the United States, west of Ludlow's line. There were such surveys. The records of this court show that many controversies were produced in that country, by the mode of locating and surveying military lands, which had been adopted under the laws of Virginia; and it is not unreasonable to suppose that Congress, when giving farther time to make locations and surveys, might be disposed to cure the defects in titles already acquired, and to prevent second locations on lands already located. The words of the proviso, too, are adapted to the saving of private rights.

It has great influence, we think, on this question, that if the proviso be construed to comprehend the surveys made by the United States, it would amount to the establishment of Ludlow's line; for those surveys were made up to that line, and would indirectly curtail the 482*] Virginia military *reserve. This was obviously not, at that time, the intention of the government. Subsequent to this period, in 1812, commissioners were appointed for the purpose of agreeing with those of Virginia on the true line, and marking it; who were directed "to note the intersections, if any, of said line with any surveys heretofore authorized by the United States." Congress was induced to give farther time for making these locations and surveys, by a just sense of the real difficulties attending the completion of titles in that country, and an equitable regard for the rights of the claimants. There can be no reason to suppose that it was intended to withdraw one part of the country from these claims more than another.

If this intention had existed, it would have been manifested in more intelligible and direct words. Instead of the ambiguous language used in this proviso, all locations would have been restrained beyond Ludlow's line; Congress would have avowed its intention in plain terms, and would have effected its object by direct means. But the course of legislation which has been pursued on this subject, the scrupulous regard which the government has shown to the conditions on which the cession of Virginia was made, the liberal and fair offers of the United States, for adjusting the real extent of the reserve, forbid a construction which would indirectly abridge that reserve.

But were it to be admitted that the proviso does comprehend the lands between the lines surveyed by Roberts and Ludlow, that admission could not affect this cause. The words of the proviso are, "that no locations shall be made on tracts of land, *for [*483 which patents had been previously issued, or which had been previously surveyed." The prohibition respects future locations, not future surveys; and the case does not show when this location was made. It might have been made previous to the passage of the act of 1807; and the presumption of law is, that it was made before that time, since the patent is presumed to be valid, until the contrary is shown.

On both points, the court is of opinion that the law upon this case is for the plaintiff, and that the judgment of the Circuit Court, in favor of the defendants, must be reversed, and judgment entered for the plaintiff.

Judgment reversed.

[Evidence.]

RIGGS v. TAYLOE.

If a party intend to use a written instrument in evidence, he must produce the original, if in his possession. But if it is in the possession of the other party who refuse to produce it, after notice, or if the original is lost or destroyed, secondary evidence (being the best which the nature of the case allows) will be admitted.

The party, in such case, may read a counterpart; or, if there is no counterpart, an examined copy; or, if no such copy, may give parol evidence of the contents.

NOTE.—As to secondary evidence of lost papers, and proof of loss, see note to 5 L. ed. U. S. 414.

Where a writing has been voluntarily destroyed for fraudulent purposes, or to create an excuse for 484*] its non-production, secondary evidence *of its contents is not admissible. But where the destruction or loss (although voluntary) happens through mistake or accident, such evidence will be admitted.

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by Mr. Key for the plaintiff, and Mr. Hay[1] for the defendant.

Mr. Justice Todd delivered the opinion of the court:

This was an action on the case brought by the plaintiff against the defendant in the Circuit Court of the District of Columbia, upon a contract in writing, entered into between the plaintiff and defendant, for the sale of bank stock of the Central Bank of Georgetown. At the time that this contract was entered into, each party had a counterpart of the contract, and the plaintiff alleging the loss of his, he gave notice to the defendant to produce, upon the trial, the one which he, the defendant, had; but the defendant declined producing it, stating that he had lost his also. In consequence of these losses, the plaintiff, upon the trial of the cause, offered to prove, by a person who was a witness to the contract, and had subscribed it as such, the contents of the contract, and to entitle himself to give this testimony, made the following affidavit: "The plaintiff in this cause makes oath, in relation to the memorandum of 485*] *agreement between the defendant and himself, relative to the stock in the declaration mentioned, that his impression is, that he tore up the same, after the transfer of the stock, believing that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. He is not certain that he did tear it up, and does not recollect doing so, but such is his impression. If he did not tear it up, it has become lost or mislaid; and that he has searched for it among his papers repeatedly, and cannot find it." The defendant objected to this testimony, and insisted that no evidence ought to be given of the contents of the said contract. The court sustained the objection; whereupon a verdict and judgment was given for the defendant. The plaintiff filed a bill of exceptions to the opinion of the court, excluding the evidence as aforesaid from going to the jury, and the cause is brought up to this court by a writ of error.

The only question to be decided by this court is, whether the Circuit Court erred in rejecting the said evidence.

Whether the plaintiff in the cause was a competent witness to prove the loss or destruction of the written agreement, referred to in the bill of exceptions, need not be inquired into, as it was not objected to in the court below, and the question was waived by the defendant's counsel in this court.

The admissibility of evidence of the loss of a deed or other written instrument, is addressed to the court, and not to the jury.

486*] *The general rule of evidence is, if a party intend to use a deed, or any other instrument, in evidence, he ought to produce the original, if he has it in his possession; but if the instrument is in the possession of the other party, who refuses to produce it, after a reasonable notice, or if the original is lost or destroyed, secondary evidence, which is the best that the nature of the case allows, will in that case be admitted. Phillips on Evid. 399. The party, after proving any of those circumstances, to account for the absence of the original, may read a counterpart, or, if there is no counterpart, an examined copy, or, if there should not be an examined copy, he may give parol evidence of the contents.

It is contended by the defendant's counsel, that the affidavit is defective, not being sufficiently certain or positive, as to the loss of the original writing. The affiant only states his impression that he tore it up; and if he did not tear it up, it has become lost or mislaid; that this is in the alternative, and not certain or positive. We do not concur in this reasoning. An impression is an image fixed in the mind, it is belief; and believing the paper in question was destroyed, has been deemed sufficient to let in the secondary evidence. Phillips on Evid. 399; 7 East, 66; 8 East, 284. The alternative alluded to is, "if he did not tear it up, it has become lost or mislaid." Now, if he tore it up, it was destroyed; if it was not destroyed, it was lost or mislaid; in either event, it was not in the power or possession of the affiant, which, we think, is sufficiently *certain [*487 and positive to let in the secondary evidence.

It is further contended, that it appears from the plaintiff's own showing, the destruction or loss of the writing was voluntary and by his default; in which case, he ought not to be permitted to prove its contents. It will be admitted, that where a writing has been voluntarily destroyed, with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received; but in cases where the destruction or loss (although voluntary) happens through mistake or accident, the party cannot be charged with default. In this case, the affiant states, that if he tore up the paper, it was from a belief that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. In this he was mistaken. If a party should receive the amount of a promissory note in bills, and destroy the note, and it was presently discovered that the bills were forgeries, can it be said that the voluntary destruction of the note would prevent the introduction of evidence to prove the contents thereof; or, if a party should destroy one paper, believing it to be a different one, will this deprive him of his rights growing out of the destroyed paper? We think not. Cases of voluntary destruction of papers, arising from mistake as well as from accident, might be multiplied ad infinitum. In this case, the evidence offered was *that of the subscribing [*488 witness to the writing; it was the best evidence that the nature of the case admitted, which was in the possession or power of the party. This court is therefore of opinion, the Circuit Court erred in refusing to let the said evidence go to the jury.

1.—He cited 2 M'Nally on Evid. 344; 1 Phill. on Evid. 167; 3 T. R. 51; 2 Dall. 415.

It was further contended by the defendant's counsel, that the declaration is radically defective, stating no cause of action whatever.

If there had been a single count only, in the declaration of the written contract, it might be necessary to go into an examination of this point; but as there is a count for money had and received, and money paid and advanced, which, if the evidence had been permitted to go to the jury, and they had found their verdict on this count, it would have been clearly good, we deem it immaterial to decide it.

Judgment reversed, and a venire facias de novo awarded.

489*] [*Chancery. Alien. Mortgage.]

HUGHES et al., Appellants,

v.

EDWARDS et ux., Respondents.

Where the mortgage deed contained a defeasance that the mortgageor should pay the debt, according to the condition of a bond recited in the deed, by which it was payable on a day already past, at the time of the execution of the deed, held, that this circumstance did not avoid the mortgage deed in equity, where it was to be considered as a conveyance, absolute at law, but intended as a security merely, and to be treated in the same manner as an ordinary mortgage.

A court of equity looks to the substantial object of the conveyance, and will consider an absolute deed as a mortgage, wherever it is shown to have been intended merely as a security for the payment of a debt.

In the case either of a legal or equitable mortgage, the mortgagee may pursue his legal remedy by ejectment, and, at the same time, file his bill to foreclose the equity of redemption.

Under the 9th article of the treaty between the United States and Great Britain, of 1794, it is not necessary for the alien to show that he was in the actual possession or seisin of the land, at the date of the treaty, which applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. The title of an alien mortgagee is protected by the treaty.

But, independent of the stipulations of the treaty, an alien mortgagee has a right to come into a court of equity, and have the property, which has been pledged for the payment of the debt, sold for the purpose of raising the money. His demand is merely a personal one, the debt being considered as the principal, and the land as an incident.

A mortgageor cannot redeem after a lapse of twenty years, after forfeiture and possession by the mortgagee (which period has been adopted in equity by analogy to the statute of limitations), no interest having been paid in the meantime, and no circumstances appearing to account for the neglect.

*Where the mortgagee brings his bill of [*490 foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged, unless circumstances can be shown to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgageor that the mortgage is still subsisting, and the like.

A bonæ fidei purchaser under the mortgageor, with actual notice of the mortgage, or constructive notice by means of a registry, can only protect himself, by the lapse of time, or other equity, under the same circumstances which would afford a protection to the mortgageor.

Such a purchaser is not entitled to have the value of the improvements made by him deducted from the proceeds of the sale of the mortgaged premises.

APPEAL from the Circuit Court of Kentucky.

This cause was argued by Mr. Clay[1] for the appellants, and by Mr. Wickliffe for the respondents.

Mr. Justice Washington delivered the opinion of the court:

This is an appeal from a decree in equity of the Circuit Court for the District of Kentucky. Edwards and wife, the plaintiffs in the court below, filed their bill in that court, on the 8th of June, 1816, in which they charge, that the female plaintiff, before her coverture, advanced, by way of loan, to James Hughes, her brother, the sum of £770 2 4, for which he gave his bond, bearing date the 10th of September, 1793, with condition to pay the same on the 12th of the same month; and for securing the said debt, she took from the said Hughes *a mortgage upon sundry lots, situate [*491 in Lexington, in Kentucky, which are particularly described. It further charges, that the debt still remains due and unpaid; and that the defendant, Hughes, subsequent to the execution of the mortgage deed, had sold part of the mortgaged premises to Gabriel Tandy, David and James M'Gowan, Robert Wilson, Samuel Patterson, James Wilson and John Anderson, John Parker and William Bowman, all of whom are alleged to have purchased with legal notice of the plaintiff's lien on the said property, the deed having been duly recorded in the County Court of Fayette, agreeably to law.

1.—He cited Foster v. Hodgson, 19 Ves. 184; Cholmondeley v. Clinton, Jac. & Walk.

NOTE.—As to when a conveyance and an agreement to reconvey is a mortgage, and when not. See note to Conway v. Alexander, 7 Cranch, 218.

Where a person takes title to lands, under an agreement that he should loan money, and take title to the lands as security, the agreement is valid, although resting in parol, and the persons for whose benefit it was made can require a conveyance upon repaying the amount of said advances and interest. The person taking the title is simply mortgagee of the lands, and he for whose benefit it is taken is mortgagor. Bowery Nat. Bk. v. Duncan, 12 Hun, N. Y. 405; Stoddard v. Whiting, 46 N. Y. 627; Carr v. Carr, 52 N. Y. 251; 4 Lans. N. Y. 351; McBurney v. Wellman, 42 Barb. 390; S. C. affirmed, 43 How. Pr. N. Y. 427, sub nomine, Dodge v. Wellman.

It is always competent to prove by parol that what purports to be an absolute conveyance is really in the nature of a mortgage. Cases above cited.

So, where a person bids in lands and takes the title thereto, at a judicial sale, at the request of another person having an interest therein, upon a parol agreement between them that the former shall purchase said lands at said sale for the benefit of the latter, such agreement is valid and may be enforced in equity. The purchaser holds said lands subject to his advances, as trustee for the other. Church v. Kidd, 3 Hun, N. Y. 254; Stoddard v. Whiting, 46 N. Y. 627; Ryan v. Dox, 34 N. Y. 307; Morrill v. Cooper, 65 Barb. N. Y. 512; Dodge v. Wellman, 43 How. Pr. N. Y. 427.

So, where a father conveys lands to a third person for the benefit of his children, or one person conveys lands to another, under a parol agreement, in either case, that the grantee shall hold such lands in trust for and convey the same to such children, or to another, upon the happening of some event, or at any other time, the grantee takes such title in trust. Such a trust, though not expressed in writing, will be upheld and enforced. The statute of frauds has no application to such a case. Moyer v. Moyer, 21 Hun, N. Y. 67; Lowry v.

The mortgageor, and the purchasers under him, all of whom are stated to be citizens of Kentucky, are prayed to be made defendants; and the prayer of the bill is, that the defendants may be decreed to pay the aforesaid debt, with interest, etc.; and on failure, that the equity of redemption of the defendants be foreclosed, and the mortgaged property decreed to be sold, to satisfy the said debt, etc. The bill alleges the plaintiffs to be aliens, and subjects of the King of Great Britain. The deed of mortgage, dated the 14th of February, 1794, which (as well as the bond referred to in it) is made an exhibit, contains a defeasance, that the mortgageor should pay the said sum of £770 2 4, with lawful interest thereon, according to the condition of the bond recited in it. It was duly proved and recorded in the County Court of Fayette, on the 11th of March, 1794.

Tandy and Patterson severally answered this bill, each of them admitting himself to be in 492*] possession *of certain parts of the mortgaged premises, under a bona fide conveyance, for valuable consideration paid, from the mortgageor, or others claiming under him, and without notice of the mortgage, other than the constructive notice given by the record of the same. They allege the continued possession of the mortgaged premises, from the date of the mortgage, by the said Hughes, or those claiming by purchase under him; and rely upon the length of time, and uninterrupted possession, as grounds for presuming that the debt has been paid, or released, in bar of the relief sought.

M'Gowan, and Hughes, the mortgageor, having died pending the suit, the guardians ad litem of their heirs and representatives severally answered, not admitting any of the charges in the bill, and relying upon the presumption of payment, or a release of the debt, from length of time.

The bill was dismissed, as to all the defendants, except Hughes' heirs, Patterson and Tandy, upon their answers coming in; and after one or more interlocutory decrees, the court pronounced a final decree of foreclosure, as to the above defendants; and in case the balance found to be due by the report of the commissioner should not be paid by a certain day, a sale of the mortgaged property, in which the equity of redemption was foreclosed, was decreed.

It was admitted by the parties, that the defendants had made lasting and valuable improvements on the mortgaged property claimed by them; and that the female plaintiff, shortly after the date of *the mortgage, left [*493 the United States, and that neither she, nor her husband, has been since within the United States.

Amongst the exhibits filed in the cause, are two letters from James Hughes, the mortgageor, to the female plaintiff, the one bearing date the 24th of February, 1803, and the other the 17th of December, 1808; in the former of which he recognizes distinctly the existence of the mortgage, and in both, promises to make remittances as soon as it should be in his power.

The counsel for the appellants insist upon the following objections:

1. That the mortgage deed is a void instrument, the defeasance being to pay the money on the day it became due by the bond, viz., on the 12th of September, 1793, which was impossible, that day having already passed.

2. The plaintiffs, being aliens, by their own showing, cannot hold lands in Kentucky, and, therefore, cannot maintain a bill to foreclose this mortgage.

3. The plaintiffs are barred of their right to foreclose, by length of time.

4. That the mortgaged property ought not to have been made liable to the payment of this debt, beyond its unimproved value.

1. The first objection is well founded in point of fact; but as to its legal consequences, it was in a great measure answered by the concession which the learned counsel, who urged it, was constrained to make. He admitted the law to be, as it unquestionably is, that if a deed for land is to be *made void, by the [*494 happening of a subsequent condition, the performance of which is impossible at the time the deed is made, the condition only is void, and the estate of the grantee becomes absolute. But the use which he endeavors to make of the objection, was to turn the respondents out of the court of equity, and to leave them to their legal remedy, by ejectment, to recover the possession of the granted premises, in which it was supposed they might be successfully encountered by the statute of limitations. But in what respect the situation of a grantee in a deed without a defeasance, but which was intended by the parties to operate only as a security, differs from that of an ordinary mortgagee, in respect to jurisdiction, and the act of limitations, is not perceived by the court. The latter may pursue his legal remedy by

Smith, 9 Hun, 514; Sieman v. Austin, 33 Barb. 9; S. C. affirmed, sub. nom. Sieman v. Schurck, 29 N. Y. 598; Cipperly v. Cipperly, 4 N. Y., S. C. R. (T. & C.) 342; Norton v. Mallory, 3 N. Y. S. C. R. (T. & C.) 640; 1 Hun, 499; Foote v. Bryant, 47 N. Y., 544; Holden v. Burnham, 2 Hun, 678; 5 N. Y., S. C. R. (T. & C.) 195; Fairchild v. Fairchild, 5 Hun, 407; S. C. affirmed, 64 N. Y. 471; Mason v. Libby, 54 How. Pr. N. Y. 112.

A purchaser of a trust estate, with knowledge of the trust, is subject to all the duties in respect to the same which rested upon the trustee, from whom he purchased. Gautier v. Douglass Man. Co., 13 Hun, N. Y. 514.

Parol evidence is admissible to show that what appears upon the written papers to have been a conditional sale for an agreed price, was, in fact, a loan of money, and that the land was but a security for the money lent. Russell v. Southard, 12 How. U. S. 139; Bentley v. Phelps, 2 Wood. & M. 426.

If a joint purchase of real estate be made in the name of one of the copurchasers, parol evidence is admissible to prove the fact, in order to raise a resulting trust. Powell v. Munson, Man. Co., 3 Mas. 347; Hunter v. Town of Marlboro, 2 Wood. & M. 168; Jenkins v. Eldridge, 3 Story, C. C. 181.

A court of equity will consider an absolute deed as a mortgage, whenever it is shown to have been intended merely as a security for the payment of a debt. Holbrook v. Am. Ins. Co., 1 Curt. C. C. 193; 1 Am. Law Reg. 18; Bank of Mt. Pleasant v. Sprigg, 1 McLean, 178; 10 Pet. 257; Babcock v. Wyman, 19 How. 289.

That equitable relief on parol evidence may be had in cases where the statute of fraud is set up. See Conway v. Alexander, 7 Cranch, 218; Sprigss v. Bank of Mt. Pleasant, 14 Pet. 201; Morris v. Nixon, 1 How. 118; Taylor v. Luther, 2 Sumn. 228; Russell v. Southard, 12 How. 139; Wyman v. Babcock, 2 Curt. C. C. 386.

ejectment, and he may, at the same time, file his bill, for the purpose of foreclosing the mortgageor of his equity of redemption. The objects of the two suits are totally distinct; and it is no objection to the remedy sought in equity, that the plaintiff has another remedy which he may pursue at law. In the one, he seeks to obtain possession of the mortgaged premises; and in the other, to compel the mortgageor to pay the debt, for the security of which the mortgaged property was pledged. Whether the defendant could avail himself of the act of limitations in the former case, whilst the equitable remedy if the plaintiff is subsisting, is a question which need not be decided in the present case, as the parties are now before a court of equity. The effect which length 495*] of time may have upon *the plaintiff's rights in that court, will be considered under another head.

The principles here laid down, are not less applicable to the case of an absolute deed, which is intended by the parties to operate as a security for a debt, than they are to that of a common mortgage. A court of equity looks at the real object and intention of the conveyances; and when the grantor applies to redeem, upon an allegation that the deed was intended as a security for a debt, that court treats it precisely as it would an ordinary mortgage; provided the truth of the allegation is made out by the evidence. So, too, the grantee in such a deed, may treat it as a mortgage, and, acknowledging it to be such, may apply to a court of equity to foreclose the equity of redemption, which will be decreed, in like manner as if an unexceptionable defeasance were attached to the deed. That court directs its attention to the real object of the deed, and the intention of the parties, and will compel a fulfillment of both. Now, what was the object of the present deed? It is admitted by all the parties to this cause, that it was to secure a debt due by James Hughes, the grantor, to Martha Hughes, the grantee; and it is apparent, from the instrument itself, exclusive of the condition, that the debt to be secured was that of which the bond recited in the deed was the evidence, which was payable on the 12th day of September, 1793, with interest from the date of the bond. This, then, being the contract of the parties, it ought to be carried 496*] into execution, unless *there should be objections to such a decree, other than the one which has been just disposed of.

2. The next objection relied upon, is the alienage of the respondents. This objection would not, we think, avail the appellants, even if the object of this suit was the recovery of the land itself, since the remedies, as well as the rights, of these aliens, are completely protected by the treaty of 1794, which declares "that British subjects, who now hold lands in the territories of the United States, etc., shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens." In the cases of Harden v. Fisher, 1 Wheat. Rep. 300, and Orr v. Hodgson, 4 Wheat. Rep. 463, it was decided that, under this treaty, it was not necessary for the alien to show that he was in the actual possession or seisin of the land, at the time of the treaty; because the treaty applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. Now, it is unquestionable, that at the time this treaty was made, the female plaintiff was entitled to assert a legal claim to the possession of this land, or to foreclose the equity of redemption, unless the debt with which it was charged was paid, in which case, equity would have considered her as a mere trustee for the mortgageor.

*But the objection is deprived of all [*497 its weight, and would be so, independent of the treaty, in a case where the mortgagee, instead of seeking to obtain possession of the land, prays to have his debt paid, and the property pledged for its security sold for the purpose of raising the money. Under this aspect, the demand is, in reality, a personal one, the debt being considered as the principal, and the land merely as an incident; and, consequently, the alienage of the mortgagee, if he be a friend, can, upon no principle of law or equity, be urged against him.

3. It is objected, in the third place, that the respondents are barred of their right to foreclose, by length of time. It is not alleged or pretended that there is any statute of limitations in the State of Kentucky which bars the right of foreclosure or redemption, and the counsel for the appellants placed this point entirely upon those general principles which have been adopted by courts of equity, in relation to this subject. In the case of a mortgageor coming to redeem, that court has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff, after twenty years' adverse possession, fixed upon that as the period, after forfeiture, and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is, that where the mortgageor has been permitted *to retain [*498 possession, the mortgage will, after a length of time, be presumed to have been discharged, by payment of the money, or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgageor that the mortgage is still existing, and the like. Now, this case seems to be strictly within the terms of this rule. The two letters from the mortgageor to the female plaintiff, in 1803 and 1808, admit that the mortgage was then subsisting, that the debt was unpaid, and they contain promises to pay it when it should be in the power of the writer. In addition to these circumstances, credits were indorsed on the bond, for payments acknowledged to have been made, which, though blank, the court below ascertained to have been made on the 15th of January, 1798, the 15th of May, 1803, and the 2d of August, 1808. The

mortgageor, then, cannot rely upon length of time to warrant a presumption that this debt has been paid or released, the circumstances above detailed having occurred from eight to thirteen years only prior to the institution of this suit.

But it is insisted that, although these acknowledgments may be sufficient to deprive the mortgageor of a right to set up the presumption of payment or release, they cannot affect the other defendants, who purchase from him parts of the mortgaged premises, for a valuable consideration. The conclusive answer to this argument is, that they were purchasers, with notice of this incumbrance. It must be ad-499*] mitted, that it was but constructive *notice; but for every purpose essential to the protection of the mortgagee against the effect of those alienations, it is equivalent to a direct notice, and such is unquestionably the design of the registration laws of Kentucky. A purchaser, with notice, can be in no better situation than the person from whom he derives the title, and is bound by the same equity which would affect his rights. The mortgageor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice, passes nothing but an equity of redemption, and the latter can, no more than the mortgageor, assert that equity against the mortgagee, without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them. The court is therefore of opinion that this objection cannot be sustained by either of the appellants.

4. The last objection is, that the mortgaged property ought not to have been made liable to the payment of this debt, beyond its unimproved value. The object of this suit is, to recover a debt, and to have the property pledged for its security sold, for the purpose of paying it. The debt, as was before observed, is the principal, and the land is only as a collateral security for the payment of it. The mortgagee seeks not to obtain the possession of the land, and to deprive the mortgageor or the purchaser of the improvements they have made upon it; and 500*] even if he did, *the question would not be materially changed. If by means of these improvements the value of the land has been increased, the mortgageor, or purchasers, are permitted to enjoy all the benefit of such increase, by paying the debt charged upon the land. If he will not do this, but submits rather to a sale of the property, he has all the benefit of its increased value, by receiving the overplus raised by the sale, after the debt is discharged. His improvements were made upon property which he knew was pledged for the payment of this debt, and he made them solely with a view to his own interest. The land was in reality his own, subject only to the lien; so much his own, that he is not accountable to the mortgagee for the rents and profits received by him during the continuance of his possession, even although the land, when sold, should be insufficient to pay the debt. Neither is the purchaser accountable for any part of the debt, beyond the amount for which the land may be sold, although it should have been deteriorated by waste, dilapidation, or other mismanagement. The claim, therefore, of the purchaser with notice, to have the value of the improvements which may have been made for the fruits of the property itself deducted from the price at which the property may be sold, seems to the court too unreasonable to admit of a serious argument in its support. No case was cited, nor has this court met with one, which affords it the slightest countenance. We must therefore overrule this objection.

Before concluding this opinion, it may be proper *to notice a point which was [*501 made by the counsel for the appellants, although it was not much insisted upon; it was, that the balance due upon this mortgage ought to have been apportioned upon all the purchasers from Hughes. The bill was properly dismissed as to all the defendants, except the heirs and representatives of Hughes, Tandy, and Patterson, upon their answers, denying the equity of the bill; and from these decrees no appeal was taken. As to Tandy and Patterson, who acknowledged themselves to be purchasers with notice, they stand precisely in the situation of the mortgageor, and the mortgagees have nothing to do with their relative rights to contribution amongst themselves. They are entitled to be paid the debt due to them, and to call for a foreclosure and sale of all the mortgaged property, whether it be in the possession of the mortgageor or of others to whom he has sold it. If either of these defendants should pay more than his proportion of the debt, according to the relative value of the property they possess, that is a matter to be settled among themselves. But it would be most unreasonable to force the mortgagees into the delay and expense incident to the adjustment of those differences between persons with whom they have no concern. The conveyances by the mortgageor to them are void, as to the mortgagees, against whom they have no right, except that of redeeming, upon payment of the mortgage debt and interest.

Decree affirmed with costs.

[*Local Law.] [*502

STEPHENS, Appellant,

v.

M'CARGO et al., Respondents.

The land law of Virginia, of 1779, makes a pre-emption warrant superior to a treasury warrant, whenever they interfere with each other, unless the holder of the pre-emption warrant has forfeited that superiority, by failing to enter his warrant with the surveyor of the county, within twelve months after the end of the session at which the land law was enacted; and on that period having expired, and being prolonged by successive acts, during which time there was one interval between the expiration of the law and the act of revival, the original right of the holder of the pre-emption warrant was preserved, notwithstanding that interval, the entry of the holder of the treasury warrant not having been made during the same interval.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court:

This is an appeal from a decree pronounced by the Circuit Court of the United States for the District of Kentucky, directing the appellant to convey to the respondents certain lands mentioned in their bill, and claimed by them under two distinct titles.

The board of commissioners granted a certificate of pre-emption on the 26th day of April, 1780, to Benjamin Harrison, for 1,000 acres of land, which certificate contained, within itself, a good location.

The entry with the surveyor was made on the 5th day of June, 1786; the land was sur-
503*] veyed on *the 12th of December, 1787; and the grant was issued on the 10th of February, 1789.

The complainants deduce title from Harrison to parts of this land.

The appellant claims under a grant issued on the first day of March, 1784, founded on a survey of the 14th of February, 1783, and on an entry made the 30th of May, 1780, on a treasury warrant.

In an ejectment brought against all the persons occupying the land covered by his patent, judgment was rendered in his favor; whereupon, several of the defendants filed their bill on the equity side of the court, setting forth their better title, under the pre-emption warrant of Harrison, and praying that Stephens might be enjoined from proceeding farther at law, and might be decreed to convey to them, respectively, the lands they held under Harrison.

An amended bill was afterwards filed, with the leave of the court, in which two of the defendants in the suit at law, who were not parties to the original bill, united with the original complainants. This amended bill sets forth, that on the 10th day of May, 1780, Richard Barbour made a valid entry of 1,000 acres of land, on a treasury warrant, which was surveyed in January, 1786, and patented in June, 1787. One of the original complainants, and the two complainants introduced in the amended bill, show a regular title under this patent.

The answer of the defendant put the claims in issue, and the court sustained the titles both
504*] of *Harrison and Barbour, and directed the defendant, Stephens, to convey to the plaintiffs so much of the land recovered by him in the suit at law as was held by those titles.

From this decree Stephens has appealed; and his counsel alleges that it is erroneous, because,

1. The titles of Harrison and Barbour are united in the same bill.

2. Stephens has the better title in equity, as well as law.

1. As to the form of the proceedings:

It may be admitted, that two persons cannot unite two district titles in an original bill, although against the same person. Such a proceeding, if allowed, might be extended indefinitely, and might give such a complexity to chancery proceedings as would render them almost interminable. But we know of no principle which shall prevent a person claiming the same property by different titles, from asserting all his titles in the same bill. If this principle be correct, then, as three of the complainants held under both titles, there would be a strict propriety in submitting both titles to the Court.

This would not be questioned, so far as the same land was claimed by both titles. So far as the surveys of Barbour and of Harrison interfered with each other, and the same person held under each, he would be unquestionably correct in comprehending both claims in the same bill. If this were the fact in only a small portion of the land, still the two titles may be brought before the court; and if this may be done, it would follow that all who *claim [*505 under either, and who are properly in court, may assert their claims under both titles.

But a joint judgment has been rendered at law, against all these complainants, and they have an unquestionable right to unite in their application to a court of equity, for an injunction to this judgment. The court may, consequently, hear the whole cause, for the purpose of determining whether this injunction shall be perpetuated; and it is a rule that a court of equity, which has jurisdiction of a question, may proceed to its final and complete decision. Directing a conveyance is only making that relief, which would be afforded by a perpetual injunction, more complete.

We think that all those against whom the judgment at law was rendered, might properly unite in this bill, and assert their titles under Barbour and Harrison, or either of them.

We proceed, then, to the inquiry, whether the appellant or the respondent have the better title in equity.

This inquiry is confined to that part of the case which respects the title under Harrison. Barbour's entry, being prior to that of Stephens, gives a better equitable title, according to the settled course of decisions in Kentucky, if the entry be a valid one, as this is admitted to be.

The land law of Virginia, under which all parties claim, makes a pre-emption warrant superior to a treasury warrant, whenever they interfere with each other, unless the holder of the pre-emption warrant shall have forfeited that superiority, by failing to comply with some of the requisites of *the law. One [*506 of these is, that the warrant shall be entered with the surveyor of the county within twelve months after the end of the session of assembly in which the law was enacted. That session of assembly ended on the 26th of June, 1779, and, consequently, the time given by this act for making entries, expired on the 26th of June, 1780.

But the legislature was induced, by weighty considerations, to prolong this time, and various acts of assembly were passed, which did prolong it, until after this entry was made. It has been supposed, however, that there was, at least, one interval between the expiration of the law and the act of revival, and this circumstance gives birth to the present controversy.

The right of the legislature to give farther time for entering pre-emption warrants has never been drawn into doubt; but the influence of such laws on the rights or claims of others has been questioned. The appellant contends, that by making his entry on the 30th of May, 1780, he acquired an inchoate right to the land, which could be defeated only by such an observance of the law, on the part of the person

possessing the pre-emption warrant, as would preserve it from forfeiture; and that the land vested in him, by virtue of his entry, the instant the forfeiture took place.

We will inquire how far this principle is countenanced by the words of the act.

When the Virginia assembly was about to open a land-office, for the purpose of selling the immense tract of vacant territory within its limits, certain pre-existing rights were recog-
507*] nized and *affirmed; and others, which had no previous legal existence, were created, and conferred on meritorious individuals, as a reward for the fatigue and hazard encountered in exploring the country. Of the latter description was the pre-emptive right, given to him who had marked and improved a tract of land. When the land-office was opened, it was opened for the sale of waste and unappropriated land, not for the sale of land already appropriated, or of land, a right to appropriate which was vested by law in another; consequently, no entry, strictly speaking, was authorized, either by the act or the words of the warrant, on lands which were not at the time waste and unappropriated.

The words of the law opening the land-office are: "Be it enacted, that any person may acquire title to so much waste and unappropriated land, as he or she shall desire to purchase, on paying the consideration of forty pounds for every hundred acres," etc. The land, then, which was brought into market and offered for sale, on which the purchaser might place his warrant, and to which he might acquire a title, was "waste and unappropriated land;" land to which another had by law a pre-emptive right, could not be of this description. So long as that pre-emptive right continued, it was withdrawn from the general mass of property brought into market and offered for sale; it was land to which the power of appropriation conferred by the warrant did not extend.

The idea and intention of the legislature, on this subject, is more clearly expressed in the
508*] clause *which provides for the disposition of the property in the event of a failure to make the entry within the time limited by law. It is in these words: "And where any such warrant shall not be entered and located with the county surveyor, within the before-mentioned space of twelve months, the right of pre-emption shall be forfeited, and the lands therein mentioned may be entered for by any other person holding another land warrant; but such pre-emption warrant may, nevertheless, be located on any other waste and unappropriated lands, or upon the same lands, where they have not, in the meantime, been entered for by some other."

It would be, at least, useless to grant an express power to the holder of a common treasury warrant, to locate the land after the forfeiture of the pre-emption right, if that power had been previously granted by the general clause, which enables him to locate waste and unappropriated land; and the limitation on the right of location, which makes it to commence after the forfeiture of the pre-emptive right, is opposed to the idea of its pre-existence.

The subsequent words authorize the holder of the pre-emption warrant to locate it "on any other waste and unappropriated lands, or upon the same lands, where they have not, in the meantime, been entered for by some other."

There can be no doubt that the words, "in the meantime," do of themselves import that interval which occurred between the forfeiture of the pre-emption right and the re-entry of the warrant. *Only an entry made in [*509
this interval obstructs the re-entry which may be made by the holder of the pre-emption warrant. If the sense of these words could be rendered still plainer, it would be done by considering them in connection with the other parts of the sentence. The entry which is preserved and protected against the re-entry of the pre-emption warrant, is that which had just before been authorized; that is, an entry made after the right of pre-emption had been forfeited. If the pre-emption warrant of Harrison had been re-entered, and had come in conflict with the entry of Stephens, made prior to its forfeiture, it must have prevailed, or the words of the law have been entirely disregarded. The act of assembly, prolonging the time for making his entry, is certainly equivalent, while in force, to a re-entry made by himself without such act. It was in force when his entry was made, on the 5th day of June, 1786.

Upon the words of the law, then, there can be no doubt respecting the superiority of the title under Harrison, so far as it depends on the entries. The difficulty is produced by the circumstance that a patent was issued to Stephens before the warrant of Harrison was entered with the surveyor.

The entry of Stephens was made on the 30th day of May, 1780, before the pre-emptive right of Harrison had expired. The survey was made on the 14th of February, 1783, while the act of May session, 1782, which prolonged the time for making these entries until June, 1783, was in force. The patent issued on the 1st of March, *1784, at a time when the act [*510
passed in 1783, prolonging the time for making entries until nine months after the end of that session of assembly, was in force.

It is not, we think, to be doubted that the several acts of assembly, prolonging the time for entering pre-emption warrants, have the same effect, except as to entries made "in the meantime," that is, in the interval between a forfeiture and a renewal of the right, that would be allowed to the original act, had it continued in force until after Stephens had obtained his patent.

The act of 1783 expired in June, 1784, and was revived and continued, by a subsequent law, until November, 1786. It was during the existence of this law that Harrison's entry was made.

The pre-existing law was permitted to expire before the act for its revival and continuance was passed; and the appellant contends that this interval cured all the defects in his title, and placed it beyond the reach of any legislative enactment. In support of this position, he relies on the principle settled in Kentucky, that a patent is an appropriation of land, and that no subsequent entry can draw its validity into question. He relies also on the case of Hoofnagle et al. v. Anderson, 7 Wheat. Rep. 212.

The court has felt great difficulty on this point. The proposition that a patent is an ap-

propriation of the land it covers, although the proceedings previous to its emanation may be irregular and defective, is unquestionably true; but this principle has never, so far as is known 511*] to the court, *been applied to a case in which the opposing title to the particular land in controversy had its commencement before the patent issued. In the case of Hoofnagle et al. v. Anderson, the plaintiffs sought to set aside a patent by an entry made after the grant had issued, on a warrant which gave no specific claim to the particular land in controversy, but a general right to locate any unappropriated land in the military district. In that case, too, the warrant, under which Anderson's patent had been obtained, was issued to an officer really in the state line, but said, by mistake, to belong to the continental line. It was, originally, equally entitled with that under which Hoofnagle and others claimed, to be placed in the military district north-west of the Ohio, and had lost that equal right by an act of the legislature, not entirely compatible with that strict regard to vested interests, which all governments deem a sacred obligation. The mistake in the warrant was a plain official error, not mingled with the slightest suspicion of fraud, and its holder, who was a purchaser without notice, had lost, in consequence of that mistake, the chance of acquiring any other land. The mistake, too, had done no more than to restore him a right which had been taken from him, perhaps inadvertently, certainly with a belief that no injury was done him.

The situation of both parties was different in that case from what it is in this. The party who obtained the patent had an original right, equal to that of the person who demanded the 512*] land. In *this case the appellant has no such original right. The warrant of Hoofnagle and others gave them no particular claim to the land in controversy; but, in this case, Harrison's warrant gave him, and those claiming under him, originally, an exclusive right to the particular land in controversy. That exclusive right, it is true, was forfeitable, and was at one time forfeited. But the legislature, which created the right, and limited its duration, might, with the strictest propriety, prolong its existence; and might also prescribe the manner in which the property should be afterwards acquired by any other person. The legislature has prescribed that manner. It is by an entry made when the pre-emptive right was forfeited. With the single exception of the claim given by such an entry, the legislature might certainly remit the forfeiture, and re-instate the pre-emptioner in his original rights.

A title acquired according to law might very properly be considered as obstructing the operation of this re-instating act, and be sustained against him; but a title which, in no stage of its progress, was authorized by law, appears under circumstances much less favorable. That patents obtained on improper entries have prevailed against persons whose titles commenced after such patents have issued, is no authority for the opinion that such patents ought to prevail against a title which traces its commencement to a time anterior to the emanation of the patent. The only difficulty in the case consists in connecting the right of the pre-emptioner, at the time of his *entry [*513 was made, with the original right given by the act which opened the land-office. That act gave the person who had marked and improved a piece of ground, the pre-emption to 1,000 acres of land, to include his improvement, provided the warrant was entered within twelve months. That any act prolonging the time for making this entry, would continue the original right, is not to be questioned. It is plainly the intention of the legislature, and nothing can prevent that intention from being effectual, but the intervention of some other title which the legislature cannot rightfully remove. The original act shows how that other intervening title may be obtained. It is by an entry made while the pre-emptive right had no existence.

Considering this question as being res integra, entirely unaffected by the decisions made in the courts of Kentucky, the opinion of this court would be, that a title acquired while the pre-emptive right of Harrison was in force, could not be sustained against his entry, if made according to the act by which his right was continued. We do not think that this opinion is opposed to the decisions of Kentucky, because no decision has ever been made in that country against a pre-emption right, properly entered, under the acts of assembly for continuing the original law in favor of a treasury warrant, located while those laws were in force. Titles under treasury warrants, entered during the existence of a prior right, have been sustained against other subsequent entries *made under similar circumstances; [*514 but never, so far as we are informed, against that prior right, if completed according to acts of the legislature prolonging the time for its completion.

In the case of Alsted et al. v. Miller, Hardin, 193, the Court of Appeals of Kentucky decided in favor of a title founded on a pre-emption warrant, entered in December, 1782, against a title founded on a treasury warrant, entered on the 9th of June, 1780. That case is admitted to differ essentially from this, because, when Miller's pre-emption warrant was entered, no interval had occurred between the different acts, during which the land might have been legally entered; and because, too, Miller's appears to have been the oldest patent. But in that case the court decided that the time for entering the pre-emption warrant might be prolonged, notwithstanding the previous entry of a treasury warrant on the same land. The court observed that the holders of treasury warrants purchased subject to the reservations made in favor of pre-emptioners; that the legislature might have permitted this reserved land to return to the common fund, on the failure of the person holding the pre-emption warrant to comply with the terms of the law, or might dispense with those terms in his favor, and prolong the time allowed for making his entry. The principle of this decision is, that an entry made during the existence of the pre-emptive right, is not such an inceptive title as could be defeated only by the performance of the condition on which *the pre-emption [*515 right depended, at the time his entry was made. It gave him no rights which were not under the

control of the legislature, and might not be defeated by an act giving the pre-emptioner farther time to enter his warrant.

So far, then, as the decisions of Kentucky go, they are rather in favor of the opinion that the original right of Harrison was preserved, notwithstanding the interval during which it was forfeited, since the entry of the appellant was not made in that interval.

The decree of the Circuit Court affirmed with costs.

[Local Law.]

LOVE, Plaintiff in Error,
v.
SIMMS' LESSEE, Defendant in Error.

A question, under the registry acts of Tennessee, whether a junior conveyance registered, should take precedence of a prior unregistered deed. Held, that the registry did not, under the circumstances, vest the title against the elder deed.

ERROR to the Circuit Court of West Tennessee.

This cause was argued by Mr. Eaton for 516*] the *plaintiff in error,[1] and Mr. Harper for the defendant in error.

Mr. Justice Johnson delivered the opinion of the court:

This cause comes up from the Circuit Court for the District of West Tennessee. The judgment in that court is in favor of the plaintiff in ejectment, and error is brought to reverse that judgment, on the ground that the court below instructed the jury that the plaintiff there had the better title, and ought to recover. The facts of the cause are exhibited in a bill of exceptions, and, so far as are necessary to illustrate this opinion, may be stated thus:

One Stockly Donaldson obtained a grant of lands of the state of North Carolina, in that region of territory which lies west of the Cumberland Mountain, and now composes a part of West Tennessee. This grant issued upon an entry made in the office of John Armstrong.

After obtaining the patent, Donaldson executed a power of attorney to one Grant, to sell this land, and Grant accordingly sold it to one Allison, and executed a conveyance to him in due form. This deed bears date in 1795. But it appears, that two years previous to this sale, Donaldson himself had executed a title for the same land to one Adair. And the plaintiff in ejectment now makes title through Allison, 517*] while the defendant *protects himself under the conveyance to Adair, but without connecting himself with it.

If the case rested here, there would be no difficulty in it; but, by the laws of North Carolina, no deed passes an estate, unless it be recorded in the county in which the land lies, and that within twelve months of its date. In this instance, the subsequent deed claims precedence, on the ground of prior registration, after the twelve months prescribed to the prior deed and, of consequence, at a time when the prior deed was supposed to be altogether void, for want of registration.

On the point of registration the facts are these: The act of 1715, which is the registering act alluded to, has been suspended, as to the limitation of time, almost ever since its enactment. A similar provision in the land laws of that state, on the subject of registering grants, has also been the subject of a similar suspension. But as there was no county court embracing within its jurisdiction that region of country in which this land lay, a new provision is introduced into the suspending act of 1788, by which it is enacted that persons owning lands of this description, shall register them in the counties in which they reside; and a proviso, as to non-residents, is inserted, in these words: "Provided always, that persons owning such lands in this state, west of the Cumberland mountain, and not residing therein, shall register their grants for such lands in Hawkins county."

The holder of the junior conveyance from Donaldson, availed himself of this proviso, or (more properly speaking) enacting clause, and recorded *it, with all his muniments of [*518 title, in Hawkins county. This took place in the year 1797, but the defendant below, the holder of the senior title from Donaldson, did not record his title until the year 1806, when, the state of Tennessee having created a county embracing this land, he committed his deed to registration in the county where the land lay; which was also done by the plaintiff below, four years afterwards. If, then, the registration in Hawkins county was a valid registration, and the effect of it was to vest the estate, to the prejudice of the prior conveyance from Donaldson, the plaintiff had the better title, and the charge was correct.

This question will now be examined.

It is obvious, that to attribute to the registration in Hawkins county the effect here contended for, it is necessary,

1. To attach to the provisions of the 5th section of the act of 1788 a variety of incidents, and to give it a latitude of construction which nothing but the unequivocal intent of the legislature could countenance. The word land must be taken to mean muniments of title; the word grant, both patents and mesne conveyances; and words of enactment, which, in their direct and ordinary signification, are solely imperative, must be considered as importing a privilege or exemption. Besides which, all the provisions of the 5th section of the act of 1715 must be incorporated with the 5th section of that of 1788, in order to sustain the implication that recording in Hawkins county shall make the one valid, or the failure to record in that place *be fatal to the other. This view [*519 of the subject would lead to a protracted and subtle discussion, which the conclusions of this court, on other points, render now unnecessary to be pursued; and the subject is only noticed, to avoid the implication that this court has acquiesced in such a construction of the clause in question.

2. To give effect to the registration in Hawkins county, it is also obvious that the 5th section of the act of 1788 must have continued in force until 1797, when the deed to Allison was recorded in that county. And this must either be inferred from the words of the section itself,

1.—He cited Cro. Eliz. 321; 1 Burr. 119.

or must be the effect of the subsequent reviving acts.

In their ordinary and direct signification, the words of the section in question certainly import perpetuity; and did it stand alone, such would be the effect given to it, whether in its operation it be considered imperative or remedial. But the context necessarily limits its duration. Both the title and preamble of the act declare it to be to relieve persons, who would be sufferers from neglecting to record their muniments of title in due time. And it would be hard to conceive a reason why grants and mesne conveyances elsewhere should be forced upon record within a limited time, and those for lands in this district of country left without limitation as to time. While there was no office assigned for their registration, a reason existed; but that reason is taken away, when we admit that a proper office was opened for that purpose.

The question, however, does not rest here; a 520*] *recording law, unlimited in point of time, and unaffected by penalties, is an absurdity, since it destroys its own views, when it leaves the individual at large to record or not, as he pleases. And if an additional proof be wanting, to indicate the sense of the legislature in passing this section of the act of 1788, it is to be found in the reviving act of North Carolina, of 1790, in which it is expressly declared that the act of 1788 would expire if not then revived. The idea, therefore, of its being perpetual, in its own provisions, is rejected; and it remains to inquire, whether it was continued in force up to 1797, when the deed to Allison was recorded in Hawkins county. This must depend upon the several reviving acts passed subsequent to 1788, and it is perfectly clear, upon collating those acts, that the 5th section of the act of that year had expired, and was dropped, before Allison's deed was registered. In 1790, the state of North Carolina passed a law, reviving, for two years, the act of 1788, with all its provisions; but the state of Tennessee had previously been separated from North Carolina, and the provisions of the 5th section of the act of 1788 appear never to have been taken up in Tennessee.

It is not necessary, in arriving at this conclusion, to examine whether the words of the section shall be restricted to grants, or extended to mesne conveyances, or whether to deeds prior or subsequent. In no point of view will this section sustain the registration; for the deed is registered as a mesne conveyance, not a grant, 521*] properly so called, and *must take effect under those legal provisions which extend to mesne conveyances.

The act which purports to revive the act of 1788, is that of Tennessee, of 1794; and by that, the right of recording out of the county where the land lies, is wholly dropped. The general words of the act of North Carolina, in 1790, are not adopted; but the right of recording again is explicitly brought back to the general policy of the country, that of recording titles in the county where the land lies.

The question will, no doubt, here occur, whether the legislature could have intended to impose this duty, while there was no county, and no court, in which such record could be made.

The answer is, that the question is here immaterial, since it is enough for all the purposes of the defendant below, if the obligation to record did not exist at all, until there was a county established; but were it otherwise, the only question here is, whether the provisions of the act of 1794, or any other act prior to 1797, revives the supposed right to record in Hawkins county; whether it grants a privilege, or imposes a duty, as to that particular county, and the right of recording in any other place than where the land lies.

The act of 1796, which is that under the immediate protection of which it is necessary that Allison's deed should be sustained in favor of the plaintiff below, contains a simple revival of the act of 1794, without any farther provision. Its meaning and effect, therefore, must be read upon the face of the latter act.

*There were some other points made [*522 in the argument, which, as the cause must be sent back, it is proper to notice.

At one, if not two periods, of the early history of Tennessee, there occurred an interval of time, during which the suspending laws, as they are called, did not exist, and that of 1715, of course, operated upon all cases within it. That state passed from the jurisdiction of North Carolina in 1790, but its first territorial legislature did not meet until 1794. By a provision of the act of separation, the laws of North Carolina became the laws of Tennessee, until repealed by the legislative authority of the ceded territory, or, it is presumed, until they expired by their own limitations. Whether an hiatus occurred in these suspending laws, at the interval of time, is immaterial in this cause, since the junior deed did not come into existence until after the passage of the act of 1794. But between the sessions of 1800 and 1801, there did occur a chasm in these suspending laws, which chasm, the defendant in error contended in argument, put an end to the interest claimed under the prior deed altogether.

It is obvious that this argument assumes for its basis the supposition that the registration of his deed in Hawkins county was valid and effectual to this purpose. The opinion has been expressed, that the 5th section of the act of 1788, was not in force at the time when that registration was made. And the court now recurs to the subject, only to avoid the imputation of having admitted the conclusion in favor of the defendant in error, had the *reg- [*523 istration in Hawkins county been made while the law was in force. We give no opinion on the operation of the act of 1715, on titles to those lands which were so situated that it was impossible for the provisions of the act of 1715 to be complied with; that is, those lands which lay in no designated county. In the present instance, the land in controversy was not included within a county line, until the year 1801. As both deeds were registered in the proper county, after the chasm occurred, they are both equally affected by it; and it has no bearing upon their interests, as made out under the registration where the land lies.

Another point made in argument was, that the defendant could not protect himself under the title to Adair without connecting himself with it. Upon recurring to the words of the charge, we find it to be, that the plaintiff below

had the better title. From this an inference undoubtedly arises, that if the defendant below had exhibited a better title, the plaintiff could not recover, even though the defendant did not show that better title to be transmitted to himself.

Since the registration in the county where the land lies, and which is the only registration deemed valid in this cause, gave the prior registration to the prior deed, and thus took away every claim to precedence from the deed under which the plaintiff below made title, the court must be adjudged to have erred in its charge upon that subject On the implied proposition, that the better title might be set up as a shield 524*] against the plaintiff's *recovery in ejectment, even though the defendant does not show that better title in himself, we will limit ourselves to the following remarks:

The rule of law, that a plaintiff must recover by the strength of his own title, and not the weakness of his adversary's, must be limited and explained by the nature of each case as it arises. Since the rule is universal that a plaintiff in ejectment must show the right to possession to be in himself positively, and it is immaterial as to his right of recovery, whether it be out of the tenant or not, if it be not in himself, it follows that a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself. Possible difficulties may be suggested as to the application of this principle to mere tort feasors or forcible disseisors; but besides that such cases, being generally provided for under statutes of forcible entry, must be of rare occurrence, it is time enough, when they occur, to consider what exceptions they present to the general principle.

The last point proper to be noticed, is that made in the former argument, on the question of revocation of the power of attorney under which the junior deed was executed.

This was supposed to be virtually revoked by the prior conveyance of the same land, executed by Donaldson, who gave the power. And this, on general principles, is unquestionably correct. Whatever liabilities, for damages or otherwise, Donaldson might have incurred by not revoking the power by due notice, it is un-525*] questionable *that a power must cease and determine when there is nothing left for it to act upon. It will be seen, however, that this question resolves itself into the principal question in the cause, to wit, whether the first deed ever was a subsisting valid conveyance. If it was not, then the ground of the argument fails, for the estate had not, in effect, ever passed out of Donaldson; and if it was, then its effect is complete, without recurring to the ground of revocation.

Judgment reversed.

Judgment.—This cause came on to be heard, etc. On consideration whereof, this court is of opinion, that the said Circuit Court erred in instructing the jury "that the lessor of the plaintiff had the better title to the land in controversy." It is therefore adjudged and ordered that the judgment of the said Circuit Court in this case be, and the same is hereby reversed and annulled; and it is further ordered that said cause be remanded to the said Circuit Court, with instructions to issue a venire facias de novo.

[*Practice.] [*526

STEWART v. INGLE et al.

ERROR to the Circuit Court for the District of Columbia.

At a former day of this term, Mr. Hay, for the plaintiff in error, had obtained a certiorari, upon a suggestion of diminution in the record, directed to the court below, and returnable immediate. The clerk of the Circuit Court accordingly made return to the certiorari, with another record. Whereupon, Mr. Hay moved for a new certiorari, upon the ground that the return ought to have been made by the judge of the court below, and not by the clerk.

Mr. Justice Washington, after consultation with the judges, stated, that according to the rules and practice of the court, a return made by the clerk was a sufficient return.

Motion denied.

[*Jurisdiction.] [*527

PEYTON v. ROBERTSON.

In replevin, if it be of goods distrained for rent, the amount for which avowry is made is the value of the matter in controversy; and if the writ be issued to try the title to property, it is in the nature of detinue, and the value of the article replevied is the value of the matter in controversy, so as to give jurisdiction to this court upon a writ of error.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment in the Circuit Court of the United States for the county of Washington, in the District of Columbia, rendered for the sum of $591. The writ was dismissed in the early part of the term, for want of jurisdiction, the judgment being for less than $1,000. The plaintiff in error now moves to re-instate the cause, alleging that the damages laid in the declaration, not the amount of the judgment, is the matter in controversy between the parties.

The property of the plaintiff in error had been seized for rent, upon which she sued out a writ of replevin, and laid her damages in the declaration at $1,000. The defendant in error acknowledged the taking charged in the declaration, and justified it as a distress for the sum of $591, due for rent in arrear. The judgment of the court was in favor of the avowant, for the amount of the rent claimed.

*The plaintiff in error contends that [*528 her suit was not merely for restitution of the property taken, but also for damages, and that, in such a case, the value of the matter in dispute is the sum laid in the declaration.

Her counsel relied on the case of Hulscamp v. Teel, 2 Dallas, 358, and on Cook v. Woodrow, 5 Cranch, 13, to show that, in actions sounding in damages, the sum laid in the dec-

laration is the standard of value. The case in Dallas was an action of trespass, and that in Cranch an action of trover. We think this case stands on different principles from either of those. In a writ of replevin, the real matter in controversy is the sum claimed as rent, or the property replevied. If the replevin be, as in this case, of property distrained for rent, the amount for which avowry is made is the real matter in dispute. The damages are merely nominal. If the writ be issued as a means of trying the title to property, it is in the nature of detinue, and the value of the article replevied is the matter in dispute. In this case, the judgment against the plaintiff in error being for less than $1,000, this court has no jurisdiction, and the motion to replace the cause on the docket must be overruled.

Motion denied.

529*] [*Practice. Jurisdiction.]

Ex-parte BURR.

Quære, As to the authority of this court to interfere, by mandamus, in the case of the removal or suspension of an attorney of the district and circuit courts.

Whatever may be the authority of this court in that respect, it will not be exercised unless where the conduct of the court below has been grossly irregular and unjust.

In a regular complaint against an attorney, charges cannot be received and acted on, unless made on oath. But he may himself waive the preliminary of an affidavit, and the court may proceed, at his instance, to investigate the charges, upon testimony, which must be on oath and regularly taken.

MR. EMMETT moved for a rule to show cause why a mandamus should not issue to the Circuit Court for the District of Columbia, commanding that court to restore one Burr, an attorney of that court, who had been suspended from practice for one year, by order of that court.[1]

Mr. Chief Justice Marshall delivered the opinion of the court:

This is a motion for a mandamus to the Circuit Court for the District of Columbia, to restore Mr. Burr to his place of attorney at the bar of that court.

It is a very unusual application, on which the court has felt considerable doubts.

530*] *On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.

Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers; but without deciding on this question, the court is not inclined to interpose, unless it were in a case where the conduct of the Circuit or District Court was irregular, or was fragrantly improper.

In the case at bar, the proceedings were supposed to be irregular, because Mr. Burr was put to answer charges not made on oath.

That the charges, in a regular complaint against an attorney, ought not to be received and acted on, unless made on oath, is admitted. It is a course of proceeding which is recommended by considerations, *too obvious [*531 to require that they should be urged. But this is not a proceeding of that description. The court did not call on Mr. Burr to answer an accusation in the nature of an information against him. The inquiry was invited by himself; the charges were made at his instance; and the court proceeded on them at his request. Mr. Burr himself, then, dispensed with the preliminary step of an affidavit to the charges which were to constitute the subject of that inquiry. He waived this preliminary. The testimony on which the court proceeded was all on oath, and obtained in a manner which is not exceptionable. There is, then, no irregularity in the mode of proceeding which would justify the interposition of this court. It could only interpose, on the ground that the Circuit Court had clearly exceeded its powers, or had decided erroneously on the testimony. The power is one which ought to be exercised with great caution, but which is, we think, incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession. Upon the testimony, this court would not be willing to interpose where any doubt existed. It is the less inclined to interpose in this case, because the complaint is not of an absolute removal, but of a suspension, which is nearly expired, after which, Mr. Burr may be restored by the court itself, should not very serious objections exist to that measure.

Motion denied.

[*Chancery. Jurisdiction.] [*532

SMITH v. M'IVER.

In all cases of concurrent jurisdiction, the court which first has possession of the subject, must determine it conclusively.

Although courts of equity have concurrent jurisdiction with courts of law, in all matters of fraud, yet, where the cause has already been tried and determined by a court of law, a court of equity

1.—Mr. Emmett cited Tidd's Pract. 59; 1 Johns. Cas. 134, 181; Bac. Abr. tit. Mandamus.

NOTE.—Equity jurisdiction after trial-at-law.—A court of chancery cannot, on a creditor's bill, correct the errors of a court of law. Suydam v. Beals, 4 McLean, 12.

Where a case was properly examinable at law, and a trial at law has been had, and no exception

cannot take cognizance of it, unless there be the addition of some equitable circumstance to give jurisdiction.

In such a case, some defect of testimony, or other disability, which a court of law cannot remove, must be shown, as a ground for resorting to a court of equity.

APPEAL from the Circuit Court of West Tennessee.

This cause was argued by Mr. Eaton and Mr. Isaacks[1] for the appellants, and by Mr. White and Mr. Spaten[2] for the respondents.

Mr. Chief Justice Marshall delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of West Tennessee, dismissing the plaintiff's bill.

The bill states that the plaintiff had made 533*] several *entries for small tracts of land within the district, for which he had obtained patents. That the defendant, John M'Iver, claiming title to the same land, under an older grant, obtained by Donaldson and Tyrrel, had brought ejectments against him for the several tracts of land he claims, and has obtained judgment in some of them. That he has attempted to bring the causes before this court by writ of error, but has been unable to do so, because no one of his tracts is worth two thousand dollars; though all of them, taken together, are worth a larger sum.

The bill alleges that the grant to Donaldson and Tyrrel is a pretended grant, purporting to be issued by the state of North Carolina, in the year 1795; that if genuine, it does not cover his land, because it calls for 40,000 acres only, but includes 70,000 within its boundaries; that the grant is not founded on any warrants, or, if upon any, on those previously granted; and the numbers of the warrants have been inserted in the plat and certificate by the grantees since the grant issued; that it is probable the grant never did issue, but was stolen out of the office in blank, and was filled up by the grantees, of all which the said M'Iver had notice, before he received his conveyance. That M'Iver contends sometimes, that the grant issued on one set of warrants, and sometimes on another, and has caused it to be registered in Knox county, in one way, and in Overton, where the land lies, in another; and to avoid detection, has torn the plat and certificate of survey from the grant. And, finally, *that the state of North Caro- [*534 lina had no power to issue the grant.

The defendant demurred to this bill, and on argument, the demurrer was sustained, and the bill dismissed.

The first question made in the cause, is the jurisdiction of the court, sitting as a court of chancery. It is contended, on the part of the respondent, that a court of equity can exercise no jurisdiction in the case, because the plaintiff has full and adequate remedy at law.

The several allegations of the bill have been reviewed; and it is contended that each of them is examinable at law, and ought to be decided in precisely the same manner in both courts. If the surplus quantity of land contained in the patent, avoids the grant, in whole or in part, in a court of equity, its effect would be the same in a court of law. If the grant be void, because issued without warrants, or on warrants previously satisfied, it is void at law. So with respect to the allegations that it was stolen out of the land office; that the plat and certificate of survey have been torn off; that North Carolina had no power to issue it; and so with respect to every allegation in the bill. The facts alleged are all examinable at law, and a court of law is as capable of deciding on them as a court of equity. In such a case, the existence of some fact, which disables the party having the law in his favor, from bringing his case fairly and fully before a court of law, has been generally supposed to be indispensable to the jurisdiction of a court of equity. Some defect of testimony, some disability, *which a court of [*535 law cannot remove, is usually alleged as a motive for coming into a court of equity. But, in the case at bar, the bill alleges nothing which can prevent a court of law from exercising its full judgment. No defect of

1.—They cited 1 Madd. Ch. 130, 180; Polk v. Wendell, 5 Wheat. Rep. 293, 303; Cowp. 208; 1 Burr. 450; 2 Str. 592; Winchester v. Evans, Cooke's Tenn. Rep. 420; Polk v. Wendell, 9 Cranch, 87; Burton v. Williams, 3 Wheat. Rep. 529.

2.—They cited 4 Johns. Rep. 510; 5 Hayn. 106, 206, 216.

taken to the ruling of the court, chancery can give no relief. Hendrickson v. Hinkley, 5 McLean, 211.

Courts of the U. S. have equity jurisdiction to rescind a contract on the ground of fraud, notwithstanding one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money agreed to be paid by the contract, when the fraud could have been only partially available as a defense to the action at law. Proceedings on the judgment may be enjoined. Boyce v. Grundy, 3 Pet. 210.

Concurrent Jurisdiction of Tribunals.—Where two tribunals have concurrent jurisdiction, the one which first obtains possession of the subject must adjudicate; and neither party can be forced into another jurisdiction. Shelby v. Bacon, 10 How. 56; Mallett v. Dexter, 1 Curt. C. C. 178.

Where concurrent jurisdiction may be exercised by the federal and state authorities, the court which first takes jurisdiction cannot be interfered with by another court, state or federal. Ex-parte Robinson, 6 McLean, 355; S. C. 3 Liv. Law Mag. 386.

When the district courts and the state courts have concurrent jurisdiction in rem, the right to maintain the jurisdiction attaches to that tribunal which first exercises it, and takes possession of the thing in litigation. This is indispensable to prevent a clashing of jurisdiction. The Robert Fulton, 1 Paine, 620.

When there is concurrent jurisdiction of a federal and state court to take cognizance of the offense of counterfeiting, the judgment of one would not be pleadable either in abatement or in bar of an indictment by the other. But, by the rule of comity, the one first acquiring jurisdiction of the case will not be interfered with by the other during the pendency of the proceedings, in criminal as well as in civil actions. Hence, where a United States marshal took a prisoner, arrested for a crime, from the custody of a state officer, for the same offense, and the prisoner pleaded the proceedings in the State Court in abatement of the indictment, the Federal Court sustained the indictment, but remanded the prisoner to the state authorities. U. S. v. Wells, 11 Am. L. Reg. 424.

As to the jurisdiction of the courts of the United States in chancery cases, concurrent with the law jurisdiction of those courts. See Massie v. Watts, 6 Cranch, 148; Hepburn v. Dunlop, 1 Wheat. 179; U. S. v. Howland, 4 Wheat. 108; Bank of U. S. v. Planters' Bk. of Georgia, post, 904.

testimony is alleged; no discovery is required; no appeal is made to the conscience of the defendant. Facts are alleged which have precisely the same operation in a court of law as in a court of equity; and the bill does not even insinuate that they cannot be proved at law.

The argument on the other side is, that the bill charges gross fraud on those under whom the defendant claims, and charges him with knowledge of that fraud; and that courts of equity have concurrent jurisdiction with courts of law, in all matters of fraud.

Admitting this proposition to be true, to the full extent in which it is stated, it will not, we think, aid the case. In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it. The questions in these cases have all been decided at law, and the party can have no right to bring them on again before a court of chancery. Were a court of equity, in a case of concurrent jurisdiction, to try a cause, already tried at law, without the addition of any equitable circumstance to give jurisdiction, it would act as an appellate court, to affirm or reverse a judgment already rendered, on the same circumstances, by a competent tribunal. This is not the province of a court of chancery.

The appellant has relied on the case of Win-
536*] chester *v. Evans, et al. (Cook's Tenn. Rep. 420). That was a bill in the Court of Chancery of Tennessee, to be relieved against a judgment rendered in the state court of Pennsylvania, on the suggestion that it was a trial by surprise, in the absence of the party and of his witnesses. The defendant filed a plea in bar, denying the surprise alleged in the bill, and averring that the trial was a full and a fair one, and that the judgment was rendered on all the testimony belonging to the cause. The plaintiff demurred; and, on the argument of the demurrer, the court said, "taking the matter of the plea to be true, it would bar an investigation in this court. If the complainant chooses to deny the truth of this plea, he can still reply to it, as well as to the answer; and he may then have an opportunity of showing that there was not a full and fair trial; and that therefore the judgment ought, in equity, to have no effect. But while ever I am constrained to believe that there was a full and fair trial in a court of law, it will be an objection with me, to a re-investigation in a court of equity."

This case appears to the court to decide the very principle laid down in the proceeding part of this opinion.

Admitting, then, the concurrent jurisdiction of the courts of equity and law, in matters of fraud, we think the cause must be decided by the tribunal which first obtains possession of it, and that each court must respect the judg-
537*] ment or decree of the other. A question de- cided at law, cannot *be reviewed in a court of equity, without the suggestion of some equitable circumstances, of which the party could not avail himself at law.

Decree affirmed with costs.

[Practice. Jurisdiction.]

MOLLAN et al. v. TORRANCE.

An indorsee of a promissory note, who resides in a different state, may sue, in the Circuit Court, his immediate indorser, residing in the state in which the suit is brought, although that indorser be a resident of the same state with the maker of the note.

But where the suit is brought against a remote indorser, and the plaintiff, in his declaration, traces his title through an intermediate indorser, he must show that this intermediate indorser could have sustained his action in the Circuit Court.

A plea to the jurisdiction of the Circuit Court must show that the parties were citizens of the same state at the time the action was brought, and not merely at the time of the plea pleaded. The jurisdiction depends upon the state of things at the time of the action brought; and after it is once vested, it cannot be ousted by a subsequent change of residence of either of the parties.

ERROR to the District Court of Mississippi.

This cause was argued by Mr. Jones[1] for the *plaintiffs, and by Mr. Rankin[2] for [*538 the defendant.

Mr. Chief Justice **Marshall** delivered the opinion of the court:

The declaration in this cause contains two counts. The first is against the defendant, Torrance, as indorser of a promissory note, made by Spencer & Dunn, payable to Sylvester Dunn, and indorsed by him to the defendant, Torrance, by whom it was indorsed to H. J. Lowrie, and by him to the plaintiffs. The other count is for money had and received by the defendant to the plaintiffs' use.

The declaration states the plaintiffs to be citizens of New York, and the defendant to be a citizen of Mississippi, but is silent respecting the citizenship or residence of Lowrie, the immediate indorser of Torrance, through whom the plaintiffs trace their title to the money for which the suit is instituted.

The case of Young v. Bryan (6 Wheat. Rep. 146), has decided that an indorsee who resides in a different state, may sue his immediate indorser, residing in the state in which the suit is brought, although that indorser be a resident of the same state with the maker of the note; but in this case the suit is brought against a remote indorser, and the plaintiffs, in their declaration, trace their title through an intermediate indorser, *without [*539 showing that this intermediate indorser could have sustained his action against the defendant in the courts of the United States. The case of Turner v. The Bank of North America (4 Dallas, 8), has decided that this count does not give the court jurisdiction. But the count for money had and received to the use of the

1.—He cited Young v. Bryan, 6 Wheat. Rep. 146; Dugan v. United States, 3 Wheat. Rep. 180; Chitty Bills, 149, 370.

2.—He cited Turner v. Bank of N. A., 4 Dall. 8; Montalet v. Murray, 4 Cranch, 46.

NOTE.—Diversity of citizenship as ground of jurisdiction, see notes to 1 L. ed. U. S. 640, 2 L. ed. U. S. 435; 7 L. ed. U. S. 287; 36 L. ed. U. S. 579.

plaintiffs, being free from objection, it becomes necessary to look further into the case.

The defendant has filed a plea to the jurisdiction of the court, in which he states that the promises laid down in the declaration were made to H. J. Lowrie, and not to the plaintiffs, and that the said H. J. Lowrie and the defendant are both citizens of the state of Mississippi. The plaintiffs demurred to this plea, and the defendant joined in demurrer. On argument, the demurrer was overruled, the plea sustained, and judgment rendered for the defendant.

The case is now before the court on a writ of error.

The plaintiffs contend that the plea is defective, because it avers that the said H. J. Lowrie and the defendant are both citizens of the state of Mississippi at the time of the plea pleaded, not that they were citizens of the said state at the time the action was brought.

It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events. Since, then, one of the counts shows jurisdiction, and the plea does not contain sufficient 540*] matter to deny *that jurisdiction, we think that judgment ought not to have been rendered on the demurrer in favor of the defendant. It must therefore be reversed, and the cause remanded to the court for the district of Mississippi, where the parties may amend their pleadings, which are very defective.

Judgment reversed.

Judgment.—This cause came on to be heard on the transcript of the record of the District Court of the United States for the District of Mississippi, and was argued by counsel. On consideration whereof, this court is of opinion that there is error in the judgment of the said District Court, in overruling the demurrer of the plaintiffs to the plea of the defendant, and in giving judgment for the defendant; wherefore it is considered by this court, that the said judgment be reversed and annulled, and it is hereby reversed and annulled accordingly; and the said cause is remanded to the said District Court, with liberty to the parties to amend their pleadings, and that further proceedings may be had therein, according to law.

541*] [*Local Law.]

DEN ex dem. WALKER v. TURNER.

By the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection, only when held under a grant, or under mesne conveyances which connect it with a grant.

A sheriff's deed, which is void for want of jurisdiction in the court under whose judgment the sale took place, is not such a conveyance as that a possession under it will be protected by the statute of limitations.

MR. JUSTICE WASHINGTON delivered the opinion of the court:

This was an ejectment brought in May, 1818, in the Circuit Court for the District of Tennessee, by the plaintiff in error, to recover possession of a lot of ground in the town of Nashville, distinguished in the plan of the town as lot No. 85. Upon the trial of the cause, the plaintiff gave in evidence a deed for the lot in controversy, from the commissioners of the town of Nashville to the lessor of the plaintiff, bearing date the 6th of August 1790, and then proved the defendant to be in possession of the same at the time the suit was brought.

The defendant then gave in evidence a record of the County Court of Davidson, in the state of Tennessee, by which it appears that upon the complaint of Roger B. Sappington, administrator of Mark B. Sappington, deceased, to a justice of the peace for the said county, supported by his oath, that George Walker (the lessor of *the plaintiff) was justly in- [*542 debted to him, as administrator aforesaid, as appears by the books of the said Mark, to the amount of $20.25, and that the said Walker was an inhabitant of another government, so that the ordinary process of law could not be served upon him, an attachment, bearing date the 24th of April, 1804, was awarded by the magistrate against the estate of the said Walker, which the officer was, by the said process, directed to secure, so as to be liable to further proceedings to be had before the said justice, or some other justice for the said county. The return upon the attachment was, that no personal property was to be found; and on the 26th of April, 1804, judgment was rendered by the magistrate in favor of the plaintiff for $20.25 and costs.

These proceedings being carried into the County Court of Davidson, the cause was there docketed, and the defendant having appeared by attorney, a stay of six months, under the law, was entered on the docket. At the sessions of the court, in October, 1804, the defendant entered special bail, and reprieved the property attached. The record then exhibits the following entry, viz.: "On which attachment the said administrator obtained judgment before J. A. Parker," [who issued the attachment,] "a justice of the peace, on the 26th of April, 1804; which proceedings being brought up to Davidson County Court, April sessions, 1804, and a stay of further proceedings ordered to the present sessions (October, 1804), at which sessions bail was entered, in order to *replevy the property at- [*543 tached; after which, and during the same sessions, the said Sappington moved the court for an order to sell the property attached, whereupon the court directed the clerk to issue

NOTE.—As to adverse possession, and what deeds are sufficient to establish title or color of title under which possession will be protected by the statute of limitations. See note to Ricard v. Williams, 7 Wheat. 59.

Sheriffs deed.—In an action of ejectment, brought by the purchaser under a sheriff's deed, against the defendant in the execution, the defendant cannot question the title. The sheriff stands in the situation of the attorney of the party, appointed by law to sell and convey, and his deed stands on the same footing with the deed of the party himself. Cooper's Lessee v. Galbraith, 3 Wash. C. C. 546.

Where two different and irreconcilable descrip-

orders of sale to the sheriff, to sell the property attached." The record proceeds to state, that, in pursuance of this judgment, orders of sale issued, returnable to the January sessions of 1805, but which did not appear to have been returned.

The defendant then gave in evidence a deed, dated the 22d of July, 1809, from the sheriff of Davidson county to Roger B. Sappington, for the lot in question, purchased by him at public auction, under process of the court of said county, for non-payment of the taxes due upon the said lot. The defendant also gave in evidence a deed from the said Roger B. Sappington to Lemuel P. Turner, deceased, to whom the defendant was proved to be heir and devisee. He further proved that shortly after the deed by the sheriff to Roger B. Sappington, he (the grantee) exercised acts of ownership on the lot in question, by cutting trees, quarrying stones, etc., which he continued to do until he sold the lot to Turner, but that he never resided on the lot, or had any continued possession thereof, except as above stated.

The next evidence given by the defendant, was a deed, dated the — day of January, 1806, from the sheriff of Davidson county to Roger B. Sappington, which, after reciting all the proceedings before mentioned, before the magistrate of Davidson county, and the court of that county, in the suit of Sappington v. 544*] Walker, the writ of *vend. expo. to sell the said lot, issued by the said County Court, and the purchase of the same by the said Sappington, as the highest bidder, at public auction, conveys the said lot to him.

The defendant then proved, that in the year 1811 or 1812, Lemuel P. Turner commenced building a stone fence on this lot, which he was one or two years engaged in completing; that he commenced building a house on the lot, which he incessantly persevered in till it was finished, after which he removed into it, in 1812 or 1813.

Upon the above evidence, set forth in a bill of exceptions to the opinion of the court, the charge to the jury was, that the deed from the sheriff of Davidson county to R. B. Sappington, under the judgment of Sappington's Administrator v. Walker, was sufficient, if the jury believed the facts to be as above stated, to vest the title of said Walker to said lot in Sappington, the purchaser at the execution sale; that the tribunal that adjudicated, and from whom the execution issued, had jurisdiction of the subject-matter, and that the parties, too, were in court; that the deeds aforesaid were of such a color or appearance of title as, connected with seven years' peaceable and continued possession, by the persons claiming under them, and the grant to Walker, would protect the possession under the statute of limitations. The fact as to possession was left to the jury. The judge further stated, that a party, to be protected by the statute, must have an adverse continued possession of the land in dispute, either by actually residing on it, or by *having it enclosed [*545 with a stone fence, and that a possession, by such enclosing or fence, would be sufficient, without an actual residence on the land.

This charge presents, for the consideration of the court, the following questions:

1. Whether the deed from the sheriff of Davidson county to Sappington, did vest in the latter a title to the land in question.

2. Whether, under the circumstances stated in the bill of exceptions, the possession of the defendant was protected by the statute of limitations of the state of Tennessee.

3. Whether the court below was right in the statement made to the jury, as to what constitutes a possession to be protected by the act of limitations.

1. Whether the sheriff's deed conveyed to Sappington a title to the land in controversy, depends upon the question, whether the sale was made under the judgment of a tribunal having jurisdiction of the cause in which it was rendered. The judgment was rendered by a justice of the peace, upon an attachment issued by him against a non-resident, and returnable before himself; and the order for selling the property attached, was made by the County Court. It does not, however, appear by the return made upon the attachment, that the lot in dispute, or any other property of Walker, was attached: nor does it even appear, otherwise than by a recital in the deed from the sheriff to Sappington, that any process issued from the County Court, which authorized the sheriff to sell this lot. Evidence was given by *the clerk, that an execution issued, [*546 corresponding with the order of the court, but that the execution could not be found. If the execution corresponded with the order of the court, then it authorized the sale of the property attached; and as the return of the constable does not state that any property was attached, it is difficult to perceive by what authority the lot in dispute was sold to Sappington. As to the recital in the deed from the sheriff to Sappington, that the writ of venditioni exponas, under which the sale was made, authorized the sale of this lot, it is inadmissible as evidence of that fact against

tions of property sold by the marshal, involving the purchaser in mistake, and the case is clearly made out and without contradiction, the court will set aside the conveyance. McPherson v. Foster, 4 Wash. C. C. 45.

A third person, claiming land sold by the sheriff, cannot make himself a party and call upon the court to vacate the conveyance by the officer. The sale can in no manner affect his title, and he cannot be injured by confirming it. Glassel's adm'rs v. Wilson's adm'x, 4 Wash. C. C. 59.

A sheriff's deed cannot be given in evidence, without producing the judgment and execution under which the sale was made: without them the sheriff has no authority to sell. Den v. Wright, 1 Pet. C. C. 64.

It is no objection to the validity of a judicial sale that the deed, by direction of the purchaser, was made to a third person. Voorhies v. Bk. of U. S., 10 Pet. 449.

A sale made by virtue of a void judgment, will confer no title upon the purchaser. Shelton v. Tiffin, 6 How. 163.

A sale made by a trustee under a decree of the court, will not pass the title of land in the actual adverse possession of a third person at the time of the decree. Carroll v. Dawson, 5 Cranch, C. C. 514.

Where a court of equity, having full jurisdiction as to both persons and property, decrees that a master of the court sell and convey real estate, a sale and conveyance in conformity to such decree is as effectual to convey the title as the deed of a sheriff, made pursuant to execution on a judgment at law. The defendant whose property is sold need not join in the deed. Miller v. Sherry, 2 Wall. 237.

the plaintiff, who was neither a party nor privy to the deed.

But passing by this objection to the validity of the sale, the court will inquire whether the same was sanctioned by the judgment of a tribunal having competent jurisdiction of the case in which it was rendered. It is, in the first place, by no means to be admitted, that at the time these proceedings were instituted, a justice of the peace was authorized, by the laws of Tennessee, to issue an attachment against the estate of a non-resident debtor, returnable before himself, and determinable by him. By the 19th, 20th, and 21st sections of the act of 1794, a justice of the peace is empowered to issue an attachment against the estate of a debtor who has removed, or is removing himself privately out of the county, or who so absconds and conceals himself, that the ordinary process of law cannot be served upon him; and also, against the estate of a non-resident; but in all these cases, the at- [*547 tachment is to be returned *to the court where the suit is cognizable, and is to be there adjudicated. This attachment may be levied on the lands, goods and chattels of the debtor. By the 56th section of this act, the magistrate is authorized, in cases where by the said act he has jurisdiction, to issue an attachment against the estate of an absconding or absent debtor; and the proceedings thereon, before him, are to be in a summary way, as on a warrant. The court does not understand that this section extends to persons who are citizens and residents without the limits of Tennessee. It may well be doubted, then, whether the proceedings before the justice were not, on this ground, coram non judice. But without giving a positive decision upon that point, the court is of the opinion that the justice had not jurisdiction of the subject-matter, upon which his judgment was rendered. By the 52d section of the above act, jurisdiction is given to any justice of the peace, in cases of debts and demands amounting to twenty dollars and under, where the balance is due on any specialty, note or agreement, for money or specific articles, or for goods, wares and merchandise, sold and delivered, or work and labor done; in which cases he is empowered to render judgment, and to award execution against the goods and chattels, or the body of the debtor. It is admitted by the counsel that a subsequent law raised the jurisdiction of the justice beyond the sum for which this judgment was rendered. By the act of 1786, which we understand is still in force in Tennessee, it is provided, that when [548* an *execution is in the hands of a constable, in consequence of a judgment of a justice of the peace, and there shall be no personal property whereon to levy it, in such case he shall levy it on the real estate of the defendant, and make return thereof to the next County Court, that the court may order the sheriff to sell the said real estate, or enough thereof, according to law. Whether it was under this act that the proceedings before the magistrate found their way into the County Court, it is impossible for this court to decide. It does not seem to us that the case is one which was provided for by that act, since it does not appear that any execution was issued by the magistrate, upon his own judgment; or if any did issue, that it was levied on the real estate of the debtor, and returned to the County Court. Be all this as it may, the ground of the jurisdiction of the magistrate does not appear upon the face of the proceedings before him; without which, the court must consider them as coram non judice. The cases of which he had cognizance are particularly enumerated in the 52d section, before recited; and it appears, by the record given in evidence, that the demand sworn to by Sappington was for $20.25, as appeared by the books of his intestate. But this was not the assertion of a cause of action, for "a balance due on any specialty, note or agreement, for money or specific articles, or for goods, wares and merchandise sold and delivered, or for work and labor done." It might have been for rent due, for money advanced, money received to the use of the plaintiff, and even for money claimed *by the plaintiff as due ex [*549 debito, and charged in the books of the intestate. It is obvious that the magistrate had no authority to take cognizance of these cases, and of others, which might be stated; and since his jurisdiction was strictly special and limited, it is essential to the validity of his judgment, and of the proceedings under it, that the record should show that he acted upon a case which the law submitted to his jurisdiction. The order of the County Court, for the sale of the defendant's land, having been founded upon this judgment, is exposed to the same objection which applies to the judgment itself. If the judgment was void, an execution, or order of sale, founded upon it, was equally so. This court must therefore decide, that the deed from the sheriff to Sappington, under whom the defendant claims, was utterly void, having been made without any legal authority.

2. The next question is, whether, under the circumstances stated in the bill of exceptions, the possession of the defendant was protected by the statute of limitations of the state of Tennessee. This statute, which passed in the year 1797, enacts, "that in all cases wherever any person or persons shall have had seven years' peaceable possession of any land, by virtue of a grant, or deed of conveyance, founded upon a grant, and no legal claim by suit in law be set up to said land, within the above said term, that then, and in that case, the person, etc., etc., holding possession as aforesaid, shall be entitled to hold possession, in preference to all other claimants, of such quantity of land as shall be specified in his, her, or their said grant, *or deed of con- [*550 veyance, founded on a grant as aforesaid."

In the case of Patton's Lessee v. Easton (1 Wheat. Rep. 476), a construction of the above act was given by this court, in which it was decided that a possession of seven years is a bar only when it is held under a grant, or under a deed founded on a grant; and that as the defendant, in that case, showed no title under the trustees of the town of Nashville, nor under any other grant, his seven years' possession was insufficient to protect his title, or to bar that of the plaintiff, under a conveyance from the trustees.

That was a stronger case for the defendant

than the present; for in that the defendant gave in evidence a deed, for a valuable consideration, from Josiah Love to William T. Lewis, at a time when the possession of the land in controversy was vacant. That Lewis, immediately after the conveyance, took possession of the land, made valuable improvements thereon, and continued so possessed for about seventeen years, when he sold and conveyed the same to the defendant, who took and continued the possession until the ejectment was brought. Here, then, was an entry upon land in the actual possession of no person, under a bona fide deed, and a long-continued possession under that title, which could not avail the defendant, because he could not trace a connected title up to a grant. In the present case it appears, from the defendant's own showing, that Sappington, under whom he claims, had no title. If the defendant claims under a grant, or 551*] under mesne conveyances, *which connect him with a grant, he gains a preference, by seven years' possession, over all other claimants, however superior their title may be to his, independent of such possession. But this possession is of no value to him, unless he can show such a title as is above described. The case of Harris and Holmes v. Bledsoe's Lessee, decided by the Supreme Court of Errors and Appeals of the state of Tennessee, in January, 1821, of which a manuscript report was handed to the court, seems in principle to be undistinguishable from the present, except that in that the defendant connected himself with a grant, if the state of the case, which is very imperfectly set forth, in the opinion of one of the judges, is rightly understood by this court. But the infirmity of the defendant's title lay in one of the links of the chain, which was that of a deed from executors who had no power to sell and convey by the law, nor was it given by the will of the testator. Even a deed of confirmation, which was executed with a view to cure this defect in the title, was unavailing, "because," to use the language of one of the judges, "the act to be confirmed was void." In the case before the court, the defect in the defendant's chain of title is the want of authority in the sheriff to convey to Sappington, which rendered his deed absolutely void.

The court is therefore of opinion, that the court below erred in stating to the jury that the deed to Sappington, under the judgment of Sappington's Administrator v. Walker, was sufficient to vest the title of Walker in Sap- 552*] pington; *and that the deeds referred to were of such a color or appearance of title as, connected with seven years' peaceable and continued possession, by the persons claiming under them, and the grant to Walker, would protect the possessor under the statute of limitations. It is deemed unnecessary to notice the third point, because, if the charge requires of a defendant more than the law does, to entitle him to the benefit of the seven years' possession, it is so far favorable to the plaintiff in error. It certainly does not require of him less. Neither does the court notice the sheriff's deed to Sappington for the lot in controversy, purchased by him at public auction, under process of the County Court, for non-payment of taxes, as that subject was not noticed by the judge, in his charge to the jury, and it can, therefore, present no question for the consideration of this court.

Judgment reversed, and a venire facias de novo awarded.

Judgment.—This cause came on to be heard, etc. On consideration whereof, this court is of opinion that the said Circuit Court erred in stating to the jury that the deed to R. B. Sappington, under the judgment of said M. B. Sappington's administrator against said Walker, was sufficient to vest the title of said Walker in said Sappington, and that the deeds referred to were of such a color or appearance of title as, connected with seven years' peaceable and continued possession, by the person claiming under them, and the grant *to [*553 said Walker, would protect the possession under the statute of limitations. It is therefore ordered and adjudged that the judgment of the said Circuit Court in this case be, and the same hereby is reversed and annulled.

[Practice.]

CATLETT v. BRODIE.

Under the judiciary act of 1780, ch. 20, s. 22, the security to be taken from the plaintiff in error, by the judge signing a citation on a writ of error, must be sufficient to secure the whole amount of the judgment, and is not to be confined to such damages as the appellate court may adjudge for the delay.

MR JUSTICE STORY delivered the opinion of the court:

A motion has been made to dismiss this, and several other suits, unless the plaintiff in error shall give new bonds for the prosecution of the writ, within a limited period, to be fixed by the court, upon the ground that the writs of error have been allowed by the judges of the Circuit Court for the District of Columbia, upon bonds being given in small sums to respond the damages and costs, the debts secured by the judgments being very much larger.

The judiciary act of 1789, ch. 20, s. 22, requires every judge or justice, signing a citation on *a writ of error, to take good [*554 and sufficient security that the plaintiff in error "shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good." A writ of error lodged in the clerk's office, within ten days after the rendition of judgment, operates as a supersedeas of execution; and the question arises, whether, in cases where it operates as a supersedeas, the security taken by the judge or justice ought not to be sufficient to secure the whole amount of the judgment.

It has been supposed at the argument, that the act meant only to provide for such damages and costs as the court should adjudge for the delay. But our opinion is, that this is not the true interpretation of the language. The word "damages" is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is

entitled to, if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid, after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Upon any suit brought on such bond, it follows, of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only; and for such amount only is the obligee entitled to judgment.

In the present case, and in the other cases which are in the same predicament, the court 555*] directs *that these suits stand dismissed, unless the plaintiff in error shall give good and sufficient security to an amount to secure the whole judgments, on which the writs are brought, within thirty days from the rising of this court, such security to be taken and approved by any judge or justice by whom a writ of error or citation may be allowed.

Order.—It is ordered by the court, on motion of Mr. Key, of counsel for the defendant in error, that this cause do stand dismissed, unless the plaintiff in error shall, within thirty days from the rising of this court, give a bond, with good and sufficient security, in due form of law, to prosecute his writ with effect, and to answer all damages and costs, if he fail to make his plea good; the amount of such security to be sufficient to secure the whole judgment, in case the same shall be affirmed, and be not otherwise discharged; such security to be taken and approved by any judge or justice who is authorized to allow a writ of error and citation on the said judgment.

556*] [*Extinguishment.]

BAITS v. PETERS & STEBBINS.

A covenant, under seal, to come to a settlement within a limited time, and to pay the balance which might be found due, is merely collateral, and cannot be pleaded as an extinguishment of a simple contract debt, the period within which the settlement was to be made having elapsed before the commencement of the suit, and the plea not averring that any such settlement had been made.

ERROR to the District Court of Alabama.

This was an action of assumpsit, commenced in the court below, in February, 1821, by Baits, the plaintiff in error, against Peters & Stebbins, the defendants in error, in which the plaintiff declared against the defendants, upon an agreement to account with him for goods delivered by him to the defendants, for sale on commission, and also for money had and received, and upon an in simul computassent. The defendants pleaded the following pleas: (1st) The general issue. (2d) Payment. (3d) An agreement, under seal, made at New York, on the 15th of July, 1820, and long after the said promises and undertaking, between the plaintiff and one of the defendants, by which the plaintiff covenanted not to sue the defendants within six months, and to send on an agent, within the same term of time, to settle the accounts with the defendants, at Blakely, in Alabama; and the defendants covenanted to come to a settlement *with the said [*557 agent, and to pay the balance which should be found to be due. To this last plea there was a demurrer, and, judgment being rendered thereon, by the court below; for the defendants, the cause was brought by writ of error to this court.

The cause was argued by Mr. Wheaton for the plaintiff in error, no counsel appearing for the defendants in error. He argued that the agreement thus pleaded in bar, as an extinguishment, was not a sufficient bar to the action, but was merely a collateral undertaking, which did not extinguish the original demand.[1]

Mr. Chief Justice Marshall delivered the opinion of the court:

That the third plea was bad. The agreement stated in that plea, although under seal, did not operate as an extinguishment of the simple contract debt. The agreement was but a collateral undertaking, to come to a settlement within a limited period, which had elapsed before the commencement of the suit, and to pay the balance found due upon such settlement. There was no averment in the plea that any such settlement had been had, under that agreement, and, consequently, the covenant to pay the balance did not appear to have attached upon the demand.

1.—The Bank of Columbia v. Patterson, 7 Cranch, 299, 303; Day v. Leal, 14 Johns. Rep. 404.

Note.—Extinguishment.—If a settlement of an account is the consideration of a release, and the settlement is successfully impeached, the release has no operation in equity. Kelsey v. Hobby, 16 Pet. 269.

Acquittances given by some of the cestuis que trust, without full knowledge of the fraud which has been practiced, do not bar them. Michould v. Girod, 4 How. 503.

The official bond given by a receiver of public moneys does not extinguish the simple contract debt arising from a balance of account due from him to the United States; if such bond is not given for the balance due, it is a collateral security for the faithful performance of the official duties of the officer; and an action may be brought for the recovery of the balance on the account, and an action of debt on the official bond to recover the penalty from the securities. Walton v. U. S., post. 651.

A bond given to secure the duties payable on the importation of goods, is not an extinguishment of the debt, but merely security for the payment. U. S. v. Lyman, 1 Mas. 482.

In general, a higher security, taken from the debtor himself, extinguishes the original contract; this proceeds upon a presumption of law, that it is taken in satisfaction of the original debt, for if it appear otherwise on the face of the security, it will not operate as an extinguishment. It is a mere question of intention. Ibid.

A higher security taken from a third person will not be presumed to be taken in satisfaction, unless it is averred and proved to be the agreement of the parties so to consider it. Ibid.

An executory agreement, without consideration, to receive a less sum from the debtor, in lieu of a larger debt, does not extinguish, nor is it a satisfaction of the original debt. Latapee v. Pecholier, 2 Wash. C. C. 180.

B. & J., partners in trade, having imported goods. B. executed a bond for the duties in his separate name, and the firm then became insolvent. Held,

558*] [*Local Law.]

SEBREE et al., Plaintiffs in Error,
v.
DORR, Defendant in Error.

In a declaration upon a promissory note, the omission of the place where it is payable is fatal.

Secondary evidence of the contents of written instruments is not admissible, when the originals are within the control or custody of the party.

This rule of evidence is not dispensed with by the local statutes of Kentucky, which provide that no person shall be permitted to deny his signature, as maker or assignor of a note, in a suit against him, unless he will make an affidavit denying the execution or assignment. These statutes do not dispense with proof of the existence of the instrument, or of the right of the party to hold it by assignment.

THIS cause was argued by Mr. Bibb[1] for the plaintiffs in error, and by Mr. Wickliffe[2] for the defendant in error.

Mr. Justice Story delivered the opinion of the court:

This is a writ of error to the Circuit Court of Kentucky. The action was brought by Dorr, 559*] as *assignee, against Sebree and Johnson, as assignors, upon two notes, under seal, made to them by the Lexington Manufacturing Company. The declaration, instead of distinct counts upon each note, combines, in an inartificial manner, both notes in a single count. It states, that "the Lexington Manufacturing Company, by their corporate seal, and signed by John T. Mason, Jun., their president, did, on the 12th day of March, 1818, at, etc., execute and cause to be made, their note or writing obligatory, by which they did oblige themselves to pay to John T. Mason and James Johnson, twelve months after the date of the said writing, $10,065.88; and on the same day, and at the same place, did execute their other writing obligatory, in like manner, by which they bound and obliged themselves to pay to the said James Johnson and John T. Mason the further sum of $311.31;" omitting to state when the last note was payable. It then proceeds to allege the indorsements of the notes to the plaintiff, the presentment of the same to the Lexington Manufacturing Company for payment, the refusal, and protest for non-payment, and the commencement and prosecution of suits to final judgment and execution, against the company, for the amount of the notes, in the General Court of Kentucky; the return upon the execution, that no property could be found, and due notice to the defendants. It further avers, that the General Court had jurisdiction of the suits, and that, in consideration of the premises, the defendants became indebted and promised to pay the amount to the *plaintiff. There were also [*560 counts for goods sold, and for money had and received. The cause came on for trial upon the general issue; and the only evidence produced by the plaintiff to support his action, was the records of the foregoing suits, which also contained copies of the original notes, and of the protests by the notary. The defendants then prayed the court to instruct the jury, (1) that the plaintiff had not made out a good cause of action; (2) that the records and proceedings aforesaid were not evidence against the defendants, because it did not appear that the General Court had cognizance of the subject-matter; (3) that the records were not sufficient evidence of diligence on the part of the plaintiff, nor of the insolvency of the makers, nor of the assignment by the defendants. The court overruled the motion, and instructed the jury that the records entitled the plaintiff to a verdict against the defendants; and to these proceedings on the part of the court the defendants filed their bill of exceptions, and have thus brought the same points for consideration before this court.

By the local law of Kentucky, instruments of this nature are assignable; and if due and reasonable diligence is used by the assignee, to procure payment from the maker, by the speedy commencement and prosecution of a suit against him, and satisfaction cannot be obtained upon the judgment and execution in such suit, the assignor is responsible for the amount. But without such suit, no action lies against the assignor. It is also provided by the statutes of Kentucky, and the substance *of [*561 these statutes has been incorporated into the rules of the Circuit Court, that no person shall be permitted to deny his signature, as maker or as assignor, in a suit against him, founded on instruments of this nature, unless he will make an affidavit denying the execution or assignment.

These explanations are necessary, to enable us more accurately to understand the nature and bearing of the objections relied on at the bar, to reverse the present judgment.

The first objection that occurs, upon the examination of this cause, is, that the note for $311.31 is not stated in the declaration to be payable at any particular time; and if this be

1.—He cited Hardin, Rep. 223; 3 Marsh. Ken. Rep. 163; 1 Marsh. 228; 2 Marsh. 256, 522, 610, 614; 1 Cranch, 209; Print. Dec. 152; 1 Bibb. 239, 542, 596; 2 Bibb. 34; 3 Bibb. 6, 227; 4 Bibb. 286, 527, 290, 424, 556; 7 Johns. Rep. 174; 4 Johns. Rep. 1; 3 Caines, 112; 2 Mass. Rep. 433; 5 Cranch, 322; 1 Saund. 32.

2.—Who cited 1 Marsh. Ken. Rep. 535, 541; 2 Marsh. 256; 5 Cranch, 135; 2 Bibb. 35; 1 Phillips on Evid. 286.

NOTE.—As to the admission of secondary evidence, see note to 5 L. ed. U. S. 414.

that although both were originally bound for the duties, yet the bond given by one extinguished this obligation, and made it his separate debt. U. S. v. Astley, 3 Wash. C. C. 508.

Where two or more persons are liable for a simple contract debt, a judgment obtained against one is an extinguishment of the claim upon the others, in the same manner as a bond, given by one of two persons liable on a single contract, is an extinguishment of the original debt. Willings v. Consequa, 1 Pet. C. C. 301.

A release to one of two joint obligors extinguishes the obligation, and equity will not relieve in such a case, although it is obvious that such extinguishment was not intended by the parties. Ibid.

The separate bond of one of several joint importers, for the amount of duties upon merchandise received, does not operate as an extinguishment of the liability of the other importers, whether partners or joint owners. (This is contra to U. S. v. Astley cited above.) Meredith v. U. S., 13 Pet. 486.

The giving of a second bond, with additional surety, if not an extinguishment of the prior one, is collateral to it; so that judgment on the second bond, without satisfaction, does not preclude suit on the prior bond. U. S. v. Hoyt, 1 Blatchf. 326.

not a substantial infirmity in the count, the conclusion of law is that the note was due presently, or on demand. Now, the record of the suit, which is offered to show due diligence in endeavoring to recover this note from the maker, is not founded on a note payable on demand, but on a note payable twelve months after the date; so that there is a material variance between the note declared on in this suit, and the note which was declared on in the record offered in evidence. If we admit the copy of the note in the same record to be evidence, a further difficulty is presented; for on its face, the note purports that, "twelve months after date, the president, directors and company of the Lexington Manufacturing Company promise to pay to James Johnson and John T. Mason, Jun., or their order, $311.31, negotiable and payable at the office of discount and deposit of 562*] the Bank of the United States, *at Lexington, without defalcation, for value received." The variance of this note from that described in the present declaration, is very striking. It is payable to the defendants, or order, in twelve months after date, and at the bank of discount and deposit of the United States, in Lexington. These are all material parts of the note, and they are all omitted in the declaration. The variance, then, in this view also would be fatal. And it may be added, that in the suit in the General Court, the declaration also omits to state that the note was payable to order, and at the Bank of the United States; so that, in fact, the note is materially different from the declaration, in both suits. In regard, too, to that part of the present declaration, which describes the note for $10,065.88, there is a total omission to state that it was "negotiable and payable at the office of discount and deposit of the Bank of the United States, without defalcation, for value received," as in the copy produced in the record it purports to be; and the same omission occurs in the declaration in the suit in the General Court. Nothing is better established, both upon principle and authority, than that if the place where a note is payable is omitted in the declaration, it is fatal; for the evidence produced does not support the declaration. There is a variance in the essence of the instrument, as declared on, and as proved. Upon these grounds, then, it is manifest that the record produced in evidence did not support the plaintiff's action.

There is another objection, which is equally decisive of the case. It is, that there was no 563*] production *of the original notes, nor any excuse offered to account for the non-production of them, at the trial. It is a general rule of the law of evidence, that secondary evidence of the contents of written instruments is not admissible, when the originals are within the control or custody of the party. Here no proof was offered to show that the original notes were impounded, or that they were not within the possession of the party, or within the reach of the process of the court. Without such proof, the principles of the common law repudiate the introduction of copies; and copies were all that the record, in the most favorable view for the plaintiff, presented to the court. But it is said that the statutes of Kentucky, already referred to, dispense with the proof of the execution of instruments of this nature by the maker, and also of assignments by the assignor, unless the party will, on oath, deny the signature and the assignment; and that the only object of producing the originals, is to establish these facts. The argument, therefore, is, that these statutable provisions amount to a dispensation with the general rules of evidence as to the production of the original notes. But to us it appears that the statutes of Kentucky ought to have no such interpretation. The object of the legislature manifestly was, to dispense with the formal proof of instruments, where the party would not deny on oath the fact of their execution. It was thought inconvenient to suffer parties to take advantage of unexpected objections, and multiply delays by general denials, which might often spring up by surprise *at the trial, and thus load [*564 the cause with heavy and unnecessary expenses. But it would be most dangerous to allow that, because the proof of the execution of an instrument was dispensed with, therefore, no proof of its existence, or of the right of the party to hold it by assignment, was to be required. The production of the originals might still be justly required, to ascertain its conformity with the declaration, to ascertain whether it remained in its genuine state, to verify the title by assignment in the plaintiff, to trace any payments which might have been made and indorsed, and to secure the party from a recovery by a bona fide holder under a subsequent assignment. These are important objects, and which no wise legislature would lose sight of; and it is too much to expect any court of justice to infer, upon so slight a foundation, the abolition of those salutary rules of evidence which constitute the great security of the property and rights of the citizens.

We are therefore of opinion that the records, however admissible for the purpose of showing due and reasonable diligence by suit, were not legal evidence of the assignment of the notes, so as to dispense with the production of the originals.

It is unnecessary to go into the question as to the jurisdiction of the General Court over the suit against the Lexington Manufacturing Company, and what would be the legal effects growing out of the defect of such jurisdiction. These, as well as some other minor points, may be passed over, *since the [*565 cause may be disposed of without entering upon the discussion of them.

It is the opinion of the court, that the Circuit Court erred in instructing the jury that the records aforesaid entitled the plaintiff to a verdict; and the judgment must therefore be reversed, and a venire facias de novo be awarded.

Judgment accordingly.

[Lex Loci.]

KERR, Appellant,

v.

THE DEVISEES of A. MOON, Respondents.

The disposition of real property, by deed or will, is subject to the laws of the country where it is situated.

NOTE.—Title and transfer of real property by will and devise governed by laws of state or country where situated, see notes to 5 L. ed. U. S. 335; post, 290, 367, 583; 2 L.R.A.(N.S.) 415.

Where the devisor was entitled to warrants for land in the Virginia military district in the state of Ohio, under the laws and ordinances of Virginia, on account of his military services, and made a will in Kentucky, devising the lands, which was duly proved and registered according to the laws of that state. Held, that although the title to the land was merely equitable, and that not to any specific tract of land, it could not pass, unless by a will proved and registered according to the laws of Ohio.

Even admitting it to have been personal property, a person claiming under a will proved in one state, cannot intermeddle with, or sue for, the effects of a testator in another state, unless the will be proved in the latter state, or it is permitted by some law of that state.

Letters testamentary give to an executor no authority to sue for the personal estate of his testator, out of the jurisdiction of the state by which they were granted.

Under the statute of Ohio, which permits wills 566*] made in other states *concerning property in that state, to be proved and recorded in the court of the county where the property lies, it must appear that the requisitions of the statute have been pursued, in order to give the will the same validity and effect as if made within the state.

APPEAL from the Circuit Court of Ohio.

This cause was argued by Mr. Scott for the appellant, and by Mr. Brush for the respondents.

Mr. Justice Washington delivered the opinion of the court:

The respondents filed their bill in the Circuit Court for the District of Ohio, in which it is stated, that Archelaus Moon was, in his lifetime, entitled to warrants for 4,000 acres of land in the Virginia military district, between the Scioto and Little Miami rivers, in the state of Ohio, under the ordinances and laws of Virginia, on account of his services as a captain in the Virginia line on continental establishment, during the war of the revolution. That, being so entitled, he, on the 8th of May, 1796, in the county of Fayette, in Kentucky, where he resided, duly made and published his last will and testament, which, after his decease, in the same year, was proved and admitted to record in the court of that county; an authenticated copy whereof, with the probate annexed, is made an exhibit, and referred to as part of the bill. That by this will, the testator devised the aforesaid land to the complainants, his widow and children. The bill then sets forth, that on the 2d of January, 1809, four war- 567*] rants, for 1,000 acres *each, were granted to Robert Price, assignee of Josiah P. Moon, and George C. Friend and Martha, his wife, formerly Martha Moon, who are described in the assignment as the only children and representatives of Archibald Moon, deceased; which warrants were, some time in the same or the succeeding year, assigned by Price to the defendant, Kerr, who, in March, 1810, made fifteen entries or locations thereon, amounting in the whole to 3,723 acres, leaving 277 acres unlocated. That, some time in the winter of 1811, the complainants gave notice to Kerr of their claim to the said warrants and land, and of their intention to prosecute the same, personally, in writing, and by a publication in a newspaper printed in Chilicothe. That Archelaus and Archibald Moon were the same name and person, and that Josiah P. Moon and Martha Friend were his children by his first wife, and were disinherited by the aforesaid will. That the defendant had notice that the assignment to Price was fraudulent. The bill prays a discovery of the matters so alleged, and a decree that the defendant, Kerr, assign the evidences of title to the said lands to the complainants, and for general relief.

The answer admits that the defendant purchased from Robert Price, in September, 1809, four several land warrants, for 1,000 acres each, for which he paid and secured to be paid to said Price the sum of $2,663. That the warrants issued for the military services of Archibald Moon, and that they were assigned to the defendant at the time of his purchase. That in March, 1810, and at different times thereafter, the defendant *made various entries of [*568 land on the said warrants, in the Virginia military district, believing his title to said warrants to be unquestionable; and that the lands so located are owned either by the said defendant, or by those to whom he had sold them. The defendant denies the notice charged in the bill, except that, in the winter of 1811, he saw the publication in which the claim of the complainants was asserted, before which time he had sold a great part of the lands to different persons for a valuable consideration, the principal part of which he had received, and that some of the purchasers have made valuable improvements on the lands. He denies all knowledge of the will, or that the complainants are the heirs or devisees of said Moon.

To this answer a general replication was put in, and a number of depositions were taken and appear in the record. The material facts which they establish are, the execution of Moon's will; the proof of it, and its admission to record in the County Court of Fayette, in Kentucky; the destruction by fire of the clerk's office of that county in 1802 or 1803, with most of its records; and that an attested copy of the above will was procured and admitted to record in the said County Court, in conformity with a special act of the state of Kentucky, for supplying the evidence of deeds, wills, and other records of the said office, which had been consumed. That the testator was sometimes called Archelaus, and at other times Archibald; and that he had four children by his first wife, of whom Josiah P. and Martha were *two, and six children by his last wife, [*569 who, with his widow, are the plaintiffs in this suit.

After a reference to the master, and the coming in of his report, a final decree was made thereon, that the defendant, Kerr, assign to the complainants all the warrants, entries, and surveys procured under the warrants granted to Price, and by him assigned to the defendant; that Kerr was to be paid by the complainants, for his trouble and expense in locating and surveying the said lands, at the rate of £12 10. per 1,000 acres; and also, the sum of $487.48, which he had paid for taxes on the said lands, with interest thereon. From this decree an appeal was taken to this court.

The objection principally relied upon by the appellant's counsel is, that no estate in the lands in controversy passed by the will of Archelaus Moon to the respondents, because the same was not proved and recorded in any court of the state of Ohio, where the lands lie,

in conformity with the existing laws of that state. By an ordinance of Congress, for the government of the territory north-west of the river Ohio, passed on the 13th of July, 1787, it is declared, that, until the Governor and judges should adopt laws as prescribed by that ordinance, estates in the territory might be devised or bequeathed by wills in writing, signed and sealed by the testator (being of full age) and attested by three witnesses; provided such wills should be duly proved and recorded with-570*] in one *year after proper magistrates, courts, and registers should be appointed for that purpose.

It is an unquestionable principle of general law, that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated. This was decided in the case of The United States v. Crosby, 7 Cranch, 115. The application of this principle to the present case, is controverted by the counsel for the respondents, upon the following grounds:

1. That the interest of the testator in these lands ought to be considered and treated as personal estate, and, therefore, it might well pass by a will, proved and admitted to record in the state where the testator died.

2. That by an act of the legislature of Ohio, passed on the 25th of January, 1816, authenticated copies of wills, proved according to the laws of any state or territory of the United States, relating to any estate within that state, are allowed to be proved in the court of the county where such estate shall be; and when so proved and admitted to record, they are declared to be good and valid in law, as wills made in the state.

3. That as no objection was made in the Circuit Court to the admission of the authenticated copy of this will, it ought not to avail the appellant in this court.

1. It can by no means be admitted that this is to be considered in the light of personal property, notwithstanding the title of Moon rested merely upon a legislative reservation in 571*] his favor by *the state of Virginia, which was to be afterwards perfected by the grant of a warrant, and by a location, survey and patent. Although his title to any particular tract of land was, in the first instance, altogether uncertain, and, even after location, was purely equitable, still the subject-matter of the devise was land, the title to which could not be acquired or lost, except in the way prescribed by the laws of Ohio. But could it even be conceded that this was personal property, it would still be property within the state of Ohio; and we hold it to be perfectly clear, that a person claiming under a will proved in one state, cannot intermeddle with, or sue for, the effects of a testator in another state, unless the will be proved in that other state, or unless he be permitted to do so by some law of that state. In the case of Doe v. M'Farland, 9 Cranch, 151, it was decided, that letters testamentary gave to the executors no authority to sue for the personal estate of the testator, out of the jurisdiction of the power by which the letters were granted.

2. The next reason assigned why the general principle above laid down does not apply to this case, is deemed by the court altogether insufficient; because, whatever benefit the devisees might have derived under the act of the 25th of January, 1816, had they pursued the requisitions it prescribes, as to which we give no opinion, it is a sufficient answer to the argument drawn from that act, to observe that its requisitions were not pursued. It permits authenticated copies of wills, proved according to the laws of any state of this *Union, [*572 relating to any estate within that state, to be offered for probate in the court of the county where the estate lies, and authorizes the same to be there recorded; and it then proceeds to declare the effect of such recording to be, to render the will good and valid, as if it had been made in the state, subject, nevertheless, to be contested as the original might have been. But it does not appear that the copy of this will was offered for probate and admitted to record. Had it been so offered, it might have been contested, and for anything that we can say, the sentence of the Court of Probate might have been not to admit it to record.

3. The last point remains to be considered. That the objection to the validity of this will to pass the lands in controversy to the respondents, was not made in the court below, is highly probable, as we observe that it is not noticed, much less relied upon, in the answer. Nevertheless, the will, duly proved and recorded, according to the laws of Ohio, constituted the sole title under which the plaintiffs in the court below claimed the lands in dispute. It was as essential, therefore, to the establishment of that title, to allege in the bill, and to prove by the evidence, or by the admission of the defendant, that this will had been proved and recorded, according to the laws of Ohio, as to set forth and prove the existence of the will itself. The defect in the title of the respondents appears upon the face of the bill, and as it contains no allegation that a copy of the will had been duly proved and recorded, the defendant *cannot be said to have admitted [*573 those facts by not denying them in his answer.

The court erred, therefore, in decreeing an assignment of all the warrants, entries, and surveys under the warrants, to the complainants.

Considering, as we must, in the present state of the cause, that A. Moon died intestate as to these lands, they of course descend to those persons who are entitled to the same according to the laws of Ohio; and this is a subject fit to be decided by the court below, to which the cause must be remanded for further proceedings.

Decree reversed, and the cause remanded for further proceedings.

[Local Law.]

MEREDITH et al., Appellants,

v.

PICKET et al., Respondents.

Under the following entry, "H. R. enters 2,000 acres in Kentucky, by virtue of a warrant for mill-

tary services performed by him in the last war, in the fork of the first fork of Licking, running up each fork for quantity;" it appeared in evidence that at the first fork of Licking, the one fork was known and generally distinguished by the name of the South Fork, and the other by the name of the main Licking, or the Blue Lick Fork, and that some miles above this place the South Fork again forked. Held, that the entry could not be satisfied with lands lying in this first fork.

574*] *In such a case, the entry could not be explained, and the survey supported, by oral testimony. The notoriety and names of places may be shown by such testimony, but the words of an entry are to be construed by the court as any other written instrument.

THIS cause was argued by Mr. Bibb for the appellants, and by Mr. Talbot for the respondents.

Mr. Chief Justice Marshall delivered the opinion of the court:

This case depends entirely on the question, whether the entry under which the appellees claim has been surveyed on the land for which it calls.

The entry is in these words: "Holt Richeson enters 2,000 acres in Kentucky, by virtue of a warrant for military services performed by him in the last war, in the fork of the first fork of Licking, running up each fork for quantity."

It is shown in testimony, that at the first fork of Licking, the one fork was known and generally distinguished by the name of the South Fork, and the other by the name of the main Licking, or the Blue Lick Fork. Some miles above this place the South Fork again forks. The land of the appellees has been surveyed in the first fork.

It is contended by the appellants, that the entry calls for land in the second fork, and that the survey is made on lands which will not satisfy its words.

The court concurs in this opinion. The first fork of the first fork cannot be the first fork itself. Whatever difficulties may attend the attempt to place the lands properly the court

575*] feels none in *saying that the entry cannot be satisfied with lands lying in the first fork.

Some other objections were made in argument, which it is unnecessary to notice, as this is completely decisive of the case.

It may not, however, be improper to say, that the attempt of the appellees to explain their entry, and to support their survey, by depositions, cannot avail them. It is the proper province of testimony to show the notoriety and names of places, but not to explain a written instrument. That is the proper province of the court. The judges must construe the words of an entry, or of any other title paper, according to their own opinion of the words as they are found in the instrument itself, and not according to the opinion of witnesses, who may or may not be selected for the purpose.

The decree of the Circuit Court, perpetuating the injunction awarded to the appellees to restrain the appellants from proceeding on their judgment in ejectment, is erroneous, and ought to be reversed, and the bill of the plaintiffs in the Circuit Court dismissed.

[*Practice.] [*576

WALDEN, ex dem. DENN v. CRAIG.

In ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted, in the discretion of the court.

But a writ of error will not lie in a case where the court below has denied a motion for this purpose.

ERROR to the Circuit Court of Kentucky.

In 1797, John Denn, lessee of Ambrose Walden, instituted an action of ejectment in the United States District Court of the district of Kentucky, against Richard Fen, as casual ejector. The declaration states a demise for the term of ten years from the 15th day of August, 1789. At March term, 1798, Lewis Craig and Jonathan Rose were admitted defendants, in place of Richard Fen, the casual ejector; and entered into the usual rule, confessing the lease, entry, etc. At June term, 1800, judgment was rendered for the plaintiff for his term yet to come, etc., and a writ of hab. fac. poss. was awarded. On the 5th day of September, 1800, Thomas Bodley and others, claiming as landlords of Craig and Rose, obtained an injunction to the above judgment. At May term, 1809, the bill of injunction was dismissed, for want of jurisdiction. In September, 1811, Bodley and others obtained a second injunction to stay execution on the judgment at law in ejectment. At May term, 1812, the injunction was *dissolved on [*577 hearing, on bill, answers, depositions and exhibits; and in April, 1813, the complainants dismissed their bill. Walden, on the 22d of May, 1819, took out a writ of hab. fac. poss. which was quashed by the court, on the ground, it is presumed, that the term stated in the declaration in ejectment had expired. At November term, 1821, Walden moved the court to enlarge the term stated in the declaration. The court being divided, the motion was entered as overruled; and the plaintiff (Walden) took out a writ of error to the judgment of the court on this motion.

This cause was argued by Mr. Taylor[1] for the plaintiff, no counsel appearing for the defendant.

Mr. Chief Justice Marshall delivered the opinion of the court:

Upon this case two questions arise:

1. Ought the Circuit Court to have granted leave to the plaintiff to extend the term laid in his declaration?

2. Does a writ of error lie to the refusal to grant this amendment?

It has been truly said in argument, by the counsel for the plaintiff in error, that the power of amendment is extended at least as far in the 32d *section of the judiciary [*578 act, as in any of the British statutes; and that there is no species of action to which the discretion of the court in this respect ought to be more liberally applied than to the action of

1.—He cited Cro. Jac. 440; 1 Salk. 47; 2 Str. 807; 2 Burr. 1,159; 4 Burr. 2447; Str. 1272; Cowp. 841; 7 Cranch, 569; 1 Cranch, 110; 4 Cranch, 237; 4 Cranch, 324; 5 Cranch, 11; 5 Cranch, 15; 6 Cranch, 206; 7 Cranch, 569.

ejectment. The proceedings are all fictitious, fabricated for the mere purposes of justice, and there is every reason for allowing amendments in matters of mere form. There is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practiced by the opposite party. The cases cited by the plaintiff's counsel in argument are, we think, full authority for the amendment which was asked in the Circuit Court, and we think the motion ought to have prevailed. But the course of this court has not been in favor of the idea that a writ of error will lie to the opinion of a circuit court, granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. For this reason, the writ of error must be dismissed.

579*] [*Practice.]

THE UNITED STATES v. JOSEF PEREZ.

The discharge of the jury from giving a verdict in a capital case, without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offense.

The court is invested with the discretionary authority of discharging the jury from giving any verdict, in cases of this nature, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated.

MR. JUSTICE STORY delivered the opinion of the court:

This cause comes up from the Circuit Court for the southern District of New York, upon a certificate of division in the opinions of the judges of that court. The prisoner, Josef Perez, was put upon trial for a capital offense, and the jury, being unable to agree, were discharged by the court from giving any verdict upon the indictment, without the consent of the prisoner, or of the attorney for the United States. The prisoner's counsel, thereupon, claimed his discharge as of right, under these circumstances; and this forms the point upon which the judges were divided. The question, therefore, arises, whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offense. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment *until such trial can be [*580 had. We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further

NOTE.—Discharge of jury before verdict. Former adjudication in criminal cases.

A former conviction cannot be pleaded in bar, unless it has been followed by judgment. States v. Herbert, 5 Cranch, C. C. 87.

A discharge of the jury in a capital case, on the ground of insanity in one of the jurors, without the consent of the prisoner or his counsel, is not a good plea in bar to the further trial of the prisoner, as such discharge is within the discretion of the court. U. S. v. Haskell, 4 Wash. C. C. 402.

It is not a good plea in bar to an indictment for a misdemeanor, that the case was once committed to a jury, and withdrawn before the verdict, by order of the court. U. S. v. Morris, 1 Curt. C. C. 23.

A person convicted of an assault and battery committed in a riot, may still be tried and convicted of the riot. U. S. v. Peaco, 4 Cranch, C. C. 601.

A conviction and sentence of one, not a member of Congress, by the House of Representatives, for a breach of privilege, by assault and battery on one of its members for words spoken in debate, are not a bar to a criminal prosecution by indictment for the same assault and battery. U. S. v. Houston, 4 Cranch, C. C. 261.

An acquittal upon an indictment for forging an order with intent to defraud John Lang, is no bar to an indictment for forging the same order with intent to defraud William Lang. U. S. v. Book, 2 Cranch, C. C. 294.

Conviction for keeping a disorderly house is a bar to a prosecution for the same offense at any time prior to the finding of the indictment. U. S. v. Burch, 1 Cranch, C. C. 36; Dixon v. Corp. of Wash., 1 Cranch, C. C. 114.

A conviction for keeping a faro bank, contrary to a municipal by-law, is no bar to an indictment for keeping a disorderly house, on same evidence. U. S. v. Hood, 2 Cranch, C. C. 133.

Conviction for larceny of a pocket-book is a bar to a subsequent indictment for stealing a note in the pocket-book at the time. U. S. v. Lee, 4 Cranch, C. C. 446.

Conviction for robbing the mail and putting driver's life in danger is a bar to a subsequent prosecution for same offense or any part of it. U. S. v. Wilson, 7 Pet. 150.

Withdrawal of a juror is matter in the discretion of the court. The fact that the court has excluded evidence offered by defendant under a notice of special matter which is defective, is not a surprise which will warrant a withdrawal. Foote v. Silsby, 1 Blatchf. 445; Affirmed, 14 How. 281.

Discharge of a sick juror after counsel had commenced to open the case, but before any evidence offered, and swearing another juror in his place, no objection being made, is no error, Silsby v. Foote, 14 How. 218; Young v. Marine Ins. Co., 1 Cranch, C. C. 556.

The court has power to discharge the jury impaneled to try the issue in a criminal cause, whenever it is necessary for the purposes of justice, and there is no exception of capital cases. U. S. v. Coolidge, 2 Gallis, 364.

proceedings, and gives no right of exemption to the prisoner from being again put upon trial. A certificate is to be directed to the Circuit Court, in conformity to this opinion.

581*] *Certificate.—This cause came on, etc. On consideration whereof, it is ordered by the court, that it be certified to the Circuit Court of the district of New York, that, under the circumstances stated in the record, the prisoner, Josef Perez, is not entitled to be discharged from custody, and may again be put to trial, upon the indictment found against him, and pending in the said court.

[Promissory Note. Evidence. Pleading. Local Law.]

RENNER, Plaintiff in Error,
v.
THE PRESIDENT, DIRECTORS, and COMPANY of THE BANK OF COLUMBIA, Defendants in Error.

By the custom of the banks in the District of Columbia, payment of a promissory note is to be demanded on the fourth day after the time limited for the payment thereof, in order to charge the indorser, contrary to the general law merchant, which requires a demand on the third day.

Evidence of such a local custom is admissible, in order to ascertain the understanding of the parties, with respect to their contracts made with reference to it.

Cases in which evidence of commercial usage is admissible, in order to ascertain the meaning of contracts.

The declaration against the indorser, in such a case, must lay the demand on the fourth, and not on the third day.

Quære, Whether a declaration, in such a case, not averring the local usage, would be good upon demurrer.

Secondary evidence of the contents of written instruments is admissible, wherever it appears that the original is destroyed, or lost, by accident, without any fault of the party.

582*] *In the case of a lost note, it is not necessary that its contents should be proved by a notarial copy. All that is required is, that it should be the best evidence the party has it in his power to produce.

To admit secondary evidence of a lost note, it is not necessary that there should be a special count in the declaration upon a lost note.

THIS cause was argued by Mr. Webster and Mr. Jones[1] for the plaintiff in error, and by Mr. Key[2] for the defendants in error.

Mr. Justice Thompson delivered the opinion of the court:

This case comes up on a writ of error to the Circuit Court of the District of Columbia; and by the record it appears that the action in the court below was prosecuted against Renner, the plaintiff in error as indorser of a promissory note, drawn by James Foyles, and discounted at the Bank of Columbia. The note bears date on the 9th day of January, 1817, for $4,600, *and is payable sixty days aft- [*583 er date. In the declaration it is averred, that demand of payment of the maker was made on the 14th of March, which was on the fourth day after the expiration of the sixty days which the note had to run.

Several questions, arising out of the record, have been presented for the consideration of the court. The principal one, however, is that which relates to the time of demand of payment of the maker of the note, and grows out of a bill of exceptions taken upon the trial. This has been pressed upon the court as a question of great importance, and the decision of which, in its application to the concerns of the bank, will have a very wide and extensive effect.

We shall proceed to the consideration of this point, in the first place, leaving the others, which are of minor importance, to be noticed hereafter.

The testimony given at the trial was for the purpose of showing that the Bank of Columbia had, from its first establishment, in 1793, adopted the practice of demanding the payment of notes discounted by it, on the fourth day after the time limited for the payment thereof, according to the express terms of the note. And that such was the universal custom of all the banks in Washington and Georgetown. That this custom was well known and understood by the defendant, when he indorsed the note in question. After this testimony had been received, without objection, the counsel for the defendant below called upon the court to instruct the jury, that upon the evidence so given by the plaintiffs, of a demand upon the *maker of the note, on the fourth day [*584 after the time limited by the note for the payment, the defendant was not liable on his indorsement; which instruction the court refused to give, and a bill of exceptions was thereupon taken.

This court must therefore assume as established facts (and, looking at the evidence before the jury, no doubt could be entertained on the subject), that the custom of the Bank of Columbia, and all the other banks in Washington and Georgetown, from their first institution, had been to demand payment of notes due them, on the fourth day after the time limited therein; and that this custom was known and well understood by the defendant, Renner, when he indorsed the note in question; and it may be added, with full knowledge

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1.—They cited Rushton v. Aspinwall, Doug. 679; Chitty on Bills, 62, 465; Bayley on Bills, 185, 186; 7 East's Rep. 231; Lyndo v. Burgos, per Sir W. Grant, 1 Wheat. Selw. N. P. 280; Heylin v. Adamson, 2 Burr. 678; Thompson v. Ketchum, 8 Johns. Rep. 189; Hoare v. Graham, 3 Cowp. 57; 1 Phillips on Evid. 432, 433, 496, 498; Lewis v. Thatcher, 15 Mass. Rep. 431; Edie v. E. I. Company, 2 Burr. 1216; Davis v. Todd, 4 Taunt. 672.

2.—He cited 4 T. R. 153, 173; 2 Caines' Err. 196; 2 Caines' Rep. 443; 1 Caines' Rep. 43; 18 Johns. Rep. 230; 12 Johns. Rep. 423; 13 Johns. Rep. 470; 1 Phillips on Evid. 490, 492; 1 Harris & Johns, 423; 4 Mass. Rep. 251; 6 Mass. Rep. 449, 477; 9 Mass. Rep. 155, 159; 10 Mass. Rep. 26, 366; 12 Mass. Rep. 89; 3 Dall. Rep. 365, 415; 5 Cranch, 49; 9 Cranch, 1.

NOTE.—As to time of demand of payment of promissory notes and bills, in order to charge indorser, see notes to 1 L. ed. U. S. 640; 2 L. ed. U. S. 102; 5 L. ed. U. S. 215.

As to loss of instrument and secondary proof of its contents, see note to 5 L. ed. U. S. 414.

Necessity of knowledge of banking custom, see note to 21 L.R.A. 445.

and expectation that this note was to be dealt with in the same way; for it was a renewal of a discount, continued for a considerable time before, on other notes similarly drawn and indorsed, some of which had been demanded in like manner, and protested, and afterwards paid and taken up by himself. Under such circumstances, it would seem that nothing short of some positive and unbending principle of law could shield the defendant from responsibility. But, so far from trenching upon any such principle, we think his liability completely established, by well-settled rules of law.

It seems to be assumed as the settled law of promissory notes, that in order to charge an indorser, demand of the maker must be made on the third day after that limited in the note; 585*] and that *this is so stubborn a rule that parties are not permitted to violate it, even by their mutual agreement.

We admit, in the most unqualified manner, that the usage of making the demand on the third day of grace has become so general, that courts of justice will notice it ex officio; and in the absence of any proof to the contrary, will presume that such was the understanding of all parties to a note, when they put their names upon it. But that this rule has any attributes so inviolable, as not to be touched by the parties to negotiable paper, cannot be admitted. It has its origin in custom, and that custom, too, comparatively, of recent date; and is not one of those, to the contrary of which the memory of man runneth not, and which contributed to make up the common law code which is so justly venerated. So far from this, that the allowance of any days of grace, is in derogation of the common law rule, applicable to other contracts. They are, emphatically, the mere creatures of usage, varying in different countries, to suit the views and convenience of men in business, originally gratuitous, and not binding on the holder. The common law would require payment on the last day limited by the contract, and would also give to the maker the whole of that day. It is a settled principle of the common law, applicable to all contracts, that a party has until the last day limited by his agreement, to perform his engagement, and even until the last hour of the day. The common law knows of no fractions of a day; custom, however, and that introduced, too, principally by banks, has lim- 586*] ited *the day to a few hours of business. But this, and whatever other rules have been adopted by consent, and merely for the convenience of commercial men, are departures from the common law doctrine. When, therefore, the allowance of only three days of grace is said to be the law of the contract, by bills of exchange and promissory notes, nothing more can be intended than that custom has so long sanctioned this rule that all dealers in paper of this description are understood to govern themselves by it. The law of the contract, properly speaking, is to pay when due; and that time is to be ascertained, either from the contract per se, or that taken in connection with some known custom, which the parties are presumed to have tacitly consented should be made a part of the contract. And it is in this view only, that three days of grace are allowed, where that custom is recognized as the rule; for a note, which upon its face has sixty days to run, is in truth and in fact a contract for sixty-three days, and interest is taken for that time. And how is it ascertained that it is a note for sixty-three days, but by looking out of the contract, and finding what was the understanding of the parties? Where the custom has existed for a long time, and has become general, courts of justice, as before observed, will notice it ex officio; and where it has not, it is matter of proof.

If this is not the light in which these transactions are to be considered, all banks are chargeable with usury; for all take interest beyond what is allowed by law, if time is to be determined by the note itself. The general rule of law is, *that demand of pay- [*587 ment must be made of the maker, when the note falls due; and that time, as now settled, is on the last day of grace; and even this rule is of recent date, for in the King's Bench in England, as late as the year 1791, about coeval with the institution of this bank, and the custom established by it, we find (Leftly v. Mills, 3 T. R.) Lord Kenyon and Mr. Justice Buller differing on this very point; the former holding that, by analogy to other contracts, the acceptor of a bill of exchange had the whole of the third day of grace to pay the bill, and that a demand on the fourth day was not too late. Mr. Justice Buller thought the demand ought to be made on the third day of grace; that the nature of the acceptor's undertaking was to pay the bill on demand, on any part of the third day of grace; and he inferred this, from its having been, as he said, the practice to make the demand on that day. If it was a doubtful question in England, so late as the year 1791, whether the demand ought to be made on the third day of grace, or the day after, this bank is not chargeable with any culpable innovation upon long-established rules of law or usage, by adopting the practice of making the demand on the fourth day.

It is said, however, that the effect of this testimony is to alter and vary, by parol evidence, the written contract of the parties. If this is the light in which it is to be considered, there can be no doubt that it ought to be laid entirely out of view; for there is no rule of law better settled, or more salutary in its application to contracts, than that *which [*588 precludes the admission of parol evidence, to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character; but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom; for the custom, then, becomes a part of the contract, and may not improperly be considered the law of the contract; and it rests upon the same principle as the doctrine of the lex loci. All contracts are to be governed by the law of the place where they are to be performed; and this law may be, and usually is, proved as matter of fact. The rule is adopted for the purpose of carrying into effect the intention and understanding of the parties. That the note in question was to be paid at the Bank of Columbia, and to be governed by the regulations and custom of the

institution, and so understood by all parties, cannot admit of a doubt.

It would be a waste of time to go very much at large into an examination of the various usages and customs that are admitted in evidence and recognized in courts of justice, both in England and in this country, in almost every branch of business, and especially in commercial transactions, for the purpose of ascertaining the meaning and interpretation of contracts. A few only will be noticed, that are somewhat analogous to the present case.

In the case of Cutler v. Powell, 6 T. R. 320, there was brought under consideration the legal effect of a promissory note, given to the 589*] mate of a *ship for a certain sum of money, provided he proceeded on her voyage, and continued to do duty to the port of destination. The legal construction to be given to this note was clear, and so considered by the court, that nothing was due unless the mate continued to do duty to the port of destination. He having died, however, on the voyage, the court directed an inquiry into the usage of merchants in such cases, declaring that if it sanctioned an allowance for the time the service was performed, the plaintiff should recover according to such usage.

No intimation is here given that such proof would be repugnant to the contract, although it was against the legal import of the note, if construed without reference to the usage; and although the usage related to trade, it was very limited in its application.

So in Noble v. Kenneway, Doug. 511, usage of trade was admitted in evidence, to explain the understanding of parties, in a policy of insurance, although the usage had not existed three years. Lord Mansfield said, the usage could only be known by proof, and must be tried by a jury; that underwriters must be presumed to be acquainted with the practice of the trade they insure, whether recently established or not. If it were necessary, cases might be multiplied almost without end, showing the same principle and same recognition of local and particular usages, in almost every branch of business.

We have, also, in the state courts in our own country, the decisions of very enlightened judges, adopting the same principles, and gov- 590*] erning themselves *by the same rules; and in many cases, not unlike the one before us.

In Jones v. Fales, 4 Mass. Rep. 252, the same doctrine as to usages of banks was fully sanctioned; and although that particular usage might have been found, in practice, inconvenient, and not to meet public approbation, yet the principle which governed the decision of the court, is not thereby weakened, viz., that the usage with which the defendant was conversant was proper evidence to be submitted to a jury, to infer from it the agreement of the party. And although, as suggested at the bar, this custom was altered by the banks, we do not find the courts of justice in that state attempting to control it, in its application to notes made in reference to the usage.

The doctrine of this case was again fully recognized in The Lincoln and Kennebeck Bank v. Page, 9 Mass. Rep. 155, where it was held that bank usages, established respecting de- 168

mands on makers of promissory notes, and notices to indorsers, being known to dealers in the banks, they were bound by them, and that the usage was proper evidence to be submitted to a jury. These cases are not referred to for the purpose of approving the particular usages, but to show that evidence of such usage was never considered as contradicting the written contract.

Halsey v. Brown et al. 3 Day, 346, is a very strong case on this subject. The question was as to the liability of ship-owners, for the loss of money taken on freight by the captain. The defense set up was, that the master, according to *established custom, was [*591 permitted to take money on freight, as a perquisite to himself, and the owners discharged from responsibility; and the question directly presented to the court was, whether a particular custom or usage could be given in evidence to control the general law. And the court says it is a principle, that the general common law may be, and in many instances is, controlled by special custom. So the general commercial law may, by the same reason, be controlled by a special local usage, so far as that usage extends, which will operate upon all contracts of this nature, made in view of, or with reference to, such usage.

In Smith v. Wright, 1 Caines, 43, this general principle is laid down: The true test of a commercial usage is, its having existed long enough to have become generally known, and to warrant a presumption that contracts are made in reference to it.

In the case of The Bank of Utica v. Smith 18 Johns. Rep. 230, a note, payable at the Mechanics' Bank in New York, was presented, and payment demanded, fifteen minutes after bank hours, and this was held sufficient; it appearing that, although it was a quarter of an hour after the usual time of closing the bank as to other business, it was within bank hours, it appearing that, according to the general course of doing business at this bank, these fifteen minutes were the usual and accustomed time for these presentments, and of this course of business the defendant ought to have informed himself.

*It is unnecessary to pursue this [*592 subject farther by particular reference to decisions in the state courts. The same doctrine, as to the effect of particular usages in controlling the general law, will be found to accompany the administration of justice, wherever the subject is brought under consideration. Whether these usages are, in all instances, wise and beneficial, may, perhaps, be questionable, but where they do exist, they are considered as regulating and controlling contracts, made under and in reference thereto.

The same principle is recognized by this court, in the case of Yeaton v. The Bank of Alexandria, 5 Cranch, 492. The Chief Justice, in speaking of the effect of usage upon the legal obligation of parties, observes, if the case showed that such was the usage of the bank, and such the understanding under which notes were discounted, this court is not prepared to say that the undertaking created by the indorsement would not be so fashioned as to give effect to the real intention of the parties.

These cases are sufficient to show, in the

most satisfactory manner, the light in which courts of justice consider contracts, made in reference to any particular usage, and the effect that such usage is to have upon them. And no good reason is perceived why these principles should not be applied to the case before us. The custom, under which this bank has transacted business for five and twenty years, of demanding payment of the drawers of notes on the fourth instead of the third day, after the time limited for payment, is 593*] *not unreasonable or repugnant to any principles of general policy. It does not stand alone, but is in accordance with the usage of every other bank in Washington and Georgetown. The defendant indorsed the note in question, with full knowledge of the custom. A demand on the fourth day is in perfect harmony with the principles of the common law, if applied to the contract, the maker having the whole of the third day to pay his note, and not being in default until the fourth. The inconveniences suggested on the argument growing out of a usage here, differing from that which is in practice in other places on this subject, are not of great public concern. If they exist, they affect the banks and their customers only. And if felt to the prejudice of either the one or the other, we may rest assured it would be altered. Their private interest is a sure guaranty for this.

But, admitting the practice to be inconvenient, and that a uniformity, in this respect, with other parts of the country would be desirable, the remedy is not in the hands of courts of justice, whose business it is to judge of contracts as made by parties themselves, and not to prescribe the manner in which they shall be made.

We are, accordingly, of opinion that the court below did not err in refusing to instruct the jury that the demand upon the maker of the note, on the fourth day after the time limited for payment thereof, discharged the defendant from liability on his indorsement.

One of the minor points, which has been alleged as error, appearing on the face of the 594*] record, *is, that the demand on the maker of the note should, at all events, have been laid on the third day after the time limited by the note for payment, and not on the fourth. This objection cannot be sustained at this time. Whether the declaration would not have been bad on demurrer, not, however, because the demand is laid on a wrong day, but because it does not aver the usage, is a question not necessary now to decide. But if, as we have determined, the demand was probably made on the fourth day, it would have been bad if laid at an earlier day, because the maker would have been under no obligation to pay, and, of course, not in default. If, therefore, the cause should be sent back to the court below, no amendment in this respect ought to be made. The want of an averment, so as to let in the proof of the usage, cannot now be objected to the record. The evidence was admitted without objection, and now forms a part of the record, as contained in the bill of exceptions. Had an objection been made to the admission of the evidence of usage, for the want of a proper averment in the declaration, and the evidence had, notwithstanding, been received, it would have presented a very different question.

The time of the demand, as laid in the declaration, is according to the legal effect of the note. If made at an earlier day, it would have given no cause of action against the indorser, for he was not bound to pay until the default of the maker, and he was not in default until the fourth day. *It is a general rule, [*595 in declaring as to time, that it must be laid after the cause of action accrues.

The case of Rushton v. Aspinwall, Doug. 679, does not apply. The bill of exchange, upon which that suit was founded, was dated on the 27th of November, in the year 1778, payable three months after date. The declaration stated that the bill was presented for acceptance on the day of the date thereof, and duly accepted, and, afterwards, on the same day, the acceptor was requested to pay, etc., but neglected and refused, etc., and then goes on to state the liability of the defendant, as indorser, and that he, on the same day, assumed and promised to pay, etc. It appears, therefore, that the refusal of the acceptor, and the assumption of the indorser, are laid on the day of the date of the note, which was three months before it fell due. The plaintiff, therefore, by his own showing, had no cause of action when he commenced his suit. This was a defect which no verdict could cure. He had not set forth his cause of action defectively, but shown that he had no cause of action; and this was the ground on which it was placed by the court. A cause of action, defectively or inaccurately set forth, is cured by the verdict, because, to entitle the plaintiff to recover, all circumstances necessary in form or in substance, to make out his cause of action, so imperfectly stated, must be proved at the trial; but when no cause of action is stated, none can be presumed to have been proved.

This case is not to be considered as if before *us on demurrer to the declaration. [*596 There being no averment of the special custom as to the demand on the fourth day, and the general rule being that the demand must be made on the third, if the declaration alleges it to have been made on the fourth, the joinder in demurrer admits the fact, and, of course, that the demand was too late. But had the declaration contained an averment of the special custom, it must allege a demand on the fourth day. That is according to the legal effect of the note; and a demand laid on any other day would have been bad. We must now consider the case as if the declaration had contained a special averment of the custom, the proof having been before the court and jury without objection, and now making a part of this record.

The only remaining question arises out of a bill of exceptions, taken upon the trial, to the decision of the court below, admitting secondary evidence of the contents of the note. And it has been contended,

1st. That no such evidence was admissible, unless it appeared that the note was destroyed.

The rule with respect to the admission of secondary evidence, we think, is not so restrict-

ed. If the original is lost, by accident, and no fault is imputable to the party, it is sufficient. In the present case, it appeared that the note was in court a few days before, and introduced in evidence on the trial against Foyles, the maker, but had been mislaid, and upon thorough search could not be found. Every case of this kind must depend, in a great measure, upon its own circumstances. 597*] *This rule of evidence must be so applied as to promote the ends of justice, and guard against fraud or imposition. If the circumstances will justify a well-grounded belief, that the original paper is kept back by design, no secondary evidence ought to be admitted; but when no such suspicion attaches, and the paper is of that description that no doubt can arise as to the proof of its contents, there can be no danger in admitting the secondary evidence. In this case, the note having been in court a few days before, and proved, upon a trial against the maker, there could be no possible inducement to withhold it, and it was, no doubt, mislaid purely by accident.

It is objected, in the second place, that if secondary evidence is admissible, the contents of the note was not proved by that which was competent; that it should have been by a notarial copy. Proof of the contents of a lost paper ought to be the best the party has in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantial parts of the paper. But to have required a notarial copy, would have been demanding that, of the existence of which there was no evidence, and which the law will not presume was in the power of the party; it not being necessary that a promissory note should be protested.

It is objected, lastly, that secondary evidence was not admissible, without a special count in the declaration upon a lost note. The English practice on this subject has not been adopted in this country, as far as our knowledge of it 598*] extends, *and to require a special count upon a lost note, would be shutting the door against secondary evidence, in all cases where the note was lost after declaration filed. We do not think any danger of fraud is to be apprehended from the admission of such evidence, under the usual count upon the note; and, the practice in the court below not requiring a special count in such cases, no error was committed in the admission of the evidence.

Judgment affirmed.[1]

[Promissory Note.]

GEORGE M'GRUDER, Plaintiff in Error,
v.
THE PRESIDENT, DIRECTORS, and COMPANY of THE BANK OF WASHINGTON, Defendants in Error.

Where the maker of the note has removed into another state, or another jurisdiction, subsequent to the making of the note, a personal demand upon him is not necessary to charge the indorser, but it is sufficient to present the note at the former place of residence of the maker.

THE opinion of the court was delivered by Mr. Justice Johnson:

*This case comes up from the Circuit [*599 Court of the District of Columbia, in which a suit was instituted against the plaintiff here, as indorser of one Patrick M'Gruder.

The facts are exhibited in a stated case, upon which, by consent, an alternative judgment is to be entered. The judgment below was for the plaintiffs in the action, and the defendant brings this writ of error to have that judgment reversed, and a judgment entered in his favor.

The leading facts in the cause are so much identified with those in the case of Renner v. The Bank of Columbia,[2] decided at the present term, on the question relative to the days of grace, that the decision in that cause disposes of the principal question raised in this.

But there is another point presented in the present cause. There was no actual demand made on the drawer of this note, and the question intended to be presented was, whether the facts stated will excuse it.

At the time of drawing the note, and until within ten days of its falling due, the maker was a house-keeper in the District of Columbia. But he then removed to the state of Maryland, to a place within about nine miles of the District. The case admits, that neither the holder of the note, nor the notary, knew of his removal or place of residence; but the circumstances of his removal had nothing in them to sanction its being construed into an act of absconding. The words of *the [*600 admission to this point are, that he "went to the house where the said Patrick had last resided, and from which he had removed, as aforesaid, in order there to present the said note, and demand payment of the same; and not finding him there, and being ignorant of his place of residence, returned the said note under protest."

The alternative in which the judgment of the court is to be rendered, is not very appropriately stated; but since the absurdity cannot have entered into the minds of the parties, that, not knowing of the removal or present abode of the drawer, the holder was still bound to follow him into Maryland, we will construe the submission with reference to the facts admitted; and then the question raised is,

Whether the holder had done all that he was bound to do, to excuse a personal demand upon the maker.

On this subject the law is clear: a demand on the maker is, in general, indispensable; and that demand must be made at his place of abode or place of business. That it should be strictly personal, in the language of the submission, is not required; it is enough if it is at his place of abode, or, generally, at the place where he ought to be found. But his actual removal is here a fact in the case, and in this, as well as every other case, it is incumbent upon the indorsee to show due diligence. Now, that the notary should not have found the maker at his late residence, was the necessary consequence of his removal, and is entirely

1.—Mr. Chief Justice Marshall, Mr. Justice Washington and Mr. Justice Duvall did not sit in this cause. Mr. Justice Story dissented.

2.—Ante, p. 581.

consistent with the supposition of his not 601*] *having made any one of those inquiries which would have led to a development of the cause why he did not find him there. Non constat, but he may have removed to the next door, and the first question would, most probably, have extracted information that would have put him on further inquiry. Had the house been shut up, he might with equal correctness have returned "that he had not found him," and yet that clearly would not have excused the demand, unless followed by reasonable inquiries.

The party must, then, be considered as lying under the same obligations as if, having made inquiry, he had ascertained that the maker had removed to a distance of nine miles, and into another jurisdiction. This is the utmost his inquiries could have extracted, and marks, of course, the outlines of his legal duties.

Mere distance is, in itself, no excuse from demand; but, in general, the indorser takes upon himself the inconvenience resulting from that cause. Nor is the benefit of the post-office allowed him, as in the case of notice to the indorser.

But the question on the recent removal into another jurisdiction is a new one, and one of some nicety. In case of original residence in a state different from that of the indorser, at the time of taking the paper, there can be no question; but how far, in case of subsequent and recent removal to another state, the holder shall be required to pursue the maker, is a question not without its difficulties.

We think that reason and convenience are in 602*] *favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point, there is no other rule that can be laid down, which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the indorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed; and, although from the contiguity, and, in some instances, reduced size of the states, and their union under the general government, the analogy is not perfect, yet it is obvious that a removal from the sea-board to the frontier states, or vice versa, would be attended with all the hardships to a holder, especially one of the same state with the maker, that could result from crossing the British channel.

With this view of the subject, we are of opinion that the judgment below, although rendered on a different ground, must be sustained.

Judgment affirmed.

602*] [*Patent. Practice.]

Ex-parte WOOD & BRUNDAGE

Under the 10th section of the patent act of the 21st of February, 1793, ch. 11, upon granting a rule, by the judge of the District Court, upon the patentee, to show cause why process should not issue to repeal the patent, the patent is not repealed, de facto, by making the rule absolute; but the process to be awarded is in the nature of a scire facias at common law, to the patentee to show cause why the patent should not be repealed, with costs of suit; and upon the return of such process, duly served, the judge is to proceed to stay the cause, upon the pleadings filed by the parties, and the issue joined thereon. If the issue be an issue of fact, the trial thereof is to be by a jury; if an issue of law, by the court, as in other cases.

In such a case, a record is to be made of the proceedings, antecedent to the rule to show cause why process should not issue to repeal the patent, and upon which the rule is founded.

THIS cause was argued by Mr. Haines[1] in support of the rule, and by Mr. Emmet[2] against it.

Mr. Justice Story delivered the opinion of the court:

The district judge of the southern district of New York, under the 10th section of the patent act of the 21st of February, 1793, chapter 11, granted a rule upon Charles Wood and Gilbert *Brundage, at the instance and [*604 complaint of Jethro Wood, to show cause why process should not issue against them, to repeal a patent granted to them for a certain invention, in due form of law; and upon hearing the parties, no sufficient cause being, in his judgment, shown to the contrary, he, on the 2d day of July, 1823, passed an order that the said rule be made absolute, and that the said patent be repealed; and that process issue to repeal the said patent, and for the costs of the complainant. The patentees, by their counsel, moved the court to direct a record to be made of the whole proceedings, and that process, in the nature of a scire facias, should be issued, to try the validity of the patent. The court denied the motion, upon the ground that these were summary proceedings, and that the patent was repealed de facto, by making the rule absolute; and that the process to be issued was not in the nature of a scire facias, to try the validity of the patent, but merely process repealing the patent.

A motion was made, on a former day of this term, in behalf of the patentees, for a rule upon the district judge, to show cause why a mandamus should not issue from this court, directing him to make a record of the proceedings in the cause, and to issue a scire facias, for the purpose of trying the validity of the patent. The rule having been granted, and due service had, the case has since been argued by counsel, for and against the rule; and the opinion of this court is now to be delivered.

Two objections have been urged at the bar, *against the making this rule absolute. [*605 The first is, that these proceedings, being summary, are not properly matters of record. The second, that this is not a case in which, by law, a scire facias, or process in the nature of a scire facias, can be awarded, to try the validity of the patent.

Both of these objections are founded upon the provisions of the 10th section of the patent act, and must be decided by a careful examina-

1.—He cited Stearns v. Barrett, 1 Mason's Rep. 153; 8 Mod. 28; 1 Salk. 144.

2.—He cited 1 U. S. Law Journal, 88; Ex-parte O'Reilly, 1 Ves. Jun. 112; Ex-parte Fox, 1 Ves. & Beames, 67; Jefferson's case, 2 Saund. 15.

tion of those provisions. The words are, "that, upon oath or affirmation being made, before the judge of the District Court, where the patentee, his executors, etc., reside, that any patent, which shall be issued in pursuance of this act, was obtained surreptitiously, or upon false suggestion, and motion made to the said court within three years after issuing the said patent, but not afterwards, it shall and may be lawful for the judge of the said District Court, if the matter alleged shall appear to him to be sufficient, to grant a rule that the patentee, or his executor, etc., show cause why process should not issue against him, to repeal such patent; and if sufficient cause shall not be shown to the contrary, the rule shall be made absolute; and thereupon, the judge shall order process to be issued against such patentee, or his executors, etc., with costs of suit. And in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such court for the repeal of the said patent. And if the party at whose complaint the process issued, shall have judgment given against him, 606*] he shall pay all *such costs as the defendant shall be put to in defending the suit, to be taxed by the court, and recovered in due course of law."

Upon the slightest inspection of this section, it will be at once perceived, that however summary the proceedings may be, they are of vast importance to the parties, and involve the whole right and interest of the patentee. The jurisdiction given to the court is not general and unlimited, but is confined to cases where the patent was obtained surreptitiously, or upon false suggestions; where the patentee resides within the district; and where the application is made within three years after the issuing of the patent. It is, therefore, certainly necessary, that all these facts, which are indispensable to found the jurisdiction, should be stated in the motion and accompanying affidavits; and without them, the court cannot be justified in awarding the rule. It follows, of course, that in any record that is to be made of the proceedings, they constitute the preliminary part, and ought not to be omitted. In the present case, they have been wholly omitted, and the record is, in this respect, incomplete and inaccurate.

But it is said that, technically speaking, these proceedings are not matters of record. They are certainly proceedings of a court of record, for such are all the courts of the United States, in virtue of their organization, both upon principles of the common law, and the express intendment of Congress. In general, the interlocutory proceedings in suits are not entered of record, as they are deemed merely 607*] collateral incidents. But where *a special jurisdiction is given to a court, as in the present instance, it appears to us that, in conformity to the course of decisions in this court, upon the subject of jurisdiction, all the preliminary proceedings required to be found that jurisdiction should appear of record, as they constitute an essential part of the case. In general, motions and rules made in the course of suits, over which the court has an acknowledged jurisdiction, are not entered of record. But where a rule is the sole foundation of the suit, and the first step in its progress, that rule can only be granted under special circumstances prescribed by law; it is not sufficient to show that the rule itself was granted, but it must also appear, by the proceedings, that it was rightfully granted.

But the more material question is, whether the proceedings, so far as the rights of the patentees are concerned, terminated with the rule being made absolute, so that, ipso facto, the patent was repealed, and the process to be issued was only process to enforce or declare the repeal; or whether the process was in the nature of a scire facias at common law, to repeal the patent, if, upon a future trial, the same should be found invalid.

This question must be decided by the terms of the section in controversy; but in the interpretation of those terms, if their meaning is somewhat equivocal, that construction ought certainly to be adopted which, not departing from the sense, is most congenial to our institutions, and is most convenient in the administration of public justice. *The securing to inventors of an exclusive right to their inventions, was deemed of so much importance, as a means of promoting the progress of science and the useful arts, that the constitution has expressly delegated to Congress the power to secure such rights to them for a limited period. The inventor has, during this period, a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession. In suits at common law, where the value in controversy exceeds $20.00, the constitution has secured to the citizens a trial by jury. In causes of equity and admiralty jurisdiction, they have the security of a regular and settled course of proceedings, where the rules of evidence and the principles of decision are well established. And in all these cases, there is the farther benefit conferred by our laws, of revising the judgments of the inferior courts, by the exercise of appellate jurisdiction. It is not lightly to be presumed, therefore, that Congress, in a class of cases placed peculiarly within its patronage and protection, involving some of the dearest and most valuable rights which society acknowledges, and the constitution itself means to favor, would institute a new and summary process, which would finally adjudge upon those rights, without a trial by jury, without a right of appeal, and without any of those guards with which, in equity suits, it has fenced round the general administration of justice. The patent acts have given to the patentee a right to sue at common law, for damages for any violation of his invention; *and have given him a farther right to [*609 claim the interference of a court of equity, by way of injunction, to protect the enjoyment of his patent. It would be somewhat surprising if, after such anxious legislation, there should exist in the act a clause which, in a summary manner, enables any person to repeal his patent, and thus sweep away his exclusive property, without interposing any guards by way of appeal, or any regular proceedings, by which the validity of titles, in ordinary cases, is examined and contested.

With these considerations in view, let the 10th section of the act be examined. Its object is to provide some means to repeal patents which have been obtained surreptitiously, or upon false suggestions; the very cases for which a scire facias issues at the common law. As the patents are not enrolled in the records of any court, but among the rolls of the Department of State, it was necessary to give some directions as to the correct time and manner of instituting proceedings to repeal them. It accordingly directs, that the district judge may, upon proper evidence, under oath, and motion made to the court, in his discretion, "grant a rule that the patentee, etc., show cause why process should not issue against him, to repeal such patent; and if sufficient cause shall not be shown to the contrary, the rule shall be made absolute, and thereupon the judge shall order process to be issued against such patentee, etc., with costs of suit." It is obvious, from the language of this clause, that the rule is a rule not to repeal the patent, if it is made [*610] absolute, but a *rule for process to issue to repeal the patent. It is not, then, the rule, but the process contemplated by the act, that repeals the patent. It is not a mere form, but is of the essence of the proceedings, without which the rule has no efficacy. Is the process to be issued a process which, per se, repeals the patent, or are the words "to repeal such patent," to be construed as merely descriptive of the nature of the process, and of the effect of it, if judgment shall be finally pronounced in support of it? In other words, is it a process in the nature of an execution, or a judicial process, in the nature of a scire facias, calling for further proceedings? If the words of the section had stopped at the clause already referred to, it would, perhaps, have been difficult to find a sufficient explanation of the legislative will, to have led the court to the conclusion, that judicial process, in the nature of a scire facias, was certainly intended; there would have been some reason for hesitation; but, even then, an interpretation against such process would not have been without serious embarrassments. It could not be arrived at, without leaving much of questionable reasoning behind. But the section does not stop here. It goes on to make farther provisions, which, if the process absolutely repealed the patent, could have no operation, and no intelligible meaning. On the other hand, if the process was to be in the nature of a scire facias, all the words are sensible and operative, and describe the proper progress and proceedings upon such a writ. The clause is in these words: "And, in case no sufficient [*611] *cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such court for the repeal of the patent." These words follow after the clause awarding the process, and, of course, suppose the process already issued. The party is supposed to be called upon to show cause, which is precisely what a scire facias requires in its official mandate; and if no sufficient cause is shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, then the patent is to be repealed. If the process is merely to repeal the patent, and not to institute a trial, how can the party show cause? how can it judicially appear that the patentee is not the inventor? These provisions are intelligible in a scire facias, for that authorizes subsequent inquiry into the law of the facts. But, farther, "judgment" is to be rendered. Now, it is not necessary to lay any particular stress on this word, as a known juridical phrase, expressive of the final decision of the court; but if the making the rule absolute repealed the patent, and the process is merely an execution, how could any subsequent judgment be rendered in the case? It would be contrary to all analogy, to all rules of judicial interpretation, to suppose that judgment is to succeed, and not to precede, the writ of execution. The clause goes on "and if the party, at whose complaint the process issued, shall have judgment against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed *by the court, and recovered in due [*612 course of law." The language is here still more distinct and persuasive. It imports, in a clear manner, that some proceedings were to be had after the process issued, by which the case might be farther investigated; and if upon such investigation judgment should be against the complainant, the patentee should recover his costs. The language is, that the party, at whose complaint the process issued, not the rule issued, shall have judgment against him. Upon what? the rule? Certainly not; but upon the process issued. He shall pay the costs to which the defendant is put in defending the suit. What suit is here intended? We think it is clear that it means the suit upon the process, that is, upon the scire facias; for the proceedings upon the rule are not, in a technical, or in any accurate sense, a suit. The costs of defending the suit are to be paid. But how can any costs arise from a defense upon a process which is final and absolute? It appears to the court, that to give the construction contended for by the counsel against the rule, would be to reject the plain and obvious purport of the whole of the last clauses of the section, and make them a perfect nullity. In the other view, they have entire effect, and are as reasonable and just, in themselves, as they are promotive of the security of vested rights and property.

Nor does the occurrence of the words "costs of suit," in the preceding part of the section, where it is said that "the process shall be issued, etc., with costs of suit," in the slightest degree impugn *this interpretation. [*613 The true meaning of these words in this connection, is not the costs of suit, already incurred, shall be paid and collected, but that the process shall be, to show cause why the patent shall not be repealed, and costs of suit given to the complainant. In this view it fortifies the construction already asserted by the court. That this is the true exposition of the words, is made apparent by examining the 5th section of the patent act of 1790, ch. 34, which is exactly similar in terms to the 10th section of the present act, except that it omits, in this place, the words "costs of suit." These words, therefore, were not intended to change, and cannot be admitted to change, the natural meaning of the other parts of the section. And if the other words used in this connection are descriptive of the nature of the process, these words are merely explanatory of the legislative

intent, that the costs of the suit should follow upon the final judgment in favor of the complainant. Without this provision, as the other clause giving costs applies to the patentee only, the complainant, although he should prevail in the suit, would not be entitled to any costs. This was a real defect in the first act, and is cured by the insertion of the words under consideration.

Nor are there any public mischiefs which will result from the view which the court takes of this section. On the contrary, it will subserve the purposes of general justice. If a patent has been fraudulently obtained, or upon false suggestions, it may be repealed within 614*] three years, if a jury, *upon a trial, shall be satisfied of the fact. If such a repeal be not had, still the public have a perfect security. They may violate the patent with impunity, and if sued for the violation, any person may show the same facts in his defense, and they will constitute a complete bar to the suit, by the express provisions of the 6th section of the patent act. Here, also, the trial will be ordinarily by a jury, and if the verdict is found, upon such facts in favor of the defendant, the law expressly declares, that "judgment shall be rendered for the defendant, with costs, and the patent shall be declared void." Many patents, under this section, have already, in such suits, been adjudged void; so that the danger of extensive imposition or injury is wholly chimerical. On the other hand, if, by any accident or mistake, the patentee should neglect to appear to oppose the rule, upon the argument on the other side, he may be remediless. But, upon the exposition of the statute adopted by the court, he will still be entitled to appear to the scire facias, and have a more deliberate opportunity to defend his rights.

Upon the whole, it is the opinion of the court that the rule ought to be made absolute, and that a peremptory mandamus issue to the judge of the District Court, directing him to enter upon record the proceedings in this cause, antecedent to the granting of the rule, and upon which it was founded; that he award a process, in the nature of a scire facias, to the patentees, to show cause why the patent should not be repealed, with costs of suit; that upon 615*] such process being returned, *duly executed, he proceed to try the same cause, upon the pleadings filed by the parties, and the issue joined thereon; and that, if the issue so joined be an issue of fact, then the trial thereof to be by a jury; if an issue of law, then by the court, as in other cases.

Mandamus accordingly.

Judgment.—Upon the hearing of this cause upon the rule to show cause, heretofore awarded by this court, and on consideration of the arguments of counsel for and against making the same rule absolute, it is ordered and adjudged by the court that the same rule be, and hereby is, made absolute. And it is further ordered by the court that a peremptory mandamus issue to the district judge of the southern district of New York, commanding him to enter upon record the proceedings in this cause, antecedent to the granting by him of the rule to show cause why process should not issue, to repeal the patent in the proceedings mentioned, and upon which the said rule was founded; that the said judge do award a process, in the nature of a scire facias, to the patentees, to show cause why the said patent should not be repealed, with costs of suit; that upon the return of such process, as duly served, the said judge do proceed to try the cause upon the pleadings filed by the parties, and the issue joined thereon; and that if the issue be an issue of fact, the trial thereof be by a jury; if an issue of law, then by the court, as in other cases.

[*Prize. Judicial Sale.] [*616

THE MONTE ALLEGRE.

Tenant, Claimant.

In judicial sales, there is no warranty, express or implied.

Upon a sale by the marshal, under an order of court, no warranty is implied.

Neither the marshal, nor his agent, the auctioneer, has any authority to warrant the article sold.

Quære, How far the marshal is responsible to the vendee, in his private capacity, if he undertake to warrant, or to do what would imply a warranty in a private sale.

Upon an admiralty proceeding, in rem, where the proceeds of the sale are brought into court, they are not liable to make good a loss sustained by the purchaser, in consequence of a defect being discovered in the article sold.

APPEAL from the Circuit Court of Maryland.

The appellant, Thomas Tenant, filed his petition on the 14th of November, 1821, in the Circuit Court for the Maryland district, setting forth that at a public sale of part of the cargo of the ship Monte Allegre, under an interlocutory order of the District Court, in the case of Joaquim Jose Vasques, Consul-General of Portugal, against the ship Monte Allegre, and her cargo, he became the purchaser of six hundred and fifty-three seroons of Brazil tobacco, part of said cargo, for which he paid to the marshal of the district, under whose superintendence the sale was conducted, $15,495.46. That the tobacco was sold by samples, which were sound and merchantable, and that, believing the bulk of the tobacco *corresponded, in this respect, with the [*617 samples, he became the purchaser. That, shortly afterwards, he exported the whole of the tobacco so purchased to Gibraltar; and, after its arrival there, it was found, upon examination, to be wholly unsound and unmerchantable, the greater part being entirely rotten, and the remainder unsalable but at very reduced prices, and was, in fact, sold for $4,818.52.

The appellant, in his petition, further alleges, that the tobacco received no damage in its transportation to Gibraltar, but was, at the time it was sold by the marshal, wholly unsound, rotten, and unmerchantable; that the cause in which the order was passed, by virtue of which the tobacco was sold, was still pending in this court; and that the proceeds of said sale remained in the Circuit Court, under its authority and control; and, thereupon, prayed for such relief as, upon proof of the allegations, he might be considered by the court entitled to.

To this petition an answer was filed on the

2d of May, 1822, in the name of Joaquim Jose Vasques, Consul-General of Portugal, on behalf of the owners of the proceeds of the ship Monte Allegre and her cargo, resisting the claim of the appellant:

1. Because the court had no jurisdiction or power whatever to sustain the petition, inasmuch as it was calling on the court to award damages on a claim in the nature of an action for a deceit, or on a warranty, as an incident to a cause, in its nature wholly of admiralty and 618*] maritime cognizance, *the claim being entirely of common law jurisdiction, and could not be made an incident to that which appertains exclusively to the admiralty. And, secondly, the claim was resisted upon the merits. Proofs were taken on both sides, in the court below, and a decree, pro forma, was entered by consent, dismissing the petition with costs; on which the cause was brought by appeal to this court.

Mr. Meredith, for the appellant, in answer to the objection as to defect of jurisdiction, stated, 1. That this claim was an incident to the principal case of The Monte Allegre, which had been formerly determined in this court by a decree of restitution to the original Portuguese owners.[1] The general rule is, that where a court has jurisdiction in the principal question, it has jurisdiction, incidentally, over all interlocutory matters that are connected with, or arise out of, the original cause. It would seem to follow, therefore, that a sale, made in virtue of an interlocutory decree, by a court exercising a rightful and exclusive jurisdiction over the cause in which such decree is pronounced, must necessarily be considered as an incident. It could not be denied that the interlocutory decree itself was strictly incidental; and if so, the sale must necessarily have the same character, since it and the decree are inseparably connected. The decree and sale both depend on the jurisdiction in the principal cause, and so does 619*]-*the title acquired by the purchaser. The proceeds of the sale are in court, and the court has an undoubted power to distribute them according to equitable circumstances, and, so long as they remain within its control, to decide on all claims respecting them.[2] The answer in this case, however, places the jurisdiction on distinct ground. It is said, that the claim is in the nature of an action for a deceit, or on a warranty, which are actions known only to the common law, and cannot, therefore, be an incident to that which appertains exclusively to the admiralty. Such, however, is not the rule. Whether the original cause of action be either of admiralty or common law jurisdiction, all incidental matters follow the jurisdiction of the original cause, whatever the complexion of those matters, separately considered, may be.[3]

2. In judicial sales, the court has entire control over the contract. It considers the contract as made with itself, and will interfere, under equitable circumstances, to relieve the purchaser, where it would not interfere in a private contract. This is the established doctrine in equity.[4] The same principle applies to sales under decrees in the Court of Admiralty, which executes a "wide equity."

*3. But, even admitting that the sale [*620 in this case is to be governed by the stricter rules of the common law, it may be brought within those rules. The proof shows, conclusively, that this was a sale by sample, which is equivalent to a warranty;[5] and such warranty extends as well to the soundness and merchantable condition of the commodity, as to its particular species.[6] The proof, and the admission on the record, are conclusive, to show that at the time of the sale the tobacco was unsound and unmerchantable; and if the sale by sample amounts to a warranty, the purchaser was not bound to examine the tobacco. Such an examination, if made, would have been no waiver of the warranty.[7]

4. The marshal, being the agent of the court, was authorized to sell by sample, that being, according to the proof, the usual and customary mode of sale; and this even if he be considered as a special agent.[8] The marshal, however, being the agent of the court, in all sales under its decrees, is to be considered strictly as a general agent,[9] and is therefore authorized to do all acts within the scope of his employment.

*5. The proceeds now remaining in [*621 the registry, though not the specific proceeds of the tobacco, are, notwithstanding, liable to this claim. The proceeds of the tobacco were disbursed in payment of duties and expenses, which were a joint charge of ship and cargo. The fund now in court is a common fund, on which the owners of the tobacco have a claim for their distributive charge.

Mr. D. Hoffman, for the respondents, contended that the marshal possessed no power to warrant the quality of the article sold, he being a special agent, with limited powers; and that if he had exceeded the scope of his authority, he could not thereby implicate the proceeds of the property, being the agent of the court, and not of the owners. That the limited authority of the marshal, in the case of sales by order of the court, is universally known and acknowledged; that all persons, therefore, are presumed to purchase on their own means of judging; and public officers are never presumed to possess the same extent of knowledge in regard to the quality of property sold by them, as the owners thereof would be presumed to possess.

Admitting, then, argumenti gratia, that there has, in fact, been gross fraud, or a warranty express or implied, by the marshal, or by his agent, the auctioneer, or by both, such fraud or warranty would neither implicate the prop-

1.—7 Wheat. Rep. 520.

2.—Smart v. Wolff, 3 T. R. 323.

3.—3 Bl. Com. 107; 2 Bro. Civ. and Adm. Law, 107; 2 Saund. 259; Cro. Eliz. 685; Doug. 594; [illegible] Rep. 370.

4.—Sugd. Vend. 34, 115, 1st Am. ed.; Saville v. Saville, 1 P. Wms. 746; Morehead v. Frederick, Sugd. Vend. App. 524; Lawrence v. Cornell, 4 Johns. Ch. Rep. 542.

5.—Hibbert v. Shee, 1 Camp. 113; Klinits v. Surry, 5 Esp. Rep. 267; Gardiner v. Gray, 4 Camp. 144; Sands v. Taylor, 5 Johns. Rep. 404; Sweet v. Colgate, 20 Johns. Rep. 196; Bradford v. Manly, 13 Mass. Rep. 139.

6.—13 Mass. Rep. 139.

7.—1 Peters' C. C. Rep. 317.

8.—3 T. R. 757; 4 T. R. 177; 5 Esp. Rep. 75; 2 Camp. 555; 12 Mod. 514; Willes, 407; 1 Camp. 259, and cases collected in Paley on Agency.

9.—15 East's Rep. 408.

erty nor involve the owners in any responsibility. It is not competent for a court, nor for the marshal, as agent for that court, nor for [*622] the auctioneer, as agent of *the marshal, in any case to charge the property or owners by any fraud or warranty.

And first, as to the power of the court in this respect: It must be conceded, that the owners have had no agency in this sale; as to them, it is wholly in invitum. The sale was by the court, not by the owners; the court is not even the agent of the owners pro hac vice; and as the purposes of justice demand a sale, and nothing more, and as courts are never presumed to know the quality of property sold under their order, so, in the present case, the order contains an authority to sell, which, we shall presently show, does not authorize a warranty. If the appellant's claim be well founded, in respect to the acts either of the court or its agent, it must, as there has been no express warranty, repose either on the doctrine that a sound price will insure a sound article, or this, that a fraudulent representation imposes a legal obligation on the court, to the same extent to which similar representations would bind an individual. The acts of a court, as such, whatever the motives of the individuals who compose it, are, in the eye of the law, wholly uncontaminated by fraud or deceit. To that to which the law has assigned the part of declaring justice, it cannot impute a vice contradictory of such a character, nor suppose that the oracles of justice can dictate injustice. The distinction between judicial sales and those of individuals, rests mainly (1) on the actual or presumed knowledge of owners, and the actual or implied ignorance of courts (whose province it sometimes [*623] is to order *sales) of the nature and quality of the thing sold; (2) on the absolute impracticability of a court's inquiring into circumstances of quality and title in these cases, and the consequent absence of any reliance, by purchasers, in these respects; and (3) on the total want of all motive in courts and their officers, to warrant, defraud, or misrepresent. On these grounds is it that the maxim, caveat emptor, emphatically applies to such sale. It is on a similar principle that all judicial sales are out of the operation of the statute of frauds; and this is by no means because the judicial sale is at auction, for auction sales are within the statute, unless they are also in pursuance of judicial authority; but it is because there is a peculiar respect due to judicial sales. The danger which the statute intended to guard against, cannot be supposed of such sales.[1]

On the direct question under consideration, there are but few cases to be found in the books. In South Carolina it has been expressly decided, that, at a sheriff's sale, caveat emptor is the best possible rule that can be laid down. The court emphatically states that all who attend such sales ought to take care and examine into the title, etc.; that no warranty, express or implied, can be raised on the part of the owner, as to whom the proceeding is compulsory, nor of the sheriff, who is the mere [*624] agent of the court, nor of the *court itself; and, therefore, in that case, the claim of the defendant's wife to dower is no reason why the purchaser should not pay the money bid at such sale.[2] In New York, however, we find something of a contrary doctrine advanced by Mr. Chancellor Kent, who repudiated Lord Hardwicke's doctrine in the case of the Attorney-General v. Day, and held that sheriff's sales are within the statute of frauds.[3]

The cases on this point, which have been cited by the appellant's counsel, may be distinguished.

The first is Saville v. Saville,[4] where it was merely decided, that while such a purchase before the master remained in fieri, the court would not actively interfere to compel performance, the purchase having been made under a prevalent delusion as to the value of estates, and the purchaser was willing, in order to be relieved, to forfeit his deposit, which was one-tenth of the whole purchase money. It is further to be remarked of this case, that a quære is added by the learned commentator, "whether this be now the law of the court."

Several cases also were cited from Sugden, all which may be accounted for by their peculiar circumstances. The sale was in fieri in every case; the master, who conducted the sale, had all the knowledge possessed by the owners, was *possessed of every muniment of [*625] title, and ought to have known of every incumbrance; and most of the sales were voluntary; or, if not, the court either required a forfeiture of the deposit, or the clearest proof of gross mistake, which it was in the master's power to have guarded against.[5]

Having nearly exhausted the common law sources of information, on this question, I shall be pardoned for seeking further light in the Roman code, that pure and copious fountain of written reason. It is well known how strict the Ædilitian law was in regard to the obligations of vendors. Not only a sound price warranted a sound commodity, but the seller was bound to declare all the faults known to him, nay, was responsible even for such as were altogether unknown to him. Yet all the commentators on this edict admit, that neither the action quanti minoris, redhibitoria, nor that ex empto, would lie in the case of fiscal and judicial sales. It appears that where an extravagant price was given for a commodity, the Roman law allowed a diminution of the price, to be enforced by the action quanti minoris, though the purchaser suggested neither fraud nor warranty. But this applied only to private sales, not those under public authority. So, if the commodity were unsound, or unfit for its ordinary purpose, that law compelled the vendor, by the actio redhibitoria, to take back the property, or make allowance for its defects; but the policy of *the law did not suffer ju- [*626] dicial or fiscal sales to be impugned by the redhibitory action. Again, if the title proved defective, in lands or goods, the purchaser re-

1.—Attorney-General v. Day, 1 Ves. Sen. 221; Bragden v. Bradbear, 12 Ves. 472; Mason v. Armitage, 13 Ves. 25; 3 Munf. 102; Sugd. Vend. 78.

2.—The Creditors of Thayer v. Sheriff of Charleston, 2 Bay, 170.

3.—Simonds v. Catlin, 2 Caines, 63.

4.—2 P. Wms. 745.

5.—Sugd. Vend. 34, 49, 115, 185, App. 524; Lawrence v. Cornell, 4 Johns. Ch. Cas. 542.

sorted to the action ex empto; but this, too, applied only to private sales.

This doctrine is emphatically stated in the Roman code. Illud, sciendum est, edictum hoc non pertinere ad venditiones fiscales.[1] To the same effect is Domat, who cites the Ædilitian edict. "Rehibition and diminution of price, on account of the vices of the thing sold, do not take place in public sales which are made by a decree of a court of justice. For in these sales it is not the proprietor who sells, but it is the authority of justice, which adjudges the thing only such as it is."[2] Pothier, commenting on the clause, "tamen illud sciendum est," says, that "this exclusion of responsibility on the part of the owner of property, is owing to the trust and confidence reposed in courts of justice; their sales, therefore, must stand; they shall not be annulled by the action ex empto, nor the price be reduced by the action quanti minoris or redhibitoria." "Propter auctoritatem hastæ fiscalis," continues Pothier, "cujus fides facile convelli non debet."[3] The same author, in his treatise of the contract of sale, after commenting on the various remedies under this celebrated edict, says, "but the consequential actions on account *of redhibitory defects, are not allowed on sales made under judicial authority."[4] *627]

Leaving the Roman code, analogous principles are not wanting in the jurisprudence of other countries. In Holland and the Netherlands, certain purchasers have the privilege of rescinding their contracts within twenty-four hours, if the inequality of the transaction exceeds one-half the price paid. But it is said that this right does not appertain to any sales made under a decree, or in the presence of a judge, and that it certainly does not to sales on involuntary decrees.[5] There is a similar locus penitentiæ accorded to the inhabitants of these countries, who, as the same author in substance remarks, "through much internal heat are commonly much inclined to liquor, and, therefore, in the midst of innocent drunkenness, are induced to mislead and defraud the unwary in their sales and purchases. The persons thus used may recede within twenty-four hours, which privilege is, in every respect, to be understood of private trade, as there can be no suspicion of deception where the sale is public by an authorized functionary." In the same jurisprudence we find what is called an appropriation or redemption right, which gives to the vendor, in certain cases, within a limited time, the privilege of repossessing himself of the property sold, at the same *price. But this permission applies in no case to judicial or public sales.[7] *628]

But it is said that the marshal was competent to warrant the quality of the property sold, or, at least, that he has done so, and that, therefore, it is the court's duty to adopt his acts, and to save the purchaser from loss. This doctrine, we presume, can hardly be sound. The marshal is only a ministerial agent of the court; his authority cannot be more extensive than that whence it flows—derivitiva potestas non potest esse major primitiva. Nay, further, he was pro hac vice a special agent with defined powers; his authority was only to sell, and sale does not ex vi termini imply even a warranty of the title, much less of the quality of the commodity sold; for if the title should be defended by the court, it would be only on the ground that, as the proceeding was in rem, all the world was a party, and not on the principle of warranty, either express or implied. The marshal, had he been guilty of fraud, or exceeded his powers by warranting the quality of the tobacco, could only have subjected himself to personal responsibility, and not the property; nor could any such excess in the execution of his powers impose the least obligation on the court, either to bind the property, or compel the owners to ratify his act. The marshal's authority was to sell, and this, it has often been decided, does not convey a power to warrant.[8] Again, the acts of an agent beyond the *scope of his [*629 authority, are void as to everyone but himself.[9]

The marshal is necessarily a special agent only, and his, like all other defined authorities, must be strictly pursued. He need not be directed not to warrant: this is implied ex natura officio.[10] He cannot be presumed to warrant, because between him and the owners there can be no privity. An owner has the requisite knowledge of the nature and qualities of his merchandise; he, and his agent, the auctioneer, who have the fullest means of judging, may consequently sometimes impliedly warrant. But an officer of court cannot be presumed to warrant anything, since he sells the products of every region of the globe, often without invoices, letters, description, or muniments of title, and often without seeing, or the possibility of seeing, the contents of numerous packages, whose opening might lead to expense or prejudice. And even with respect to agents and servants, the general doctrine is, that they are not competent to implicate their constituents, either by their warranty or their fraud; though there are many cases where the principal has been bound, especially in the sale of horses, which rests on special grounds. It is, however, laid down by Rolle, that "a warranty on a sale must be made by him who sells; and, therefore, if a servant, on the sale of goods of *his [*630 master, warrant them, it will be a void warranty, for it is the sale of the master."[11] So here, if the marshal have warranted the property, it is a void warranty, as to the source whence he derived his power to sell.

What has been said of the marshal, applies with like force to the auctioneer. It may, besides, be remarked, that auctioneers are ever considered as special agents, and that generally they have an authority to sell only.[12] The auctioneer's powers were defined in this case by the character of the source whence he drew them,

1.—Dig. l. 1, t. 1, De Ædilio, Edicto.
2.—Domat's Civ. Law, b. 1, t. 2, s. 11.
3.—Poth. Pand. Just. l. 21, t. 1, s. 4, art. 1, No. 5.
4.—Traité du Contrat de Vente, s. 232.
5.—Van Leeuwen's Com. b. 4, c. 20, s. 4.
6.—Ib. s. 6, 7.
7.—Van Leeuw. Com. b. 4, c. 19, s. 1, 12.
8.—Nixon v. Hyscrott, 5 Johns. Rep. 58; Gibson v. Colt, 7 Johns. Rep. 390.
9.—Paley on Agency, 165, 302, 303; 3 Johns. Cas. 70; 1 T. R. 205; 3 T. R. 757; 4 Taunt. 242; 1 Dow's Rep. 44; 15 East, 45.
10.—Paley on Agency, 165, 170, 171.
11.—Roll. Abr. 95, pl. 30; 2 Roll's Rep. 270.
12.—7 Ves. 276.

and this source was known to every bidder. But where auctioneers are clothed with a general authority, usage may, and has, limited it in this class of cases, though private instructions, without usage, might not have availed.[1]

As to the question of express warranty, or fraud, it may be laid down as a settled principle that purchasers are bound to apply their attention to those particulars, which may be supposed within the reach of their observation and judgment; and that if they are wanting in that attention where it would have protected them, they must endure the loss, unless in the case of an express warranty, or of gross fraud.

This is a case in which the purchaser's vigilance should have been particularly awakened. 631*] He well *knew that the tobacco was sold under an interlocutory decree, which must have been either under a perishable monition, the consent of proctors, or the arbitrary mandate of the court. The decree itself, however, seemed to imply the perishable state of the property; and besides, interlocutory decrees for the sale of property are seldom allowed, unless from some such necessity. This alone was sufficient to put the party on the inquiry. A court, also, and its officers (unlike owners), cannot be presumed acquainted with the quality and condition of the property offered for sale; and the nature of the property itself (as we shall presently see) excluded the possibility of the marshal or his agent's possessing any knowledge not equally within the reach of the purchaser's observation. These circumstances bring the case entirely within the position just laid down, and more extensively expressed and well illustrated, in Fanblanque.[2] It is a rule of law, no less than of moral justice, that if both parties be ignorant of the quality, a loss, if any, must be sustained by the purchaser: Vigilantibus non dormientibus jura subserviunt.[3] If, then, the vendor have knowledge of patent defects discoverable by ordinary attention, the disclosure of them is a duty but of imperfect obligation, and he cannot be charged by the purchaser, unless there has been a concealment ex industria, or a war- 632*] ranty.[4] Nay, *further, a purchaser is not presumed to have been put off his guard, and diverted from his inquiry, by the vendor's commendation of the goods. Even under the Ædilitian edict, the maxim was simplex commendatio non obligat; for though that law aimed at producing the utmost good faith in sales, yet it was also a rule of the civil code, that "in buying and selling, the law of nations connives at some cunning and overreaching;" in pretio emptionis et venditionis naturalitur licet contrahentibus se circumvenire; and our law has adopted these principles, in regard both to commendation and enhancement of price. We are, then, brought to the inquiry, first, whether the soundness of the price paid will entitle the purchaser to a sound article, or to compensation for its defects; second, whether there has been a sale by sample in this case, and what is the true meaning of, and obligation flowing from a sale by sample.

Admitting a sound price to have been paid for this tobacco, we contend, first, that this does not, in our law, insure a sound and merchantable commodity. Every common law author. Wooddeson excepted,[5] sustains this position. "In the civil law," says Lord Coke, "a sound price demands a sound article; but it is not so in the common law, in which there must be either fraud or an express warranty."[6] Wooddesons position is unsustained by any authority; nor has it been subsequently approved *by the profession. In Ameri- [*632 ca, Coke's law has been almost universally sanctioned. Wooddeson's doctrine has been adopted only in the two Carolinas, and by a few elementary writers in this country.[7] We might go even farther, and say, that if the vendor not only receives a full price, but affirms the goods to be sound, neither the fullness of the price nor the falsity of the affirmation will oblige him to a diminution of the price.[8] An implied warranty as to quality, is wholly unknown to the common law, all the cases of implied warranty being applicable to title only.[9] The only exception to this, may be in the sale of provisions, which, if unsound, are positively noxious. But even this exception, though its policy is obvious, is denied.[10] The same doctrine has also been maintained in equity.[11] No implied warranty, then, can be inferred, either from the fullness of the price, or from any affirmation having been made. And even in those courts where a sound price has been held to imply a warranty of the soundness of the commodity, it has been held that if the purchaser has neglected to inform himself of such matters within his observation, as might have prevented the purchase, he shall bear the loss; and, *farther, even an express warranty [*634 would not extend to things discernable by ordinary vigilance.[12]

The only remaining ground, then, on which the appellant's claim can rest, is, second, that there has been, in fact, a sale by sample, and that this, in law, implies a warranty that the bulk of the commodity shall correspond with the article exhibited. We deny the fact; and contend that no sale by sample ever did take place; and as to the law relating to sales by sample, we entertain opinions extremely different from those which have been advanced.

We have shown that the common law knows but two sources of obligation on the part of the vendor, in regard to the quality of the article sold, viz., fraud and express warranty; and that no warranty can be inferred from the doctrine that a sound price insures a sound com-

1.—Paley on Agen. 163, note 9; Dickinson v. Lilwall, 4 Campb. 279.

2.—Fonbl. Eq. 379, note 12.

3.—Hob. 347; 2 Day, 128; 1 Hayw. 464; 1 Hardin. 50.

4.—Sugd. Vend. 1, 2, 195, 200; 2 Bay, 383; 7 Johns. Rep. 392; 4 Dig. 4, 4, 16, 4.

5.—Sugd. Vend. 3; 1 Tyl. Rep. 404; 2 Com. Con. 265; 2 Dall. 146, 322; 2 Wood. 415.

6.—Co. Lit. 102 b.

7.—2 Bay, 17, 19, 380; 1 Tayl. 1; 2 Swift's Conn. Law, 120.

8.—5 Johns. Rep. 354; 18 Johns. Rep. 403; 2 Caines' T. R. 48.

9.—12 Johns. Rep. 468; 10 Mass. Rep. 197.

10.—5 Ves. 508; 6 Ves. 678; 10 Ves. 505; Sugd. Vend. 199.

11.—1 Fonbl. 109, 373; 1 Johns. Rep. 96, 120, 274; 4 Johns. Rep. 421; 1 Bin. Rep. 27; 6 Johns. Rep. 5; 2 Caines. 48; N. H. Rep. 176; Peake's N. P. Cas. 123; 2 East, 448; 2 Caines' R. 48, 55; 1 Dall. 217; 4 Dall. 334.

12.—2 Caines' R. 202.

modity, this principle forming no part of our jurisprudence. The only remaining source of obligation, therefore, is, that this is a sale by sample; but, to establish this, it will be necessary to maintain that the naked presentation of a portion of the bulk of the commodity sold, is, per se, a warranty that the bulk shall agree in quality with the portion exhibited; a doctrine by no means sustainable by any cases which have been, or can be cited, as to sales by sample. We fully admit that a sale actually by sample, is tantamount to a warranty; but we differ materially from the counsel as to what constitutes a sample, which, we appre- 635*] hend, *is technical, and something very different from a mere exhibition, at the time of sale, of a part of the commodity offered for sale.

A sample is a portion of the bulk of a commodity, exhibited by the owner or his agent, with the intention to induce persons to buy, expressing the owner or agent's knowledge of the general character of the whole, and his willingness to warrant to the purchaser that the bulk shall correspond in all material respects with the part exhibited. It is a symbolical express warranty, being conventional, and as much expressive of intention as words. Thus we preserve the harmony of the law, which excludes all implied warranty as to quality. We deny that sale by a portion exhibited, is necessarily sale by sample of quality; the quo animo is always matter of evidence; and we conceive the following to be essential circumstances in the creation of that warranty of quality which arises from the sale by sample: (1) That the vendor be the owner, or have some privity or connection with him; otherwise the vendee cannot presume him to be clothed with the authority to warrant, or possessed of that knowledge of the quality of the commodity requisite to do so. In such cases the portion exhibited is merely to enable the purchaser to form a reasonable judgment of the generic or specific character of the commodity; and if he be not satisfied of this, or of the fairness of the selection of the sample, he should demand an express warranty, which would personally obligate the person giving it, or he may refuse to purchase. If he do neither, caveat emptor. (2) 636*] *There must be a want of power in the purchaser to examine for himself; for, in the absence of such power, the presumption is greatly strengthened that the portion exhibited is to serve in lieu of examination. (3) It should appear that the purchaser was in search of quality, that he desired to exercise some judgment, and placed some reliance on the quality of the portion exhibited; since, if the sample had no operation in determining the mind to purchase, no such influence ought to be ascribed to it. (4) There must be some further manifestation of intention to exhibit the portion as a sample of quality, than the mere fact of its presence; the minds of the seller and purchaser must have concurred on this point, and the part must be shown animo warrantizandi. (5) What is declared in connection with the exhibition of this portion, must be something more than mere opinion; for if a sample be given of what the purchaser knows the seller has never seen, it must, from the very nature of things, be matter of opinion only that the commodity will correspond in bulk with the part shown.

The sale in this case was under judicial authority; the purchaser well knew that the court and its officers possessed little or no knowledge of this tobacco; they were neither the growers, packers, nor owners of the commodity; and, consequently, even supposing the marshal competent to warrant, there would be no warranty of the quality, unless the purchaser had reason to suppose that the marshal or auctioneer had nearly the same knowledge as the owner. The case of *Gardner v. Gray,[1] cited [*637 on the other side, fortifies this view of the subject, for there the specimen exhibited came direct from the owner, and the plaintiff had a verdict, not only because he had not opportunity to examine for himself, but because the commodity in bulk could not be sold at all under the denomination of waste silk, which the specimen certainly was. To the same effect is the case of Laing v. Fidgeon,[2] where the goods were manufactured by the defendant, to whom the plaintiff had sent patterns of the commodity he wanted, which, when sent, was found wholly unsalable. Now, here the purchaser exhibited the sample, and the manufacturer, by shipping the article to him, adopted the sample, and the plaintiff fully relied on having an article fairly corresponding with it. In all the cases relied on by the appellant, it will be found that the plaintiff had no opportunity of judging for himself; whereas here the appellant, and every other purchaser, had full liberty to examine. The authorities are explicit, that the specimen exhibited must have been relied on as indicating the quality, and so are all the forms of pleading in such cases.[3] In Bradford v. Davis,[4] a case much relied on by the appellants, the court expressly instructed the jury, that if they believed it was the intention of the defendants so to represent, by exhibiting the sample, then the plaintiff would be entitled to a verdict; *clearly showing [*638 the court's opinion, that the mere exhibition of a speciment is not, per se, a sale by sample. To the same effect is the case of Chapman v. March.[5] But in the case under consideration, every circumstance combines to show that there was no intention to warrant, and these circumstances were perfectly well known to the purchaser.

The specimen exhibited, and what is declared in regard to it, may be evincive of opinion only, in which case all the authorities agree that there is no sale by sample.[6] Hibbert v. Shee[7] has been much relied on by the appellants' counsel. It must be recollected, however, to have been conceded in that case, that the sale was by sample, and the only question was, how far the commodity corresponded with the sample. The sugar had been purchased by a sample, which, after long exposure to the

1.—4 Camp. 144.
2.—6 Taunt. 108; 4 Camp. 169.
3.—13 Mass. Rep. 140.
4.—Ib. 139.
5.—19 Johns. Rep. 291; 20 Ib. 196.
6.—2 Caines, 55; 3 T. R. 57; 20 Johns. Rep. 203; 2 Comyn. Cont. 273.
7.—Camp. Rep. 113.

sun, had lost its coloring matter; the plaintiff supposed, therefore, that he was getting sugar nearly white, because he had a right to presume that the samples were fresh.

The Attorney-General, for the appellants, in reply, insisted upon the evidence to show that this was, in fact, a sale by sample. The jurisdiction of the court below, as a court of admiralty, was admitted; the objection to it having [*639 been waived. *How ought this jurisdiction to have been exercised? The libelant's claim was in rem, and in the alternative, for the fair value of the property, if transmuted. He now asks vastly more. If the specific thing had been preserved in the custody of the court, he would have received nothing but its real effective value. How, then, can he claim more, in consequence of the sale? How can a court of justice permit such injustice to be done to an incidental suitor, who has purchased under its decree? A sale by sample is a symbolical warranty. A sale by sample is where a portion of the thing is shown as a specimen of the entire commodity. The language of Mr. Chief Justice Parker, in Bradford v. Manly,[1] applies: "Among fair dealers, there could be no question that the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented if the law should refuse its aid to the party who had been deceived in a purchase so made." The sample could not have been exhibited merely to show the generic character. The principle of the legal rule is, the impression which is naturally produced on the mind of the vendee by the production of the sample. The marshal and auctioneer, although acting under the authority of the court, must be considered as the agents of the owners of the goods. If these judicial agents proceed exactly as a merchant would have done, under the same circumstances, the purchaser has a right to draw [*640 the same inference as *in the case of a private sale. The court has power to relieve, and will relieve, upon the same principles which govern a court of equity, while it is in fieri. The rules of the Roman law on this subject have never been incorporated into our municipal code, and we are rather to look to the analogous practice of the courts of equity. The circumstance of its being a judicial sale, so far from its disabling the court, gives it the more authority to redress the party, in case of mistake or misrepresentation, even in a state of facts where relief would not be granted in a private sale. It has complete control over the whole subject, and may, therefore, do the most liberal justice. Even admitting that the officers of the court have no authority to warrant expressly, or by legal implication, still the court may interfere; and, pursuing the example of a court of equity, may do justice to those who have suffered an incidental injury from judicial proceedings, which are entirely in invitos.

Mr. Justice Thompson delivered the opinion of the court, and after stating the case, proceeded as follows:

Upon the argument in this court, the counsel for the respondent abandoned the objection to the jurisdiction of the court. It becomes unnecessary, therefore, that we should notice that question.

In examining into the merits of the claim set up by the appellant, in his petition, it ought to be borne in mind, that the Monte Allegre and her cargo were illegally captured and brought within the United States, and that judgment of restitution *has been awarded in favor [*641 of the original owners. 7 Wheat. Rep. 520. Granting the claim now set up, will be throwing upon the owners an additional sacrifice of their property, without any misconduct of theirs, but, on the contrary, growing out of the illegal and wrongful acts of others. Such a result, in order to receive the sanction of a court of justice, ought to be called for by some plain and well-settled principles of law or equity. It may be said that the appellant is not chargeable with any of the misconduct imputable to those who have occasioned the loss upon the Monte Allegre and her cargo. But when one of two innocent persons must suffer, he to whom is imputable negligence or want of the employment of all the means within his reach to guard against the injury, must bear the loss.

The proceedings to obtain the order of sale of the tobacco, were without the knowledge or consent of the owners, and their property exposed to sale against their will. The appellant became the purchaser voluntarily, and with full opportunity of informing himself as to the state and condition of the tobacco he purchased. The loss, therefore, for which he now seeks indemnity, has come upon him by his own negligence.

Keeping in view these considerations, we proceed to an examination of the appellant's claim, which, if sustained, must be on the ground of fraud, or warranty, or some principles peculiar to admiralty jurisdiction, and unknown to the common law.

*If the appellant has sustained an in- [*642 jury, by a fraud not imputable in any manner to the appellee, it would be obviously unjust that he, or his property, should be made answerable for the damages. No part of the proof in the case affords the least countenance to the idea that the appellee had any agency, directly or indirectly, in the sale of the tobacco; he, of course, cannot be chargeable with fraud, and this alone would be sufficient to reject any claim on this ground. But any allegation of fraud is not better supported against the marshal or auctioneer. The petition does not allege directly, and in terms, fraudulent conduct in anyone; but only states, that from the representations of the marshal and auctioneer, the petitioner, and other purchasers, believed the tobacco to be sound and merchantable, and that under such belief he became a purchaser, at a fair price for sound and merchantable tobacco. Whether this allegation is sufficient to let in an inquiry at all upon the question of fraud, it is unnecessary to examine, because, if sufficiently alleged, it is wholly unsupported by proof. No witness undertakes to say that the marshal made any representations whatever respecting the tobacco; and the marshal himself testifies that he was present at the sale, which was made by the auctioneer under his direction, and that he gave him no instructions, other than telling him it was public property,

1.—13 Mass. Rep. 143.

and was to be sold as it was, and by order of the court. Nothing was therefore done by the marshal calculated to mislead or deceive purchasers. And the auctioneer testifies that the 643*] he knew *the property was sold by order of the court, and that he received from the marshal no instructions other than to sell for cash; that there was no deception intended or practiced in the sale. And that this was true, so far as respected himself, is fully confirmed by the fact that the house of which he was a partner, after the sale, and before the shipment to Gibraltar, purchased one-third of the tobacco from the appellant.

There is therefore no color for charging anyone with fraudulent conduct in the sale of the tobacco. And, indeed, this did not seem, on the argument, to be relied upon as a distinct and independent ground for relief, but only to be brought in aid of the claim, on the ground of warranty, which we proceed next to examine.

It was made a question on the argument, by the counsel for the appellee, whether the evidence in the case warranted the conclusion that the tobacco, at the time of the sale, was in as deteriorated a state as it was found at Gibraltar. According to the view taken by the court of the case, this inquiry becomes wholly unnecessary. It would be very reasonable to conclude, that if the tobacco was in a decaying condition at the time of sale, it would become more injured by lapse of time. But, were the inquiry necessary, the agreement of the counsel, filed the 18th of May, 1822, would seem to put that question at rest, for it is there expressly admitted that the tobacco sustained no damage on the voyage.

In support of the claim, on the ground of warranty, it is said this was a sale by sample, 644*] and *that all such sales carry with them a guaranty, that the article, in bulk, is of the same quality, in all respects, as the sample exhibited. If the rules of law which govern sales by sample, are at all applicable to this case, it becomes necessary to ascertain by whom the warranty is made. In private transactions, no difficulty on this head can arise. A merchant, who employs a broker to sell his goods, knows, or is presumed to know, the state and condition of the article he offers for sale; and if the nature or situation of the property is such that it cannot be conveniently examined in bulk, he has a right, and it is for the convenience of trade that he should be permitted, to select a portion, and exhibit it as a specimen or sample of the whole; and that he should be held responsible for the truth of such representation. The broker is his special agent for this purpose, and goes into the market, clothed with authority to bind his principal. In such cases, if the article does not correspond with the sample, the injured purchaser knows where to look for redress; and the owner is justly chargeable with the loss, as he was bound to know the condition of his own property, and to send out a fair sample, if he undertook to sell in that way.

But in judicial sales, like the present, there is no analogy whatever to such practice. The proceedings are, altogether, hostile to the owner of the goods sold, which are taken against his will, and exposed to sale without his consent. And it would be great injustice to make him responsible for the quality of the goods thus taken from him. *Nor can the [*645 marshal, or auctioneer, while acting within the scope of their authority, be considered, in any respect whatever, as warranting the property sold. The marshal, from the nature of the transaction, must be ignorant of the particular state and condition of the property. He is the mere minister of the law, to execute the order of the court; and a due discharge of his duty does not require more than that he should give to purchasers a fair opportunity of examining and informing themselves of the nature and condition of the property offered for sale. An auctioneer, in the ordinary discharge of his duty, is only an agent to sell; and in the present case, he acted only as the special agent of the marshal, without any authority, express or implied, to go beyond the single act of selling the goods. And the marshal, as an officer to execute the orders of the court, has no authority, in his official character, to do any act that shall, expressly or impliedly, bind anyone by warranty. If he steps out of his official duty, and does what the law has given him no authority to do, he may make himself personally responsible, and the injured party must look to him for redress. With that question, however, we have not, necessarily, any concern at present. But in that point of view, we see nothing in the present case to justify the conclusion that the marshal went beyond what was strictly his official duty. This was not a sale by sample, according to the mercantile understanding of that practice, or the legal acceptation of the term. In such sales, the purchaser *trusts entirely to his warranty; and [*646 in general is not referred to, nor has he any opportunity of examining, the article in bulk; and, at all events, is not chargeable with negligence, if he omits to make the examination, which he has it in his power to do. Although most of the witnesses speak of the tobacco exhibited at the auction, as a sample, we must look at the whole transaction, and see what is the judgment of law upon it, and not be governed by what be miscalled a sample. The marshal denies that he ever authorized the auctioneer to sell by sample; he says he saw some seroons opened, but he supposed it was to show the description of property, or the species of goods offered for sale; that he never examined the tobacco himself, and knew nothing about it; that he never did sell by sample, and never conceived himself authorized so to do; and the auctioneer does not pretend to have had any authority or instructions from the marshal to sell by sample. Whatever, therefore, from the testimony of the auctioneer, bears the appearance of a sale by sample, was of his own mere motion, and without authority; and if the appellant has been misled by anyone, it must have been the auctioneer; and if he has exceeded his authority, so as to make himself personally responsible, redress, if at all to be had, must be from him alone; and in examining his testimony, it ought not to be lost sight of, that, after the sale, he became interested in the purchase, and probably looks to the event of this suit for indemnity for his own loss. But his testimony, when taken together, affords no just inference against *him. He states, [*647 that a part of the tobacco was stored at Fell's

Point, a part on Smith's wharf, and from sixty to eighty seroons in the warehouse of himself and partner, which was so announced at the time of the sale; that fifteen or twenty seroons were taken into the street, out of which three or four were opened, as a sample of the whole parcel, by which the whole quantity was sold. But he also states, that the mode in which this tobacco was sold, is the usual and ordinary mode in which merchandise is generally sold at auction, when no specific directions to the contrary are given. This shows very satisfactorily that he did not understand the sale to be by sample, in the legal sense of the term, so as to carry with it a warranty. For sales at auction, in the usual mode, are never understood to be accompanied by a warranty. Auctioneers are special agents, and have only authority to sell, and not to warrant, unless specially instructed so to do. Information was given to those who attended the auction, where the tobacco was stored, to give them an opportunity of examining it, if they were disposed to do it. Some who attended with a view of purchasing, did examine, and satisfied themselves that it was unsound. Not only that which was stored at a distance was found in this condition, but also that which was in the storehouse, where the auction was held, and under the immediate view of purchasers. The appellant had it, therefore, in his power to obtain the same information with respect to the condition of the tobacco, if he had thought it worth while to give himself the trouble. So 648*] that *whatever loss he has sustained is attributable solely to his own negligence, without the fault or misconduct of anyone; and the law will not, and ought not, to afford him redress. In sales of this description particularly, and generally in all judicial sales, the rule caveat emptor must necessarily apply, from the nature of the transaction; there being no one to whom recourse can be had for indemnity against any loss which may be sustained.

Is there, then, anything peculiar in the powers of a court of admiralty that will authorize its interposition, or justify granting relief, to which a party is not entitled by the settled rules of the common law? We know of no such principle. Courts of admiralty proceed, in many cases, in rem. But this does not alter the principles by which they are to be governed in the disposition of the res. It is true that the proceeds of the Monte Allegre and her cargo remain in the Circuit Court, and may be subject to the order of this court, if a proper case was made out, which, in law or equity, fixed a charge upon this fund. These proceeds are in court as the property of the original owners, and for distribution only. And if such owners would not be liable at law for the loss upon the tobacco, it is not perceived that any principles of justice or equity will throw such loss upon their property. The principle, if well founded, cannot depend upon the contingency, whether or not the proceeds shall happen to remain in court until the defect in the article sold is discovered. If the proceeds are liable, they ought to be followed into the hands of the owner after 649*] distribution; and if *they cannot be reached, the remedy ought to be in personam. Such is the end to which the doctrine must inevitably lead, if well founded. But it is presumed no one would push it thus far.

There is no rule in courts of equity to sanction what is now asked for on the part of the appellant. The case of Saville v. Saville, 1 P. Wms. 746, is not at all analogous. The application there was to compel the purchaser of certain property to complete his contract, he wishing to forfeit his deposit, and go no further; and the question was, whether he should be compelled to go on and complete the contract; and the court permitted him to forfeit the deposit, considering it a hard bargain, not fit to be executed. But in the case before us, the contract was executed. Everything respecting it had been consummated months before the discovery of the damaged condition of the tobacco. The property had been delivered, and the consideration money paid; and the bargain was as much beyond the control of the court as if the discovery of the defect had been made years afterwards. We are, therefore, brought back to the question, whether, in sales like the present, the rule caveat emptor is to be applied; and thinking, for the reasons already suggested, that it is, the decree of the Circuit Court, dismissing the petition, must be affirmed.

Decree affirmed.

[*Practice.] [*650

M'IVER et al. v. WATTLES.

Where the writ of error is dismissed, for want of jurisdiction, no costs are allowed.

ERROR to the Circuit Court for the District of Columbia.

Upon inspection of the record, it appeared that the sum in controversy was below one thousand dollars, and, thereupon, the court directed the writ of error to be dismissed.

Mr. Taylor, for the defendant in error, moved for costs.

Mr. Chief Justice Marshall said, that in all cases where the cause is dismissed for want of jurisdiction, no costs are allowed.

Motion denied.

[*Construction of Statute.] [*651

WALTON, Plaintiff in Error,
v.
THE UNITED STATES, Defendants in Error.

Under the 2d and 4th sections of the act of the 3d of March, 1797. ch. 368. a certified transcript from the books of the treasury is evidence against the defendant; and no claim for any credit can be admitted at the trial, which has not been presented to, and disallowed by, the accounting officer of the treasury (unless in the cases excepted by the act), although no proceedings have been had against the debtor, under the act of the 3d of March, 1795, ch.

289, by notification from the Treasury Department, requiring him to render to the Auditor of the Treasury his accounts and vouchers for settlement.

Quære, Whether the act of the 3d of March, 1795, ch. 289, is not virtually repealed by the act of the 3d of March, 1797, ch. 368.

The official bond given by a receiver of public moneys, does not extinguish the simple contract debt arising from a balance of account due from him to the United States. An action of assumpsit for the balance of account, and an action of debt upon the bond against the principal and sureties, may be maintained at the same time.

In an action against the receiver, not describing him in his official capacity, evidence may be given of moneys received in his official capacity; and, under a count for money had and received, evidence may be given of public stock received by him, where such stock is, by law, made receivable, at par, in payment for lands sold by the United States.

It is not necessary that a bill of exceptions should be formally drawn and signed before the trial is at an end. The exception may be taken at the trial, and noted by the court, and may, afterwards, during the term, be reduced to form, and signed by the judge. But, in such cases, it is signed nunc pro tunc, and purports, on its face, to be the same as if actually reduced to form, and signed during the trial. It would be a fatal error if it were to appear otherwise.

652*] *THIS case was argued by Mr. Clay for the plaintiff in error, and by the Attorney-General for the defendants in error.

Mr. Justice Duvall delivered the opinion of the court:

The plaintiff in error in this case, who was defendant in the court below, was a receiver of public money, in one of the land-offices in the district of Mississippi, and being indebted to the United States in a large amount, an action of assumpsit was instituted against him, to recover the balance due, which was stated to be $102,478.85½, made up of cash and stock; viz., in cash, $93,639.93½, and in Mississippi stock, $8,838.92. The declaration contains only one count, which is for money lent and advanced, laid out and expended, and for money had and received. To this the general issue of non assumpsit was pleaded, and issue was joined. The attorney for the United States, to support the claim, offered in evidence a transcript from the books and proceedings of the treasury, authenticated under the seal of the department, pursuant to an act to provide more effectually for the settlement of accounts between the United States and receivers of public money, passed on the 3d of March, 1797; to the admission of which evidence the attorney for the defendant objected:

1. Because there had not been any proceedings against him under the act of the 3d of March, 1795, entitled, "An act for the more effectual recovery of debts due from individuals 653*] to the United *States," by notification from the Treasury Department, requiring him to render to the Auditor of the Treasury his accounts and vouchers, in order to a settlement, as directed by that act.

2. Because the account offered in evidence was against the defendant, as receiver of public money, west of Pearl River, and that the defendant, as such receiver, had executed a bond with security, according to law, for the faithful discharge of his duties as such; and that the remedy against him being upon his official bond alone, an action for money had and received would not lie.

3. Because the declaration was against him in his individual capacity, and the evidence offered showed that he was liable, if at all, in his public character as receiver of public money west of Pearl River, and not in his individual capacity. But the court overruled the objection, and were of opinion that the transcript was evidence to support the declaration, and permitted the same to go to the jury; to which opinion of the court, the defendant, by his counsel, excepted, and the proceedings were brought up to this court by writ of error, for their revision.

In the argument of this cause, the counsel for the plaintiff in error has made no question which does not appear in the record. He contends that the act of 1795 is not repealed by that of 1797, and that the suit of The United States v. Walton cannot be maintained, because, before a suit can be sustained by the United States against a debtor, he is entitled, according to the provisions of the act of 1795, to a notification from *the Comptroller of [*654 the Treasury, to appear before the Auditor, with his accounts and vouchers, affording him an opportunity of a just and fair settlement upon a full investigation of his accounts. That, without such investigation, many items, for which the debtor may claim a credit, may be rejected for want of the necessary explanations

To this reasoning the Attorney-General, on behalf of the United States, replies, by insisting that the act of 1795 is virtually repealed by that of 1797, which contains similar and additional provisions, incompatible with those of the former act; and that the debtor has ample opportunity of a full and just examination of his accounts under the last-mentioned act. The court deem it unnecessary to decide the question, whether the act of 1795 is repealed by that of 1797, because the last-mentioned act contains ample provision for this case. It is provided by the 2d section of that act, "that in every case of delinquency, where suit has been or shall be instituted, a transcript from the books and proceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted as evidence, etc." And by the 4th section it is enacted, "that in suits between the United States and individuals, no claim for a credit shall be admitted, upon trial, but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed, in whole or in part, unless it should be proved to the satisfaction of the court, that the defendant is, at the time of trial, in possession of vouchers *not be- [*655 fore in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury, by absence from the United States, or some unavoidable accident."

These positive provisions of the law must be disregarded, if we say that the authenticated transcript from the treasury department is not evidence. They are too plain to require argument; and the debtor has a fair opportunity of establishing his account, if just, without a notification from the Comptroller, according to the act of 1795. In the first place, he states his account, and when stated, it is rendered, to the auditor, who examines it, and makes a report

to the Comptroller, by whom it is revised. Afterwards, in case of a suit, he has an impartial trial in court, where an opportunity is again afforded him of supporting his claim; and if the court and jury, before whom the cause is tried, should be of opinion that any item of his account has been improperly rejected, it is restored to his credit. On the trial of this cause in the court below, it appears that the balance claimed was reduced by the verdict of the jury to $44,994.57; it is presumed, by the exhibition of vouchers under the 4th section of the act of 1797, which had not been rendered to the accounting officers of the treasury.

It was also urged, on the part of the plaintiff in error, that the amount offered in evidence is against him, as receiver of public money; and that he had executed a bond with security, according to law, for the faithful discharge of his duties as such; and that, therefore, the account [*656 was merged *in the sealed instrument, on which alone the action can be sustained. It may be admitted, that a security under seal extinguishes a simple contract debt; but in the case under consideration, the account and the bond are distinct from each other. The official bond is not given for the balance due; it is a collateral security for the faithful performance of the official duties of the officer, and was executed long before the existence of the balance claimed. It may be asked, how could a bond, in a penalty of $10,000, extinguish a simple contract debt of more than $100,000? The balance claimed could not be recovered by a suit on the bond. In all similar cases, between the United States and their debtors, it is usual to institute a suit for the recovery of the balance struck on settlement of the account, and an action of debt on the official bond, to recover the penalty of the sureties. It is indispensably necessary, in every instance where the debtor is unable to pay.

The third and last objection made on behalf of the plaintiff in error, is on the ground that he is charged in the declaration in his individual capacity, and the evidence offered is against him in his public character; and further, that the account charges stock and money, and the claim is in money only; that on a count for money had and received, evidence cannot be given that the defendant received anything but money. It is a full answer to this objection, to observe, (1) that the receiver is individually responsible for all the money he received in his public capacity; and, (2) that evidences of the [*657 public debt are made, by *law, payable at their nominal value, for lands sold by the United States; and, therefore, stock is receivable as money at par. And it appearing, by the account offered in evidence, that the far greater part of the balance claimed is in money, it was proper and legal evidence to support the declaration; and as the balance claimed was reduced by the verdict of the jury, which is for money only, and for less than the amount of cash claimed, the just inference is, that the stock balance was extinguished by the vouchers produced by the defendant, on the trial in the court below.

An objection was made on the part of the United States, that the bill of exceptions in this case was not taken at the trial, but purports on the face of the record to have been taken and signed after judgment rendered in the case. It is true, that the bill of exceptions states that the evidence was objected to at the trial; but it is not said that any exception was then taken to the decision of the court. So that, in fact, it might be true, that the objection was made, and yet not insisted upon by way of exception. But the more material consideration is, that the bill of exceptions itself appears on the record not to have been taken at all, until after judgment. It is a settled principle that no bill of exceptions is valid, which is not for matter excepted to at the trial. We do not mean to say that it is necessary (and in point of practice we know it to be otherwise) that the bill of exceptions should be formally drawn and signed, before the trial is at an end. It will be sufficient, if the exception be taken at the trial, and noted by the *court, with [*658 the requisite certainty; and it may, afterwards, during the term, according to the rules of the court, be reduced to form, and signed by the judge; and so, in fact, is the general practice. But in all such cases, the bill of exceptions is signed nunc pro tunc; and it purports on its face to be the same as if actually reduced to form, and signed, pending the trial. And it would be a fatal error if it were to appear otherwise; for the original authority, under which bills of exceptions are allowed, has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before the verdict.

Judgment affirmed with costs.

[Prize.]

THE FANNY.

The Consul-General of Portugal, Libelant.

Case of capture by an armed vessel, fitted out in the ports of the United States, in breach of the neutrality acts. Claim by an alleged bonæ fidei purchaser in a foreign port rejected, and restitution decreed to the original owners.

A bonæ fidei purchaser, without notice, in such case, is entitled to be re-imbursed the freight which he may have paid upon the captured goods; and the innocent neutral carrier of such goods, the same having been transhipped in a foreign port, is entitled to freight out of the goods.

*APPEAL from the Circuit Court of [*659 Maryland.

This was the case of a libel filed by the Consul-General of Portugal, on behalf of certain Portuguese subjects, owners of a number of hides which had been brought from St. Thomas to Baltimore in the brig Fanny. The facts proved in the cause, which the court considered to be material, are the following:

Some time in the year 1817, Robert M. Goodwin, Clement Cathill, James Halsey and John R. Mifflin, all of them citizens of the United States, and denominated "The American Concern," fitted out, at Buenos Ayres, a brig, called La Republicana, as a privateer to cruise against the subjects of Spain and Portugal, under a commission obtained for her from Jose Artigas. Thus prepared, she sailed under the command of Obadiah Chase, also a citizen of the United

States, and, in February, 1818, she captured the Portugese brig, Aurora, which, with her cargo, were sent to St. Barts, and there sold as American property for about $20,000. With this money, thus raised, Goodwin proceeded to Baltimore, and there invested it in the purchase of a new brig, called the Athenea, which had been lately built at that port. Having changed her name to that of the New Republicana, both privateers shipped their crews at Baltimore, together with their munitions of war, except the cannon and carriages for the latter vessel, which, with a view of deceiving the custom-house officers, were put on board of a small schooner, and were transferred to this priva- [*660] teer, a few miles below the *fort. The commission, together with other papers belonging to the Republicana, were delivered to the New Republicana, and both the privateers proceeded to sea; the latter under the command of the above-mentioned Clement Cathill, one of the owners. She soon after fell in with the Portuguese ship Don Pedro de Alcantara, laden with a valuable cargo of hides, sugar, etc., which she captured on the 22d of September, 1818, and ordered in to the Five Islands, there to await the orders of Goodwin. At this place, Goodwin transhipped the principal part of the cargo into several small vessels, which proceeded to the Island of St. Thomas, consigned to Souffron & Co., merchants of that place. The residue of the cargo, except a small part, which was afterwards taken, together with the Don Pedro, by Commodore Jolly, commanding a squadron belonging to the republic of Columbia, was also carried by Goodwin to St. Thomas, in the old privateer, at which place it is probable the whole or a great part of the captured property was sold. Nathaniel Levy, the American consul at that island, purchased 4,004 of the hides, which, together with 555 logs of lignum-vitæ, he shipped in the brig Fanny to Baltimore, where she arrived in January, 1819, consigned to Lyde Goodwin. On the 21st of this month, the hides and lignum vitæ were libeled as Portuguese property, illegally taken on the high seas, and on the 27th of the same month, the lignum-vitæ was released from the operation of the libel.

To this libel a claim was filed by Lyde Goodwin, as agent of Levy, in which it is as- [*661] serted that *the hides had been purchased by Levy, in the regular course of trade, from Souffron & Co., and all knowledge of the matters alleged in the libel is denied. On the 15th of March the hides were delivered upon stipulation, having been appraised at the sum of $12,000.

In the progress of the cause in the District Court, the owners of the brig Fanny presented to the judge a petition, setting forth, that on the 6th of October, 1818. Nathan Levy entered into a charter-party of affreightment with the petitioners for the brig Fanny, on certain terms stated in the petition, for a voyage from Baltimore to St. Lucie, and if required, to three other ports in the West Indies, and thence back to Baltimore. That, under this charter-party, the said brig took in a cargo at Baltimore, and sailed to St. Lucie, and to three other ports, and finally delivered the cargo to the said Levy, who afterwards shipped on board the said brig, at St. Thomas, 4,000 hides and 555 sticks of lignum-vitæ, to be carried to Baltimore, where she arrived on the 17th of January, 1819. That upon her arrival, and when the master was about to deliver the cargo to the consignee of Levy, this libel and claim were filed, and the cargo was taken from the possession of the master by the marshal, under the process of the said court. That there was then due to the petitioners, on the said charter-party, the sum of $2,094.50, as admitted by the said Levy, which they pray may be paid out of the proceeds of the hides and lignum-vitæ. This petition was accompanied by an account, dated the 28th of December, 1818, *signed by Nathan Levy, [*662 acknowledging a balante of $2,094.50 to be due the said brig Fanny on the charter-party. Below this account is the following entry, not signed by any person: "The freight on the homeward cargo, consisting of 4,004 hides and 555 sticks of lignum-vitæ, $1,047.25." The court made an order that the agent of the claimant should pay the freight on the above goods to the amount of $1,047.25.

The District Court decreed the claimants to pay to the libelant the appraised value of the hides, as mentioned in their stipulation, together with interests and costs, after deducting the amount of freight theretofore ordered to be paid. This decree being wholly affirmed by the Circuit Court, upon an appeal, both parties appealed from that decree to this court.

Mr. D. Hoffman, for the libelant, argued, 1. That this was a piratical taking, there being no sufficient evidence of a valid commission.[1] But if the power granting the commission were valid, still the seizure is piratical, as the commission was not only amortised, but transferred to a new vessel and a new commander, by whom it was abused in the grossest acts of violence, evincive of an animus depredandi, and which constituted the captors trespassers ab initio.[2] Had the authority which granted the commission been competent, *and the [*663 proceedings under it regular, as the laws of this country have been violated by the captors, who are American citizens, this court will restore the res capta.[3] The appellant claims the protection of this court, on the ground of his being a bonæ fidei purchaser, under a valid condemnation. If this could avail him in law, he has failed in his proof of bona fides. Every circumstance of evidence and probability is against him. Admitting, however, that there was a purchase in good faith, and under entire ignorance of the circumstances, the title of this claimant cannot be valid against that of the original owners, since there was no condemnation in point of fact; and if there had been, still, as the taking was either without a valid commission, or in virtue of an amortised or abused one, the condemnation would be inoperative.[4]

2. Levy, if free from all blame, cannot sustain his claim, under the doctrine of market overt. There can be no such protection for property taken jure belli, at least until after

1.—7 Wheat. Rep. 476; 8 Wheat. Rep. 111.
2.—3 Wood. Lec.; 14 Johns. Rep. 273.
3.—6 Wheat. Rep. 152; 7 Wheat. Rep. 496; 8 Wheat. Rep. 108.
4.—2 Bro. Civ. Law, 55. 252, 253, 268, 461, 464; 1 Johns. Rep. 471; Bee's Rep. 308; 5 Wheat. Rep. 345. 346.

condemnation; and the doctrine of market overt is itself unknown to the jus gentium.[1]

3. A condemnation is produced, but it is wholly unnecessary to dwell on its operation, since a condemnation, in all respects valid as between belligerents, cannot deprive this 664*] court of its power to *restore, when the original taking was in violation of our laws. And, second, the condemnation now exhibited, cannot possibly apply to the property in question, as it will be found, on reference to the dates, that this decree of condemnation was some time after Levy's alleged purchase, and, indeed, only a few days prior to the filing of the libel in this cause.[2] But,

4. The main point of inquiry regards the claim to freight. We contend that the appellant is responsible to us for the entire value of the hides, as the same is ascertained by the stipulation, together with interest; and that the freight bill, though properly paid by the appellant to the innocent ship-owner, cannot now be deducted by this illegal captor, from the amount stipulated to be paid by him. Waiving all question which might be made, as to the power of this court to decree freight in the case, on the ground of incidental jurisdiction, we insist that the present is not a claim by the ship-owner for his freight, but by the appellant, to have the same allowed to him out of this fund, as having been properly paid by him. If this court reject the claim of the appellant to the property, on the ground of its having been illegally captured, and that this infirmity adheres to the property even in the hands of a bonæ fidei purchaser, we are at a loss to conceive how this purchaser can rightfully impose any charge or incumbrance whatever upon it. But when we advert to the real character of the appellant, and find him 665*] *an unworthy claimant, in truth as much so as the captor himself had been, we cannot suppose that he can be entitled to any favor at the hands of this court. He brought this prize property into an American port, without the knowledge or privity of its owner, and surely ought not to claim either compensation or indemnity, for doing that which, as to the other party, is in invitum, and has proved, in fact, extremely prejudicial to him. If this be a claim on the fund, it is only so as regards the innocent owner. No lien can be created by one who has no property, general or special, in the thing. If a malæ fidei possessor cannot so mortgage or pledge the property, as that such mortgage or pledge shall be valid against the true proprietor, he is not competent to create any lien, nor to impose any charge or incumbrance whatever. But without pressing this point, we do not think that the appellant is entitled to be subrogated to the rights of the innocent ship-owner, if such right of lien even vested in him. If this claim to freight were one in rem, as well as in personam, and the illegal captors, or those claiming under them, have satisfied the personal obligation, it does not follow that they can now enforce that lien against the fund, which it might, argumenti gratia, be admitted that the ship-owner possessed. This is very unlike the case of a neutral's claim for freight on belligerent property captured from him by another belligerent. The neutral had a right so to employ his vessel, subject only to the belligerent's right to make the seizure; he, therefore, in such case, takes it cum onere, and must pay the *neutral his freight. The object here, [*666 however, is to transfer the obligation of paying the freight from the illegal captor to the despoiled individual. If the controversy were now wholly between the Portuguese owners of the property and the innocent American ship-owner, the claim might deserve some consideration. In this case, the ship-owner is the agent of the captors, or those claiming under them, not of the Portuguese owner, and as such, must look to his employers, and not to the goods; and if, in fact, the illegal captor has paid the freight, he cannot thereby entitle himself to be refunded out of the fruits of his piratical taking. The claim to freight is always conventional; a claim even to pro rata freight arises from some convention, and not from the simple fact of transportation. In this case, no consent of the owners to the shipment to Baltimore can be implied. Our claim to the property is disputed on all points; and if none of these is found tenable, but the taking is ascertained to be a gross act of piracy, it would be a strange anomaly, that an honest and lawful belligerent must pay freight to a neutral ship-owner, and yet that a piratical captor shall be exempt from charges voluntarily imposed by him on the property, and that these shall be cast on those whom he has endeavored to despoil.

5. The court below has, also, manifestly erred in allowing the entire freight bill, as this includes a charge on some lignum-vitæ, which formed no part of that which is owned or demanded by the libelant. We therefore ask at the hands of this court the whole value of the property, as it is ascertained *by the [*667 stipulation, together with interests from its date, so that the claim to freight may be wholly rejected. The ship-owner is, indeed, the petitioner for freight in this case; but he has been since paid, and the claim, in truth, is now at the instance of the captor, who desires to be subrogated to the rights of the ship-owner, and to enforce his lien, if he had one. We have endeavored to show that no such right existed, and that if it ever did, the captor is not entitled to receive the benefit of such lien.

Mr. Winder, contra, argued principally upon the facts, to show that the alleged purchase was bona fide.

Mr. Justice Washington delivered the opinion of the court, and after stating the case, proceeded as follows:

The above case presents two questions for the consideration of this court: (1) Whether the court below was correct, in restoring to the Portuguese owner that part of the cargo of the Fanny which was restored. And (2) Whether the freight which was ordered by the court to be paid to the owners of that vessel, ought, in whole or in part, to have been deducted from the appraised value of the hides.

Upon the first question, it is to be observed

1.—8 Wheat. Rep. 108, 167, 174.

2.—2 Woodb. Lec. 429; 1 Johns. Cas. 471; Martens on Priv. 44; Moll. de Jure Mar. 57, 60, 68, 85; God. 193; Hob. 79; 7 Wheat. Rep. 490.

that the facts above stated are incontestably proved by the evidence in the cause. That the capturing vessel, the New Republicana, was [*668] built at Baltimore, *purchased at that place by citizens of the United States, and there manned and fitted for sea, armed and equipped as a vessel of war, within the waters and jurisdiction of the United States; and with such equipments, left the United States, to cruise against the vessels and property of Spanish and Portuguese subjects on the high seas; and upon such cruise, captured the Don Pedro de Alcantara, with a valuable cargo, belonging to Portuguese subjects, were facts too clearly proved to be questioned; nor were they questioned by the counsel for the claimants. It is established, by evidence equally clear and uncontradicted, that the 4,004 hides which were brought in the Fanny from St. Thomas to Baltimore, upon which the sentence of the court below operated, formed a part of the cargo of the Don Pedro de Alcantara at the time of her capture, and that they were the property of Portuguese subjects.

This, then, is the case of property belonging to the subjects of a friendly power, captured on the high seas by a privateer, owned and commanded by citizens of the United States, fitted and equipped as a vessel of war, within the waters and jurisdiction of the United States; and, according to the uniform decisions of this court in similar cases, as well as in others, where similar equipments have been made within the waters of the United States by foreigners, the property so illegally captured and brought within our jurisdiction must be restored to the original owners, unless it could be maintained that the sale of it to the claimant devested [669*] those owners of their right *to the same. But it is to be remarked, in the first place, that the asserted purchase of these hides by Levy is unsupported by any evidence whatever. He alleges in his claim, that he purchased the hides for a valuable consideration from Souffron & Co., in the regular course of trade; but this allegation is not upheld by any written document, or by the testimony of a single witness. The cause was depending more than two years in the courts below, during all which time it was fully in the power of the claimant, a resident of the Island of St. Thomas, to have proved the reality of this purchase, by the testimony of the vendors, or otherwise, if the fact had been as it was alleged.

But, admitting the truth of the asserted sale to Levy, he was, nevertheless, a purchaser from the agent of a tortious possessor of property to which he had no title whatever, and who, consequently, could transfer none to his vendee. The proceedings in the Vice-Admiralty Court of Margarita, by Commodore Jolly, against the Don Pedro de Alcantara and the small part of her cargo which had not been transhipped at the Five Islands, so far from amounting to a sentence of condemnation, even of the property libeled as prize of war, proceeded upon the ground of a recapture from a non-commissioned privateer, for which the recaptor was rewarded by a liberal salvage, and the residue of the sales of the property was decreed to the Portuguese owners, in case they should claim the same within the period of a year and a day. This court is therefore of opinion that the decree *of the Circuit Court, so far as it [*670 restores to the libelant the 4,004 hides, or their proceeds, is right, and ought to be affirmed.

The second question respects the freight, which the decree of the court below ordered to be deducted from the appraised value of the hides; and it is attended by no difficulty but such as arises from the confined and imperfect statement of the facts appearing in this record. That the freight of the lignum-vitæ, which did not belong to the libelants, and against which the proceedings were abandoned, ought not to have been paid out of the proceeds of the hides, is a matter which we think is quite too clear to be disputed; and we think it probable that the mistake was occasioned by an oversight in the judge of the District Court, from his not knowing, or recollecting, when the petition for freight was before him, that the lignum-vitæ had been released from the operation of the libel. The decree, then, must, of course, be reversed; for this reason, and the cause remanded for further proceedings, in order to ascertain and separate the freight upon that article, from that due upon the hides.

But there is, apparently, error in the decree in respect to the whole of the freight, which, it is possible, may be explained and removed by a further examination, of this subject in the court below. The petition for freight claims the precise sum of $2,094.50, as the balance acknowledged to be due by the claimant, and the account, signed by him on the 28th of December, 1818, which accompanied the petition, amounted *to an acknowledgment that [*671 that sum was then due. The items of that account are, freight on 1,095 barrels of flour, out and home, per charter-party, 5 cases of furniture, 36 bags of corn, and 7 days' demurrage. Below that account is stated the freight due upon the hides and lignum-vitæ, amounting to $1,047.25. It would seem, therefore, as if the freight upon the hides and lignum-vitæ, which arrived in Baltimore some time in January, 1819, was not included in the account signed by the claimant, and if so, it was not claimed to be due, nor required by the petition to be paid. Yet the order of the court was that it should be paid, and it was accordingly deducted from the appraised value of the hides. If the case should turn out to be such as is above supposed, it would seem to warrant the conclusion that the freight upon the hides had been paid by Levy, in which case it ought not to be deducted from their appraised value, unless the reality of the asserted purchase of the hides by Levy should be made to appear to the satisfaction of the court below, without which we are of opinion that he is to be considered as a mala fidei possessor, and, consequently, as not entitled to be re-imbursed the freight so paid, out of the property of the Portuguese owners. If, on the other hand, it should appear that the claimant, was a bonæ fidei purchaser of the hides, without notice, or that the freight upon them had not been paid by him to the owners of the Fanny, then it was properly deducted.

*Decree.—This cause came on to be [*672 heard, etc. On consideration whereof, it is decreed and ordered that so much of the decree of the said Circuit Court as orders that the claimant pay to the libellant the appraised

value of the hides, in the proceedings mentioned, together with interest and costs of suit, be, and the same is, hereby affirmed with costs; subject, however, to such deduction for freight as the said Circuit Court may hereafter direct, to be paid out of said appraised value, as may be hereafter decreed under the further proceedings in this cause. And as to so much of said decree of said Circuit Court as directs the amount of freight to be deducted, agreeably to the previous order of said Circuit Court, the same is hereby reversed and annulled. And it is further ordered that said cause be remanded to the said Circuit Court for further proceedings to be had therein, according to law, for the purpose of ascertaining, upon further proof, whether the claimant had paid the freight of the hides to the owner of the Fanny; and, if so, whether the claimant was a bonæ fidei purchaser of said hides, without notice. And if the said court should be satisfied from such further proof, that the said claimant, Nathan Levy, has paid the owner of the Fanny for said freight, or that he was not such bonæ fidei purchaser, without notice, then with instructions not to allow a deduction of freight from the said appraised value. But if the said claimant was such bonæ fidei purchaser, without notice, or if said freight had 673*] not been paid by said claimant to *the owners of the Fanny, then the freight for the hides, excluding the freight on the lignum-vitæ, to be deducted from the appraised value of said hides.

[Local Law.]

DANFORTH v. WEAR.

The acts of Assembly of North Carolina, passed between the years 1783 and 1789, invalidate all entries, surveys, and grants, of land within the Indian territory, which now forms a part of the territory of the state of Tennessee. But they do not avoid entries commencing without the Indian boundary, and running into it, so far as respects that portion of the land situate without their territory.

The act of North Carolina, of 1784, authorizing the removing of warrants which had been located upon lands previously taken up, so as to place them upon vacant lands, did not repeal, by implication, the previously existing laws, which prohibited surveys of land within the Indian boundary. The lands to which such removals are made, must be lands previously subjected to entry and survey.

ERROR to the Circuit Court of West Tennessee.

This cause was argued at the last term, and again argued at the present term, by the Attorney-General and Mr. Swann[1] for the plaintiff, and by Mr. Williams[2] for the defendant.

674*] *Mr. Justice Johnson delivered the opinion of the court:

This is one of those cases which not unfrequently occur, in which, for want of the scrutinizing eye of the party interested to maintain a judgment below, the court there is made to appear to have given a decision very different from that actually rendered. But, whatever may be the opinion of this court, independently of the record, we are concluded by the bill of exceptions, and must decide according to those questions which the record presents.

The parties are citizens of the same state, but jurisdiction is given to the courts of the United States, by the fact of their claiming title to the land in controversy, under grants from different states, to wit, the states of North Carolina and Tennessee.

The facts stated in the bill of exceptions, taken in connection with the laws of the two states and public treaties, sufficiently exhibit to this court, that the grant from the state of North Carolina, under which the plaintiff made title, although commencing in, and embracing, a tract of country over which the Indian title had been extinguished, yet extended into, and included, a large body of land over which the Indian title existed at the time of the survey, but has since been extinguished. Had the case, then, set forth that the land covered by the defendant's grant lay within the country which was subject to the Indian title, at the time of Danforth's grant, and bore date subsequent to the extinguishment of the Indian title, it would, *probably, have [*675 exhibited a true view of the case which the court below was called on to decide.

But, so far from exhibiting this state of the case, the facts admitted, not only do not confine the controversy to the tract of country that lay within the Indian boundary, but, taken in their literal meaning, expressly admit the contrary.

The words of the admission are, "that the defendant was in possession of the land claimed by the plaintiff." And when we come to inquire what land the plaintiff claims in the suit, we find it to be the whole 100,000 acres, "the beginning corner of which, and a portion of the land covered thereby, lay in a tract of country to which the Indian title had been extinguished, prior to making the survey and issuing the grant.

Here, then, we have the parties, contrary to all the probable truth of the case, contending about a title to land lying without the Indian boundary at the time it was surveyed for the plaintiff in ejectment.

But we must take the case as we find it on the record, and decide accordingly.

It appears, then, that the plaintiff's grant was rejected in the court below, and not permitted to be read to the jury. This rejection could only be sustained upon the ground that it was wholly void, or wholly inadmissible in that cause. For if the grant was good but for an acre of the land claimed in the action, the court could not have withheld it from the jury.

As to lands surveyed within the Indian boundary, this court has never hesitated to consider all *such surveys and grants [*676 as wholly void; but as the total rejection of the grant, according to the case stated, goes to its validity as to that part of the land also which lay without the Indian boundary, there must be found some other ground for sustaining the decision, then that which invalidates surveys executed in the Indian territory.

1.—They cited 2 Tenn. Rep. 157; N. C. Rep. in Confer. 440; 1 Tenn. Rep. 30.

2.—He cited Preston v. Browder, 1 Wheat. Rep. 115; Danforth v. Thomas, Id. 155.

In the present case, there can be but two such grounds supposed to exist; either that there was no law authorizing the survey in any part of the land granted, although without the Indian boundary, or, that the whole was affected by the illegality of that part which extended within that boundary.

It was in the first of these alternatives that the court held the case under advisement from the last term. In the case of Danforth v. Thomas, 1 Wheat. Rep. 155, this court threw out the suggestion that a grant of land must have some sanction created by statute. As relates to the present subject, it did not appear that any law had been passed, subsequent to the extinction of the Indian title, by which this recent purchase was authorized to be taken up under warrants.

But the court, upon consideration, are satisfied, that under the laws and practice affecting the lands in question, the extension of the county line subjected the lands purchased of the Indians to the general land laws of the state. By the 3d section of the act of 1777, entries are permitted within any county of the state, and the creation of counties has always, [*677 677*] in that state, been held *to bring the vacant lands within the county under the operation of that act.

On the second alternative, it was contended in argument that the survey was not in its inception invalid; that it was good as to part, because out of the Indian boundary; and as to the residue, was made good under the general provisions of the laws of North Carolina in favor of removed warrants; that, at most, it was only suspended by the Indian title, and attached legally and effectually to the soil, as soon as the interposing title of the Indians was removed.

In the two cases of Preston v. Browder and Danforth v. Thomas, decided in this court in 1816, 1 Wheat. Rep. 115, 155, the inviolability of the Indian territory is fully recognized. It was the law of the land, as adjudged in the case of Avery v. Strother, decided in the North Carolina Court of Conference, in 1802. Indeed, the state of North Carolina appears to have been sedulous in her efforts to prevent encroachments upon the Indian hunting-grounds, and her laws are express and pointed in invalidating entries and grants made within such reservations.

But the present grant commences in a tract of country over which the Indian title was extinct; and whatever might be the state of right, were the beginning corner within that boundary, and a portion of the land beyond it, we see nothing in the laws of North Carolina or Tennessee to avoid a grant in the whole, when it commences legally, and only covers in part the lands on which surveys are prohibited. [*678 678*] For that part, therefore, which *lies without the boundary, the grant must be held valid, and this alone entitles the plaintiff to a reversal. But as the cause must be again tried below, and the question on its validity as to the residue, as presented by the bill of exceptions, has been argued fully, and must arise again, we will now consider it.

The points made by the plaintiff's counsel are stated by himself thus:

1. That the state of North Carolina had a right to issue the grant in question, and the court erred in not suffering it to be read.

2. That the grant was good as to that part of the land to which the Indian title was extinguished.

3. That the grant, being founded on a removed warrant, was good for the whole land.

To the first and second of these positions we have expressed our assent, and only the third remains to be disposed of.

This rests upon the 6th section of the act of North Carolina, of 1784, entitled, "An act to prevent the issuing of grants," etc.

By this section, the right is given to remove warrants which have been located upon lands previously taken up, so as to place them upon vacant lands; and the supposed operative words, in the present instance, are these: "Shall be at full liberty to remove his or their warrants to any other lands, on which no entry or entries have been previously specially located; and the surveyor, or surveyors, are hereby authorized and required to survey and make return thereof, in like manner as for other returns and surveys, as by law directed."

*Reference was had to the act of [*679 1786, and the session act on the same subject, but they add nothing to the provisions of the act of 1784.

The effort is to construe this act as virtually repealing the previously existing laws, that prohibit surveys of land within the Indian boundary, and as opening the whole state to the right of removing warrants.

We are of opinion, that there are several considerations which repel this construction.

It is obvious that the lands to which such removals are authorized, must be lands previously subjected to entry and survey, otherwise the absurdity occurs, of a reservation in favor of entries and surveys which the existing laws have declared to be nullities.

Again, "the surveyors are authorized and required to survey and make return, in like manner as for other surveys and returns is by law directed." But does any law authorize or enjoin a survey of the Indian country? or shall this act be construed to enjoin as a duty that which an existing act prohibits under a penalty?

These considerations remove all doubt on the correct construction of the law respecting removed warrants; but if doubts did exist, the general policy and course of legislation of the state would forbid such a construction. The purport of the law is, to authorize removals to that land only, which might be at the time legally entered and surveyed by other warrants.

*We are of opinion, that there is error [*680 in the judgment of the court below, in refusing to let the grant be read to the jury.

Judgment reversed.

[Surety.]

MILLER v. STEWART et al.

The contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its term.

Where a bond was given, conditioned for the faithful performance of the duties of the office of deputy-collector of direct taxes for eight certain townships, and the instrument of the appointment,

referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties, held, that the surety was discharged from his responsibility for money subsequently collected by his principal.

THIS was a case certified from the Circuit Court for the District of New Jersey, upon a certificate of a division of opinion of the judges of that court. It was an action of debt upon bond, and the material facts disclosed in the pleadings were, that the plaintiff, Ephraim Miller, being collector of the direct taxes and internal duties for the fifth collection district of New Jersey, by an instrument of appointment, under seal, and pursuant to law, appointed Stephen C. Ustick his deputy-collector, for eight 681*] townships within his *district. Upon that occasion, the defendant, Thomas Stewart, and certain other persons, as sureties, executed a writing obligatory, with Ustick, to Miller, in the penalty of $14,000, upon the following condition, viz.: "The condition of the foregoing obligation is such, whereas Ephraim Miller, Esq. collector, as aforesaid, hath, by authority vested in him by the laws of the United States, appointed the said Stephen B. Ustick deputy-collector of direct taxes and internal duties, in the fifth collection district of New Jersey, for the townships of Nottingham, Chesterfield, Mansfield, Springfield, New Hanover, Washington, Little Egg Harbor, and Burlington, in the county of Burlington; now, therefore, if the said Stephen C. Ustick has truly and faithfully discharged, and shall continue truly and faithfully to discharge, the duties of the said appointment, according to law, and shall particularly faithfully collect and pay, according to law, all money assessed upon said townships, then the above obligation to be void, and otherwise, shall abide and remain in full force and virtue." After the execution of this bond, and before Ustick had, in any manner, acted under this appointment, or collected or received any moneys under the same, Miller, with the assent of Ustick, but without the assent or knowledge of the defendant, Stewart, altered the same instrument of appointment, by interlining in it another township, called, "Willingborough," thereby making it an appointment for nine instead of eight townships; and under the appointment, so altered, Ustick received, 682*] within the original *eight townships, certain moneys, as taxes, which he omitted to account for, and this omission was the breach stated in the declaration. The question for the opinion of the court, upon the special pleadings and demurrer, was, whether the alteration so made, without the consent of Stewart, discharged him from any responsibility for the money so subsequently collected by Ustick.

Mr. Wood, for the plaintiff, admitted the general doctrine that where the contract is annulled without the assent of the surety, there is an end of the guaranty. So, if the contract is, in any material respect, changed by the contracting parties (whether advantageously for the surety or not) in respect to that part of it to which the guaranty extends, the surety is discharged; for he may, then, well say, non hæc in fœdera veni. But, if a change is made in the original contract, by the contracting parties, in a part of the contract to which the guaranty does not extend, such change will not discharge the surety, unless it disadvantageously affected the other part of the contract to which the guaranty does extend. Thus, where the defendant was surety to the plaintiffs, for the performance of duties by a clerk in their banking house, a change of partners was held not to discharge the surety, because, though such change had an important bearing upon the establishment, it did not come within the scope of the guaranty.[1] A mere diminution of that part of *the contract to which the [*683 guaranty extends, as a release of part, would not discharge the surety from the part remaining, it being a part of the thing guarantied, though not the whole. Omne majus in se continet minus; the surety, in such a case, could not say that he might be prejudiced by the diminution, for it is settled law that a part payment of the debt is for the benefit of the obligor, and prejudicial to the obligee, and, therefore, it cannot be pleaded as an accord and satisfaction.[2]

1. There was no surrender by Ustick of his appointment as deputy-collector, over the first eight townships. If there was a surrender, it must have been either in fact, or in law; that is, implied in the alteration of the instrument. There was no such surrender in fact; and the alteration of an instrument with consent of parties, does not, in law, imply such a surrender. There are no authorities to warrant the position that such an alteration implies a surrender. On the contrary, they all say, an alteration of an instrument, with consent, does not vitiate it.[3] In Pagot v. Pagot,[4] when blanks

1.—Barclay v. Lucas, 1 T. R. 291.

2.—Johnson v. Branna, 5 Johns. Rep. 270.

3.—Touch v. Clay, 2 Lev. 35; Shep. Touch. 68; Smith v. Crooker, 6 Mass. Rep. 539.

4.—2 Ch. Rep. 187.

NOTE.—Principal and surety—The surety is bound to the extent, and in the manner, stated in his obligation, and no further. He has a right to stand on the very terms of his contract. Any variation, even for his benefit, made without his assent, is fatal, and discharges him. U. S. v. Boyd, 15 Pet. 187; Leggett v. Humphreys, 21 How. 66; U. S. v. Tillotson, 1 Paine, 305; Smith v. U. S. 2 Wall. 219; McMicken v. Webb, 6 How. 292; O'Neale v. Long, 4 Cranch, 60; 1 Cranch, C. C. 233.

Any agreement between the creditor and principal debtor which varies essentially the terms of their contract by extention of time or otherwise, without the assent of the surety, will discharge the latter from responsibility. Sprigg v. Bk. of Mt. Pleasant, 14 Pet. 201; Hopkirk v. McConico, 1 Brock. Marsh. 220; U. S. v. Hillegas, 3 Wash. C. C. 70.

Any agreement between the holder and drawer of a bill, for delay, or in any manner changing the original contract, discharges the indorser. McLemore v. Powell, 12 Wheat. 544; Bk. of U. S. v. Hatch, 6 Pet. 250; S. C. 1 McLean, 90; Seventh W. Bk. v. Hanrick, 2 Story, C. C. 416; Fuller v. Milford, 2 McLean, 74; Morgan v. Tipton, 3 McLean, 339, Low v. Underhill, 3 McLean, 376; Cooper v. Gibbs, 4 McLean, 396; Cope v. Hunt, 4 Cranch, C. C. 293.

But must be a binding agreement. U. S. v. Nicholl, 12 Wheat. 505; McLemore v. Powell, 12 Wheat. 554.

Mere delay, or promise of delay, without consideration, not enough. McLemore v. Powell, 12 Wheat. 554; Creath v. Sims, 5 How. 192; Sprigg v. Bank of Mt. Pleasant, 14 Pet. 201; Hunt v. U. S. 1 Gall. 32; Dennis v. Rider, 2 McLean, 451.

As to responsibility of sureties on official bonds and when discharged, see note to The United States v. Giles, 9 Cranch, 212.

in a deed were filled up after execution, the deed was held good, though not read again, nor re-executed. In Markham v. Gonaston,[1] and Wooly v. Constant,[2] the court went on the 684*] ground not only *that an altered deed or instrument was good, but that there was no surrender and redelivery implied in the alteration, to devest the property.

There is nothing in principle to warrant the idea that an alteration of an instrument implies a surrender and redelivery. A surrender is an executed contract. To constitute a surrender of an instrument by a vendee or obligee, to a vendor or obligor, two things are necessary: (1) An actual delivery of possession to the latter; and (2) an understanding or agreement to part with the property in the instrument. The act and the intent must concur. A mere delivery of possession by the vendee of the deed, for a special purpose, to the vendor, or any other person, as to keep for him, or to do any other particular act in relation to it, is not a surrender. The vendee still has the property in the deed himself. The vendor, in such case, is only his bailee. Admit, for the sake of argument, that the alteration of a deed required a new delivery, in respect to the part altered. the vendee might then deliver possession of the deed to the vendor, for that particular purpose, viz., to enable the vendee to deliver it anew, to give effect to the altered part; but not surrender his property in the deed in respect to the parts not altered. Such an absolute surrender of the whole deed is not essential; and if not essential, it should not, by a fiction of law, be required. Suppose the vendee should hand the deed to the vendor, to subjoin on a blank under it a new and distinct deed for another tract of land, which is done, does such a delivery of the deed, 685*] for such a purpose, *amount to a surrender of the old deed? If not, is there any difference, in reason and common sense, whether the conveyance of the second tract is contained in a distinct and separate deed subjoined on the same paper, or whether it is effected by an interlineation, with consent of parties, in the old deed? Fictions and subtleties should never be introduced into the law, which is a practical science, unless to subserve the purposes of justice. In fictione juris semper subsistit equitas. This fiction of a surrender is unnecessary; it may be injurious. A, pursuant to contract, conveys a tract of land to B; they afterwards discover that by mistake a lot was omitted, and, by consent, it is interlined. Upon this doctrine of surrender, the deed and property, upon the interlineation, reverted to the vendor, and continued in him until the new delivery; and, of course, it is subjected to the intermediate judgments of other liens of the vendor. The rule of law may, and ought to correspond, in such cases, with the real fact; considering the lands originally contained in the deed as passing at the date, and the land inserted by interlineation, as passing at the time of the interlining.

2. There was no cancellation of the original instrument of appointment. An alteration affects an instrument in part; a cancellation destroys it altogether. When cancelled, a deed must be resealed and redelivered, to revive it.[3] It is nowhere *said that a redelivery is [*686 necessary, in case of an alteration by consent.

3. The alterations did not cause a revocation of the old appointment. It is admitted that the appointment to, and acceptance of, a new office, incompatible with the old, is a revocation of the latter, as, if a coroner accepts the office of a sheriff. So, if there had been an intermediate office, between the collector and his deputy, incompatible with the latter, its acceptance, by Ustick, might have been a revocation of his office of deputy. In the present case, the alteration created no office. It continued the same office, only extended over an additional territory. Ustick had the same office and same power over the first eight townships after, as before the alteration. It is said, his sphere of action was enlarged. Be it so; it was enlarged only in respect to territory; his sphere of action over the first eight townships continued the same. It is said, that after the alteration, the nine townships constituted but one office, and that there was a new appointment consequently. The interlineation, as before shown, did not destroy or cause a surrender of the first appointment, with respect to the eight original townships. If, then, there was a new appointment of an office, it extended only to the ninth township, and that is a distinct office from the other eight. If there were not a new appointment, but simply an enlargement of the old office, and still constituting one office, it is an office consisting of different parts in respect to territory, which parts are easily distinguished, and were created at different times; the *former part, composing [*687 the first eight townships, being in no wise impaired by the latter, and of course, the guaranty is in no wise impaired by it. It is said that it is impossible to distinguish the moneys paid in from the ninth township from those collected in the other eight. The same objection might have been raised, and to the same effect, if the appointments had been by distinct instruments. The jury will distinguish; it is a question for them. It is said that the responsibility of Ustick was increased; and so is the responsibility of every debtor increased, who contracts new debts; but that does not discharge a surety.

4. Though where, in a bond, a previous instrument is recited, the contents thus recited are a part of the bond; yet the instrument recited is no part of the bond. Suppose A conveys a tract of land to B, and in order to explain the boundaries, a deed from A to C for a tract of land adjacent is recited, does the latter deed become a part of the former? and if destroyed, does it destroy the other? The dependency, or connection between the instruments recited, and the obligation in which it is recited, must always depend upon the nature and object of the instruments, and the intent of the parties.

Again, if this alteration, as contended on the other side, amounted to a surrender of the instrument of appointment, it was necessarily a revocation of the appointment. Such a revocation cannot be made under the act of Congress, without public notice be given in

1.—Moore, 547.

2.—4 Johns. Rep. 54.

3.—Shep. Touch. 69.

688*] the district.[1] No such *notice was given in this case. If this alteration amounts to a revocation of the instrument, in law, and as such revocation cannot be made without public notice, the alteration must be void, and the original instrument stand good.

Mr. Coxe, contra, argued, (1) That the alteration in the original instrument of appointment, by the interlineation in a material part, destroyed the bond as against such of the obligors as were not parties to the act. The appointment, being recited in the bond, became incorporated into it, and they, together, form quasi one instrument. The condition of a bond or defeasance need not be contained in the same paper, but, though written on a distinct and separate piece, they together constitute but one instrument.[2]

If the condition of a bond, thus engrossed on a separate piece of paper, becomes invalidated by any act having that legal operation, the whole instrument, though disconnected, becomes void. As in the case put by Sheppard, if the obligation depend upon or be necessary to, some other deed, and that deed become void, the obligation is become void also; as, if the condition of the obligation be to perform the covenants of an indenture, and, afterwards, the covenants be discharged, or become void, by this means the obligation is discharged and gone forever.[3] The common case of arbitration bonds will illustrate this 689*] position: *if the award made be void in itself, or become void, or be performed, the obligee cannot recover upon the bond, but that becomes void. Had the plaintiff made such an interlineation in the body of the obligation itself, inserting the name of another township, the legal effect cannot be disputed. The whole bond would have been invalidated.[4]

The consequence, then, appears to be irresistible that such must be the effect here. The appointment, originally made, became a nullity, and could only be revived by a new execution and delivery, and take effect only from that time. As to the original instrument to which the sureties of Ustick made themselves parties, by inserting it in their bond, it was wholly nullified.

It may, indeed, be said, that the alteration in the appointment having been made with the consent and acquiescence of Miller and Ustick, who alone were parties to it, it remains a valid instrument of deputation.

But the appointment is to be regarded in two entirely distinct aspects: (1) As the instrument of deputation solely. (2) As made a part of the bond, by being incorporated into it.

1. As a simple instrument of deputation, like any other deed, it could operate only between the parties to it, and could affect no others. The alteration, made and concurred in by all those interested in it, would not avoid it, perhaps, according to the current of modern 690*] authorities, though even *as between them the law was formerly held otherwise.[5]

2. As being made a part of the bond by being incorporated into it. By this circumstance, the sureties of Ustick became parties to the act of appointment, and to the instrument of deputation. It became a part of their bond. By no act of the appointor and appointee could the interests of third persons be even incidentally affected. A makes a bargain and sale to B, which cannot operate, because no pecuniary consideration is inserted. C acquires, by a judgment, or in any other manner, a lien upon the property as belonging to A. The deed cannot be altered by the parties so as to devest any intervening right. As an original instrument, carrying its original date, it can have no operation. As a deed bearing the original date, it is void; its future validity can be only upon the idea of a surrender of the instrument, and a new delivery and execution.[6]

We contend, then, that by the alteration made in this instrument of deputation, it ceased to have any validity by virtue of its original execution and delivery; as such, it was annulled.

But, whether annulled or not by this act of interlineation; whether it continued to operate as from the time of its original delivery, or from the period of its second delivery, after the alteration was made, if it have any validity, even between the parties, it cannot operate as the appointment *recited in the bond. [*691 It is another and distinct appointment from that to which the bond referred, and these sureties are not responsible for any deficiencies existing under it. By the 20th section of the act of Congress. "Each collector shall be authorized to appoint, by an instrument of writing under his hand and seal, as many deputies as he may think proper, assigning to each such deputy, by that instrument of writing, such portion of his collection district as he may think proper; and, also, to revoke the powers of any deputy, giving public notice thereof in that portion of the district assigned to such deputy." The power of appointment thus given, was exercised by the original instrument of deputation for the eight townships. It is recited in the bond, and, therefore, each party is estopped from denying it.[7] This instrument must have been made prior to the execution of the bond, because it is recited as already executed, and one of the conditions is, that he hath performed the duties of it. It must have been an appointment, bearing the date, and specially embracing the townships therein enumerated, and nothing more; otherwise it would be an appointment differing from that for the faithful performance of which this defendant became responsible. Supposing, then, it should now be made to appear that the original appointment included the township of Willingborough, *and that it was accidentally [*692 omitted in the recital of the bond, could a recovery be had in this action? The answer of the surety is non hæc in fœdera veni. The language of the court, in Clifton v. Walmesley,

1.—4 U. S. L. 557, 558, 520.

2.—Shep. Touch. 367, 370; Cro. Eliz. 657.

3.—Ib. 394.

4.—Shep. Touch. 68, 69, 71; 1 Dall. 67; 2 Bac. Abr. 650.

5.—2 Roll. Abr. 29, u. pl. 5.

6.—Eppes v. Randolph, 2 Call. 125; 4 Binn. 1, 4.

7.—Shelley v. Wright, Willes. 9; 1 Phillips, 356; 1 Powell on Cont. 236, 237.

5 T. R. 564, 567, would be conclusive against the plaintiff. This was the doctrine also in Ludlow v. Simond, 2 Caines' Err. 33, 42, 57. The plea avers, and the demurrer admits, that the deficiency sought to be recovered, arose under an appointment including the township of Willingborough. The surety became responsible for the faithful performance of the duties of no such appointment; he, consequently, cannot be called on to respond to them. But there is no pretense that any omission was made by fraud or mistake. Under the appointment thus made, Ustick did hold his office at the time the bond was executed. This office was as extensive as the eight townships enumerated in the appointment, but restricted within them. This limitation was of the very essence of the appointment, by the express terms of the statute.

The act of the 22d of July, 1813, ch. 16, s. 20, requires that the assignment of the portion of the collection district within which the deputy is to act should be contained in the instrument of appointment. Such an appointment, then, being made, it could only lawfully cease, (1) by the death of Ustick, the deputy; (2) by surrender of the appointment; (3) by a revocation without his consent; (4) by a new appointment; (5) by cancellation.

693*] *The act which did take place, was, in substance, a surrender of the original appointment, and the acceptance of a new one. The appointment, being altered by the appointor by inserting another assignment of a portion of the collection district, and after this alteration, being accepted and acted under by the appointee, became, from the date of such alteration and acceptance, a new and distinct instrument. A new and distinct office was created, the duties and responsibilities of which differed essentially from the former; the instrument of appointment included the entire portion of the collection district assigned to the deputy, as required by the statute. The legal inference is clear: the first appointment merged in the subsequent and more extensive one.[1] If it operated as a new appointment, it operated also as a complete revocation of the former one.[2] Here was, then, an appointment perfectly valid, complying with all the requisitions of the law under which the officer acted, under which his duties were performed, under which his responsibilities attached. This, however, was a totally distinct appointment from that which the bond in question was given to cover. The appointment recited in, and covered by the bond, was for eight townships; the appointment under which the delinquency occurred, was for nine. The defendant and his co-sureties never did undertake to become responsible for one cent, 694*]*under any other appointment than that set forth in their bond. The recital restricts the operation of the bond to that identical instrument of deputation therein specified.[3]

It can scarcely be necessary to cite the various cases which go to fix and limit the responsibilities of sureties, but a few of the most prominent may be referred to. Lord Arlington v. Merrick, 2 Saund. 411, is a leading case, and establishes the principles that a surety cannot be bound beyond the scope of his engagement; that the generality of the language is restrained by the recital; and that when a particular appointment is recited in the condition of the bond, the obligation covers only that appointment. So, where a bond was given to secure the faithful performance of the duties of collector of the society of musicians, and afterwards the society was incorporated, the obligor was held not liable for any default after the incorporation.[4] "The old obligation does not, in point of law, extend to the new corporation, and a surety has a right to avail himself of the objection." "A surety can only be held liable according to the plain and clear force of his contract."

The condition of a bond recited, that A was on such a day, appointed collector, etc., and bound the sureties for his duly accounting, etc.; held, that the sureties were only answerable for that single appointment, and not for his appointment in the *ensuing year.[5] Other [*695 cases go to the establishment of the same principles.[6]

3. It is no answer to the objections that have now been considered, that the surety is not damnified. He says, this is not the contract into which I entered, and it is immaterial whether it be a more favorable one than that to which I became a party or not. I have no wish to speculate upon the subject of the relative duties and responsibilities. The question is simply what I have become responsible for. And when you designate the deficiency sought to be recovered, and the office in which it occurred, my answer is, it is not in the bond. But the ground of increasing the duties and responsibilities is another equally conclusive both in point of fact and law. If the original appointment be considered as still subsisting, if the words of the obligation would cover this deficiency, the surety is entitled to judgment in his favor on the single ground that the duties and responsibilities are increased without his concurrence. Every enlargement of the duties of the deputy-collector, by enlarging the sphere of his authority, increases his responsibility, and adds to the danger of the surety. The amount of moneys received is increased, and the consequent danger of defalcation augmented.[7]

*Can it be contended that, in point [*696 of fact, the defalcation would not have been less, if the deputy's authority had not been extended to the township of Willingborough, and, consequently, if none of the moneys arising from that township had been received by him? Did the deficiencies now sought to be recovered occur, in whole or in part, in reference to the money received from Willingborough? Can we, in any manner, be called upon to meddle with the accounts of that township, by an act to which we never assented? If the accounts are intermingled, as they necessarily must be, and

1.—5 Bac Abr. 204.
2.—Bowerbank v. Morris, Wallace, 125, 129.
3.—Pearsall v. Summersett, 4 Taunt. 593.
4.—Dance v. Gridler, 4 Bos. & Pull. 34, 41, 42.
5.—Wardens of St. Saviors v. Bostock et al. 5 Bos. & Pull. 175, 179.
6.—Wright v. Russel, 3 Wils. 530; Strange v. Lee, 3 East, 484; Rees v. Berrington, 2 Ves. Jun. 540; Commonwealth v. Fairfax et al. 4 Hen. & Munf. 208.
7.—Rathbone et al. v. Warren, 10 Johns. Rep. 587, 591; 2 Caines' Err. 33, 35.

in fact are, we cannot be called on to disentangle them. In point of fact, then, the responsibility and duties of the principal have been increased, without the assent of the surety, and, in point of law, that operates to discharge him from any responsibility.

Mr. Sergeant, on the same side, stated, that the question presented upon the pleadings was, whether the defendant, Stewart, who was a surety for Ustick, had become liable for any default or neglect of Ustick, as a deputy of Miller, the collector.

The bond recited an appointment, previously made, and the defendant was bound for the fidelity of Ustick, under the said appointment. By the terms of the contract, therefore, the appointment, antecedently made, was a part of the contract, as between Miller and Stewart, as completely as if it had been contained in the bond. The appointment, thus made, was by 697*] deed, and so required *to be by law. If it had been made under color of law, and not according to law, it would have been void. The appointment, moreover, was entire, not divided, or in parts; nor, as respected the bond, was it susceptible of division. The obligation of the bond, therefore, was, that as long as Ustick should continue to act under that identical appointment, under the very deed which had been sealed and delivered by Miller to Ustick, so long, and no longer, Stewart would be responsible for Ustick's conduct.

What is the legal import and meaning of the contract thus entered into?

1. As the appointment was by deed, and was required by law to be by deed, and as it is recited to have been already made, it follows that it had already all the requisites of a perfect legal deed; that it had been signed, sealed, and delivered, and all was executed and done. This is not denied to be as true in fact as it is in law.

2. That nothing remained to be done. The whole terminated in the execution of the bond; the state of the appointment was irrevocably fixed by it. If blanks had been left, to be afterwards filled, it might be deemed evidence of authority to fill them, from all concerned, and, therefore, prove consent, and relate back.

3. That the reference in the bond being to the identical deed, thus perfected, Stewart became a party to the deed, as much as if he had signed it; had an interest in it; and it was a part of his contract, that it should not be altered, because it was his contract.

698*] *These, then, are the rights of the parties, and their obligations towards each other, as established by themselves.

The plea avers, that after all this, and before Ustick had acted under the deed of appointment, Miller, with the assent of Ustick, altered the appointment, in a material part, and that Ustick acted under such altered or new appointment; all which is confessed by the demurrer.

1. We contend, that Miller was discharged by the alteration of the deed being made without his consent. A deed is avoided by rasure, interlineation, or alteration, in a material part, unless a memorandum thereof be made at the time of execution and attestation.[3] This is unquestionably the rule; and it is for those who claim the benefit of an exception, to show that it is an excepted case. Now, it is clear that the deed in question was altered, after the execution, in a material part; and it follows, of course, that it is avoided. If the deed is avoided, the obligation is at an end. It may be supposed that the alteration here is not material; a suggestion, the value of which, as regards a surety, will be considered hereafter. But the inquiry, in such cases, is not whether the alteration is material, but whether it is in a material part. The inquiry never can be, whether the alteration is material; for no alteration can be *said to be material, if you [*699 can perceive that it has been made, and how. An interlineation can never be material, for it may always be rejected. It is never incumbent upon the party, therefore, to show that he has been injured, or might have been injured; or that, in the particular case, the alteration is material. The principle in question is founded in policy, and intended to preserve the solemn evidences of transactions among men, by denouncing every alteration as unhallowed and forbidden.

But it is contended, that an alteration, by consent of the parties, does not vitiate.[4]

Suppose the position, for the present, to be correct; then, as it is consent which neutralizes the poison of the alteration, the effect will only be co-extensive with the cause. It is not vitiated as to him who consents; but how stands it as to others? It produces its ordinary legal consequence.[4] It is, indeed, conceded, that if the contract is put an end to, or altered, the surety is discharged. It is conceded, too, that if the guaranty extends to part only, and that part is altered, the surety is discharged. But, it is contended, that if the guaranty be for part only, and other parts be altered, that does not discharge the surety. For this, no authority is cited, but the case in 1 T. R. 391 (note), which has no analogy. That was simply *a [*700 question of intention, or of the true interpretation of the surety's undertaking.

We answer, then, (1) That the proposition is a very questionable one. If there be one contract, consisting of parts, and, the whole contract being recited in the engagement of the surety, as the ground and consideration of his undertaking, he engages for a part, the whole is to stand, or he cannot be charged. Else the court must, in every case, undertake to decide, not only upon the dependence and connection of the parts, but how far they entered into the views of the surety. (2) It is not the case here. The undertaking was for the whole deed, as it originally stood, and an addition is afterwards made to it. If the appointment had been for nine townships, and the bond for eight of them, it would have been somewhat such a case. But could the deed, in that case, have been altered by striking out the ninth? The only question, then, is, whether this alteration was in a material part of the deed; for it is admitted that it was done without the consent or

1.—1 Dall. 67.

2.—2 Bl. Com. 308; Bul. N. P. 267; Shep. 68, 69; Chitty on Bills, 130; and cases there cited.

3.—2 Lev. 35; Shep. 68; 6 Mass. Rep. 539; 2 Cr. 626.

4.—Moore, 547; 2 Lev. 35; 4 Johns. Rep. 54, 58, 59; 4 Cranch, 60.

knowledge of Stewart. It was evidently a material part, and, indeed, the most material part of the appointment. It was, therefore, avoided as against all but those who consented.

2. Admitting the consent of Miller and of Ustick to be good, and binding between themselves, what is the legal operation of their conduct? We contend, that it put an end to the deed which previously existed, and created a new deed. Was the deed, after the alteration, 701*] the same *deed as before the alteration, or was it a different deed? If it was a different deed then what took place was equivalent to a surrender, a new acknowledgment, and a new delivery. That it was a different deed is manifest, because it comprehended more than the first. Yet it was an entire deed, and the whole was one single appointment, undivided and indivisible. The first was also an entire deed, and, as we have seen from the pleadings, was consumated by delivery, and was in the possession of Ustick. What was the date of the deed after the alteration? Suppose it had been done on two different days, which would have been the date? It cannot have two dates, because it is one deed. A return for alteration, and an acceptance after alteration, is a surrender, for there must be a surrender to enable a second execution. It may be admitted, that the deed might be put in his hands for a special purpose, and then it would not be a surrender; as, to read it, or to take a copy, or the like. And this may be done by parol.[1] A re-acknowledged deed dates from re-acknowledgment.[2] It cannot be divided, because it is an entire deed. The latest act, therefore, will give date to the whole. The appointment after the alteration, then, is not the appointment for which the defendant was bound.

3. This is the case of a surety.

702*] *It is no answer to a surety, to say that the alteration is not material. He has a right to determine for himself whether he will or will not consent to the alteration; whether he thinks it material or immaterial. Suppose he had been consulted, and refused his consent, no matter from what motive. Not consulting him, is, at least, equivalent to refusal. Who can tell what considerations might have justly influenced him? But the great objection to any latitude is this: that if the narrow limits, defined by numerous and uniform decisions, be not adhered to, there will be no limit at all. The limit is this: no power of man, or circumstances, can alter your engagement. You know exactly the extent of the engagement you enter into. There will be no equity against you, no intendment or legal construction. A surety cannot be held beyond the precise terms of his agreement.[3] It is upon the basis thus established that suretyship stands, and it would not stand without it. It is a needful, but it is always a perilous undertaking; and its perils most frequently overwhelm those whom one could wish to see saved—the generous and the humane. It cannot be necessary or politic to increase its dangers.

1.—Co. Litt. 232, a.

2.—Eppes v. Randolph, 2 Call. 125.

3.—1 Caines' Err. 1; 10 Johns. Rep. 180.

Mr. Justice Story delivered the opinion of the court, and after stating the case, proceeded as follows:

Nothing can be clearer, both upon principle and *authority, than the doctrine that [*703 the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. The class of cases which have been cited at the bar, where persons have been bound for the good conduct of clerks of merchants, and other persons, illustrate this position. The whole series of them, from Lord Arlington v. Merrick, 2 Saund. 412, down to that of Pearsall v. Summersett, 4 Taunt. 593, proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. Therefore, where an indemnity bond is given to partners, by name, it has constantly been held that the undertaking stopped upon the admission of a new partner. And the only case, that of Barclay v. Lucas, 1 T. R. 291, note a, in which a more extensive construction is supposed to have been given, confirms the general rule; for that turned upon the circumstance, that the security was given to the house, as a banking-house, and thence an intention was inferred that *the parties [*704 intended to cover all losses, notwithstanding a change of partners in the house.

Now, what is the purport of the terms of the present condition? The recital stated a special appointment, which had then been made by Miller, of his deputy for eight townships, particularly named. It was not a case of several distinct appointments for each township, but a single and entire appointment for all the townships; and the condition is, that Ustick has, and "shall continue, truly and faithfully to discharge the duties of said appointment, according to law." Of what appointment? Plainly the appointment stated in the recital, to which the condition refers, and to which it is tied up; that is to say, the appointment already made and executed for the eight townships. If this be the true construction of the condition, and it seems impossible to doubt it, then the only inquiry that remains is, whether any money unaccounted for was received under that appointment. To this the plea answers in the negative, unless the subsequent alteration of the instrument created no legal change in the appointment. To the consideration of this point, therefore, the attention of the court will be addressed.

And, in the first place, upon principle, how does the case stand? Can it be affirmed that the alteration wrought no change in the appointment? This will scarcely be pretended. In point of fact, the first appointment was for eight townships only; the alteration made it an appointment for nine townships. It is not like

the case where an appointment is made for 705*] eight townships, and another *distinct appointment is made for the ninth; for then there are, in legal contemplation, two distinct and separate appointments. But here, the original appointment is extended; it was one and entire when it included eight townships; it is one and entire when it includes the nine. Can it, then, be legally affirmed to remain the same appointment, when it no longer has the same boundaries? An appointment for A is not the same as an appointment for A and B. In short, the very circumstance, that there is an alteration in the appointment, ex vi termini, imports that its identity is gone. If an original appointment is altered by the consent of the parties to the instrument, that very consent implies that something is added to or taken from it. The parties agree that it shall no longer remain as it was at first, but that the same instrument shall be, not what it was, but what the alteration makes it. It shall not constitute two separate and distinct instruments, but one consolidated instrument. A familiar case will explain this. A gives a note to B for $500; the parties afterwards agree to alter it to $600. In such case, the instrument remains single; it is not a note for $500, and also for $600, involving separate and distinct liabilities, but an entire contract for $600; and the obligation to pay the $500 is merged and extinguished in the obligation to pay the $600. To bring the case nearer to the present; suppose there was a bond given, as collateral security, to pay the note of $500; it will scarcely be pretended that the 706*] alteration would not extinguish *the liability under the bond. The instrument would, indeed, remain, but it would no longer possess its former obligation and identity. Nothing can be better settled than the doctrine that, if an obligation be dependent on another obligation (and, by parity of reasoning, upon the legal existence of another instrument), and the latter be discharged, or become void, the former is also discharged. Sheppard, in his Touchstone, p. 394, puts the case, and illustrates it, by adding, "as, if the condition of an obligation be, to perform the covenants of an indenture, and afterwards the covenants be discharged, or become void, by this means the obligation is discharged, and gone forever." It is not denied at the bar that the same would be the legal operation in the present case if there had been an actual revocation of the first appointment, or an extinguishment of the instrument of appointment. But the stress of the argument is, that here there was an enlargement, and not an extinguishment, of the appointment; that, the consent of the immediate parties being given to the alteration, it remained in full force, with all its original validity, as to the eight townships. We cannot accede to this view of the case. After the alteration was made, it is, as between the parties, to be considered by relation back, either as an original appointment for the nine townships, or as a new appointment for the nine townships, from the time of the alteration. It is immaterial to the present decision, whether it be the one or the other, for in either case it is not that appointment which the defendant, Stewart, re- 707*] ferred to in *the condition of the bond, and in respect to which he contracted the obligation. It is no answer, to say that it is not intended to make him liable for any money, except what was collected in the eight townships. He has a right to stand upon the terms of his bond, which confine his liability to money received under an appointment for eight townships; and the pleadings admit that none was received until the appointment was altered to nine. It will scarcely be denied, that if, upon the agreement to include the ninth township, the original instrument had been destroyed and a new instrument had been executed, the obligatory force of the bond would, as to the surety, have been gone. And, in reason or in law, there is no difference between that and the case at bar. The alteration made the instrument as much a new appointment as if it had been written and sealed anew. It is not very material to decide whether the alteration operated by way of surrender, or as a revocation, or as a new appointment superseding the other. It was, to all intents and purposes, an extinguishment of the separate existence of the appointment for the eight townships.

This point is susceptible of still farther illustration, from considerations of a more technical nature. The act of Congress of the 22d of July, 1813, ch. 16, sec. 20, under which this appointment was made, provides, "that each collector shall be authorized to appoint, by an instrument of writing under his hand and seal, as many deputies as he may think proper," etc. The appointment must, therefore, be by deed; and the *effect of an alteration [*708 or interlineation of a deed, is to be decided by the principles of the common law. Now, by the common law, the alteration or interlineation of a deed, in a material part, at least, by the holder, without the consent of the other party, ipso facto, avoids the deed. It is the consent, therefore, that upholds the deed after such alteration, or interlineation. The reason is, that the deed is no longer the same. The alteration makes it a different deed; it speaks a different language; it infers a different obligation. It must, then, take effect as a new deed, and that can only be by the consent of the party bound by it. Whether by such consent, the deed takes effect by relation back to the time of original execution, or only from the time of the alteration, need not be matter of inquiry, because such relation is never permitted to effect the rights or interests of third persons, and cannot change the posture of the present case. If the deed, after the alteration, is permitted to have relation back, it is not the same deed of appointment recited in the condition, and to which the obligation is limited, for that is an appointment for eight townships. If it has no such relation, then it is a deed of appointment made subsequent to the bond, and of course not included in its obligation. It cannot be, at one and the same time, a deed for eight, and also a deed for nine townships; and the very circumstance, that it is the one, excludes the possibility of assuming it as the other. In truth, the assent of the parties to the alteration, carries with it the necessary implication that it shall no longer be deemed an appointment *for eight townships [*709 only; and the same consent of parties which created, is equally potent in dissolving the

deed, and changing its original obligation. It is no objection, that to constitute a new deed, a redelivery is necessary; for if it be so, the consent to the alteration is, in law, equivalent to a redelivery. Nor is it necessary that a surrender or revocation should be by an instrument to that effect. It may be by matter in pais, or by operation of law. Every erasure and interlineation in the deed, by the obligee or appointee, without consent, is a surrender; and a revocation may be implied by law. The passage cited at the bar, from Co. Lit., 232, (a), establishes, that if the feoffee, by deed of land, grants his deed by parol to the feoffer, it is a surrender of the property, as well as of the deed. And if, in this case, the deed of appointment had been delivered up to the collector, it would, at once, have operated as a surrender by the deputy, and a revocation by the collector.

An objection has been urged at the bar, against this doctrine, that the act of Congress, giving the authority to the collector to appoint deputies, also authorizes him "to revoke the powers of any deputy, giving public notice thereof in that portion of the district assigned to such deputy." Hence it is argued that no revocation can be, unless by public notice. But this is certainly not the true interpretation of the act. The very terms suppose that the revocation is already made, as between the parties, and the notice is to be given of the fact. The object 710*] of the legislature was, *to protect the public from the mischief of payments to the deputy after his powers are revoked. It requires public notice to be given of the revocation, so that no future imposition shall be practiced; and if the collector should make a private revocation, without any public notice, the legal conclusion would be, that all payments made to his deputy, in ignorance of the revocation, ought to be held valid; for no man is entitled to make his own wrongful omission of duty a foundation of right. But, as between the parties, a revocation or surrender, if actually made, would be, to all intents and purposes, binding between them, and release the sureties to the bond from all future responsibility.

Upon the whole, the opinion of the court is, that the fourth plea in bar is good, and that the demurrer thereto ought to be overruled; and this opinion is to be certified to the Circuit Court.

Mr. Justice **Johnson**. My brother Todd, and myself, are of opinion that the merits of this cause have been misconceived, the points on which it turns misapprehended, and the law of rasures, if correctly laid down according to the law of the present day, erroneously applied to this cause.

The condition of Stewart's bond to the plaintiff, recites no particular deed of appointment, under which Ustick was constituted deputy-collector; nor is there an iota in the bond, or in the declaration, that can identify the deed set forth in the plea, with the deed under which Ustick held his deputation. The condition of the bond simply 711*] *states, "Whereas E. M., collector, as aforesaid, hath, by virtue of authority vested in him by the laws of the United States, appointed U. deputy-collector," etc. It is the plea that specifies a deed of a particular date, and then proceeds to set forth a rasure in avoidance of that deed, but it contains no averment that the deed so set forth is the same under which U. held the deputation under the plaintiff, referred to in the condition. That the plea is faulty, and, even with the averment, might have been the subject of a special demurrer, cannot now be doubted; for it amounts to the general issue; and the general issue was the legitimate plea in this case. Pigot's case, and passim. But, we also hold it bad, in its present form, upon a general demurrer; for, unless the deed, so pleaded, was duly identified by the pleadings, with that under which Ustick was constituted deputy, the plaintiff was not bound to answer it. We cannot conceive how the defendant can have judgment in the present state of the pleadings, unless under the idea that the demurrer cures the failure to identify the deeds. This, however, cannot be sustained, since the want of identification is, in itself, a sufficient ground of demurrer.

Indeed, we see no sufficient ground for admitting that the condition of the bond implies a deputation by deed at all. It is true, that the 20th section of the act under which this collector was appointed, authorizes him to appoint deputies, under his hand and seal; and, as far as was necessary to enable the deputy to act against individuals, unquestionably the solemnities of a deed *were requisite [*712 to constitute him a deputy-collector. But the demand in this action is for money received by him, and not paid over; and, surely, a deputation of a less formal kind would have enabled him to bind his principal as to the actual receipt of money; so that the words of the condition do not necessarily imply a deputation by deed. He is expressly authorized, in this 20th section, to act for himself in collecting the revenue, and he could, therefore, act by his servant or deputy, constituted in a less solemn way than by deed, so far as to involve himself with the government.

But if a deed is to be implied from the condition, surely not this particular deed; and though a deed, of a date antecedent to the bond, is to be implied, it may have preceded it by a month, and yet the act and the condition of the bond both be complied with. But what form shall be presumed or implied to the deed? Why may it not have been several as to each county, or have comprised two or more? and why may not a dozen deeds, of the very date and form of this, have been in existence at the same time? A defendant who, like the present, places his defense upon the very highest stretch of legal rigor, cannot complain, if he has the same measure meted out to himself.

But if this ground is to be got over, and we are to consider the bearing of the facts pleaded, upon the law of the case, we then say that they imply no revocation of the deputation to Ustick, against which this defendant entered into the contract of *indemnity. It is [*713 the intent that gives effect to the acts of parties; nothing was farther from the minds of

the parties here, than the distinction of the power of Ustick, as to the eight counties, at the time of this interlineation. The plea avers no such intent, and as well might a delivery of a deed for perusal be tortured into a surrender and extinction of it, and its return into a revocation, as the acts of these parties respecting this interlineation be construed into a revocation and redelivery. Non constat, from anything that appears in the plea, that the paper ever passed from the hands of the party legally holding it. It was unnecessary, upon the facts stated, that it should so pass; in fact, no delivery is averred, in the plea, nor any one of the formalities necessary to re-execution. It cannot be denied that this part of the defense savors too much of a perversion of the solemnities and rules of the law. It is a catch upon the unwary, an effort to attach to men's acts consequences which are directly negatived by their intentions.

As to the idea of the identity of this instrument being destroyed by the interlineation, we consider it as springing out of an incorrect view of the nature of the instrument and of the circumstances that fix its identity. It is not one entire thing, but a several deed for each county. A deputation as to the county of A, is not a deputation as to the county of B, although written on the same paper, and comprised within the same words; it is as much a several deed, as to each county, as if 714*] written *on several sheets of paper: as much as a policy of insurance is the several contract of each underwriter, or as a bond would be the several deed of as many individuals as executed it, if it be so expressed, making them, if such be the letter of it, severally liable, and for various sums, no one for another. Interlining another county, then, left it still the original deed, as to each county taken severally, and only operated as the creation of a new power as to another county, if, in fact, as there is no averment of a subsequent delivery, it was anything more than a mere nugatory act. Such is certainly the good sense of the law upon the subject; and it is supported, we conceive, by respectable opinions, and by adjudged cases. Chief Baron Gilbert, in treating on this topic, observes, "but if any immaterial part of the contract be added after sealing and delivery, as, if A, with a blank left after his name, be bound to B, and after C is added as a joint obligor, this does not avoid the bond, because this does not alter the contract of A; for he was bound to pay the whole money without such addition."[1] And the case of Zouch v. Clay, which he quotes, as reported in Ventris, undoubtedly sustains his doctrine; for there the court overruled the plea of non est factum on the interlineation, on the ground that the bond remained the same as to him.

In this case, the bond emphatically remained 715*] *the same as to this defendant, for he was still liable only as to the eight counties, and no more; and was so guarded, as to make it impossible that the interlineation of a thousand other counties could alter or increase his liability, since the names of the counties are inserted in the condition specifically. As to his liability, and as to its influence upon the power conferred in the eight counties, this interlineation was altogether insignificant, no more than a dash of the pen, and could have done him no more injury.

There is nothing in the argument which would attach importance to it, on the ground of producing difficulty and confusion—it has been said, even impracticability, in rendering the accounts of this deputy. It is begging the question, and urging the very thing as a difficulty, which the plaintiff proffers to execute. He claims a sum collected in the eight counties specified, and no more; and unless he can prove so much collected in the eight original counties, it is very clear that he cannot have a verdict. But is he to be prejudged? is he not to be permitted to make out the case which he offers to prove?

Nor is there any more weight in the argument, that, "although the defendant may have been willing to indemnify against eight counties, it does not follow that he would undertake to indemnify against nine." No one pretends to charge him with nine counties. Surely there was nothing in the contract to preclude the plaintiff from extending his deputation to this individual over his whole *district, had he thought proper. Could [*716 a separate deed, as to the ninth county, have been pleaded as a defense?

There is no charge of positive injury in this plea, it will be observed; nor do the facts admit a suspicion of fraudulent intention. The sole effect of the interlineation, was to confide in U. to collect in another county, without giving security. The defense rests upon certain inferences from, or consequences imputed to, the naked act of interlining the word "Willingborough" without even averring the acts necessary to make the instrument a deed as to that county, or the intent to revoke or re-execute the deed as to the residue.

To us it appears, that it ought no more to affect the rights of the parties, than interlining the name of a region beyond the Atlantic, or a mere dash of the pen.

On the subject of rasures we would remark, it is to be regretted that this plea had not been specially demurred to, that the question might have been taken from the court and sent to the jury. There is no doubt that they might have found this deed several in its nature as to each county, and, therefore, unaffected by the addition of another. The tendency of the decisions has been, to carry such questions to that tribunal; and, notwithstanding some contrariety of dicta, it is now clearly settled that a rasure must make a deed void, or it is immaterial; and, therefore, non est factum is held to be the proper plea. Chief Justice Holt has declared any other form of taking advantage of a rasure impertinent (6 Mod., 215), *and the rule is not now [*717 to be doubted. But as to the principle upon which a rasure avoids a deed, it is not too much to say that the law of the subject appears to have got into some confusion. Modern decisions, particularly of our own courts, lean against the excessive rigor with which some writers and some cases disfigure it. In the case of the United States v. Cutts, 1 Gall.

1.—1 Loft's Gilb. 111; Ventris, 185; the note at the end of Pigot's case, 11 Coke, also recognizes this distinction.

69, a bond, that had been cancelled, and mutilated, the seal torn away by the joint act of the defendant and the plaintiff's bailee, was still held, and rightly held, to be sustainable as the deed of the party. In the case of Speak et al. v. United States, 9 Cranch, 28, a bond was sustained, notwithstanding the striking out of one joint and several co-obligor, in the absence of the others, and the insertion of another. And so, as to revenue bonds, there is not a court of the United States which has not sustained them against the plea of non est factum, notwithstanding that both sum and parties have been inserted after the execution by one of the obligors, and this, in his absence, because the contract was not altered, and the good sense of the law prevailed against its technicalities.

There is a great paucity of decisions, in modern times, on the subject of rasures and interlineations. If we mount to its origin, we find it, in the year-books, and in Perkins, who cites them, given as the ground of suspicion and inquiry. And so, unquestionably, it ought to be, and frauds or mutilations, to which the parties having the custody of deeds are privy, 718*] cannot be taken too strongly *against them. But when we encounter the doctrine, as laid down in Pigot's case, "that when a deed is altered in a point material, by a stranger, without the privity of the obligee, even by drawing a pen through the midst of a material word, that it shall be void," without reference to the fraud, privity, or gross negligence of the obligor, it certainly is time to pause; and I highly approve of the hesitation of my brother Story, in Cutt's case, as to the authority of Pigot's case. As an adjudication, the value of that case should be limited to the single point, "that an immaterial interlineation, without the privity or command of the obligee, does not avoid the bond." The case does not call for the decision of another point, for it is upon a special verdict, and that the only question submitted. Yet, the reporter, who seldom lets an opportunity escape him, that furnishes an apology for exemplifying his indefatigable research, makes it authority for a score of positive decisions, and the introduction to a mass of law, upon questions totally distinct. But it should be noted of this learned judge, that his reports, like the text of Littleton, are only to be considered as the occasion or excuse for displaying his acquirements in the law learning of his day, and expressing his opinions upon juridical topics.

It is certainly true, that some of the decisions in the books have carried this doctrine a great way. As, for instance, the case of the lease of the Dean of Pauls, in which the counterpart expressed a rent of £27, and the ten- 719*] ant altered *his deed from £26 to £27, to make it accord with the counterpart and the true contract. Yet it was held to avoid his lease. 1 Roll., 27; Cro. Eliz., 627. But the utmost that can be made of these cases is, that they apply to those instances in which the deed is, necessarily, an entire thing; and the reason assigned is, that the witness can no longer testify to the deed, as the deed which he saw delivered. Surely this reason is not applicable to the present case; for, let the witness be examined upon this instrument, as to the county of A, as introductory to the proof of the money collected in A, and so on as to the counties B, C and D, and what is to prevent his proving the execution of this deed? That which may just as well have been executed in as many detached sheets of paper as there are counties, certainly has nothing of necessary entirety or indivisibility in its nature. Any other rule, as applied to this case, would, we conceive, be permitting frauds to be covered by a principle which was intended to prevent frauds.

Certificate for the defendant.

[*Surety.] [*720

THE UNITED STATES
v.
KIRKPATRICK et al.

A bond, given on the 4th of December, 1813, for the faithful discharge of the duties of his office, by a collector of direct taxes and internal duties, appointed (under the act of the 22d of July, 1813, ch. 16), by the President, on the 11th of November, 1813, to hold his office until the end of the next session of the Senate, and no longer, and subsequently appointed by the President, with the advice and consent of the Senate, on the 24th of January, 1814, is to be restricted (as to the liability of the sureties) to the duties and obligations created by the collection acts passed antecedent to the date of the bond.

The second commission, issued under the appointment, with the advice and consent of the Senate, operates a revocation of the first commission, issued under the appointment by the President, which was to continue until the end of the next session of the Senate, and no longer; and the liability of the sureties in the bond did not extend beyond the duration of the first commission.

In general, laches is not imputable to the government; and where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit, upon the neglect of the officer or agent to account, will not discharge his sureties.

The case of The People v. Jansen, 9 Johns. Rep. 332, distinguished; and, so far as it conflicts with the present case, overruled.

In general, the debtor has a right to make the appropriation of payments; if he omits it, the creditor may make it; but neither party has a right to make an appropriation after the controversy has arisen.

In cases of long and running accounts, where balances are adjusted, merely for the purpose of making rests, the law will apply payments to extinguish the debts, according to the priority of time.

ERROR to the District Court for the Western District of Pennsylvania.

*This was an action of debt, com- [*721
menced by the United States, in the court below, against the defendants in error, J. Kirkpatrick and others, as the obligees of a bond, given by them to the United States, on the 4th of December, 1813, conditioned for the true and faithful discharge of the duties of the office of collector of direct taxes and internal duties, by Samuel M. Reed, who had been appointed to that office by the President, on the 11th of November, 1813, and, by the terms of his commission, was to hold his office during the pleasure of the President, "and until the end of the next session of the Senate of the

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NOTE.—As to official bonds and the extent of the liability of sureties thereunder, and when sureties are discharged, see notes to 3 L. ed. U. S. 709; post, 578; 35 L. ed. U. S. 486, 679; 42 L. ed. U. S. 987.

As to the application of payments by the debtor or creditor, see note to 3 L. ed. U. S. 136.

United States, and no longer." On the 24th of January, 1814, he was re-appointed to the same office, by the President, by and with the advice and consent of the Senate, and by the new commission issued to him, was to hold his office "during the pleasure of the President of the United States, for the time being." The pleadings upon which the cause was tried in the court below, were extremely informal and confused, but they resulted substantially in the following questions of law, upon which the judge instructed the jury, and a bill of exceptions was taken:

1. Whether the liability of the sureties to the bond was limited to the duties and obligations imposed upon the collector by the act of the 22d of July, 1813, ch. 16, and other acts relating to the assessment and collection of direct taxes and internal duties, passed antecedent to the execution of the bond, thus ex-
722*] cluding the liability for moneys *collected under subsequent statutes. Upon this point, the court below instructed the jury that the responsibility of the sureties did not extend to the obligations created by the subsequent statutes.

2. Whether the jury were at liberty to impute laches to the government, from the delay of the proper officers to call the collector to account, at the periods prescribed by law, from the year 1814 to 1818. The court left it to the jury to decide whether, under the circumstances of the case, the government had not waived its resort to the sureties.

3. Whether the responsibility of the sureties extended beyond the duration of the first commission. Upon this point, the court below charged the jury that the responsibility of the sureties extended to the re-appointment of the collector under the new commission, until his duties and obligations were varied by the statutes enacted subsequent to the date of the bond.

4. How the payments, which had been made by the collector, were to be appropriated. The balance found due in each account had been carried forward to the succeeding account, and the court was of opinion that the government could not make the appropriation. at the time of the trial, so as to apply the payments to the extinguishment of debts due subsequent to the time when the sureties ceased to be liable.

Upon these instructions a verdict was found for the defendants, upon which a judgment was rendered in the court below, and the cause was brought by writ of error to this court.

723*] *The Attorney-General, for the plaintiffs, mentioned the extreme laxity of the pleadings in the court below, not with a view of preventing a decision upon the merits, which was very much desired by the government, but in the hope of producing some reform. He argued, (1) That the appointment of the collector was permanent, neither limited in point of time, nor to the acts of Congress then in force, but extending to all laws on the subject of direct taxes and internal revenue, which might be passed during his continuance in office. The act of the 22d of July, 1813, ch. 544 (xvi.), makes a permanent partition of the whole territory of the United States into collection districts, preparatory to other distinct and separate laws, which were afterwards to follow. It looks to all future laws. There being, then, no existing law in force, all the laws to which the bond could refer were prospective. The case of The People v. Jansen,[1] which had been referred to in the court below, was distinguishable, in several particulars, from the present. (2) The instruction given to the jury, authorizing them to impute laches to the government, was erroneous. Even in the case of private individuals, mere delay in proceeding against the principal debtor will not discharge a surety.[2] (3) The charge of the judge below was also erroneous, in authorizing the jury to apply the payments made by the collector to *the balances due, under the acts in [*724 force when the bond was given. The rule is settled, that where debts are due on two different accounts, the debtor may make the application to either, at the time of payment. But, if he omit to do it, the creditor has a right to determine to which it shall be applied.[3]

Mr. Alexander and Mr. Foster, contra, contended, (1) That the bond entered into by the defendants in error, was no farther obligatory on them, than for the faithful performance of the official duties of Reed, during the continuance of the appointment recited in the condition. The first commission was to continue in force, by its own terms, only until the end of the next session of the Senate; and the new commission was a revocation of it. Being with the advice and consent of the Senate, it is by a different authority, and the President might have nominated a different person. By carrying forward the balance due by Reed, under the first commission, to his account, as collector under the second commission, it was shown that his personal responsibility was looked to, and that no resort was intended to be had against the sureties. It has been held, that a guarantee of a partnership debt is not liable, where the partnership debt is discharged, by carrying the proportions of each partner to his separate account, without notice to the *guarantee.[4] [*725 This must be upon the principle that the plaintiff had shown, by his own act, that he did not intend to resort to the surety, and that he looked to the debtors in a different capacity from that in which the guaranty was given. In Lord Arlington v. Merrick,[5] the action was debt on bond, dated the 1st of May (18 Car. II.), conditioned that, whereas, on the 30th of April, 1667, the plaintiff had deputed T. Jenkins to execute said office. from the 24th of June next for six months following, if said T. J. shall, etc., for and during all the time he shall continue deputy-postmaster, well, truly and faithfully do, execute and perform all the duties, etc. The defendant pleaded performance generally; and a breach was

1.—9 Johns. Rep. 332, 340.

2.—The Trent Navigation Company v. Harley, 10 East Rep. 34; Nares v. Rowles, 14 East Rep. 510.

3.—Peters v. Anderson, 1 Marsh. Rep. 238; Newmarch v. Clay, 13 East Rep. 239.

4.—Cremer v. Higginson, 1 Mason's Rep.; see, also, 3 Wheat. Rep. 148, note 1, and the cases there collected: Commonwealth v. Fairfax, 4 Hen. & Munf. 208, recognized by the court to be law; Anderson v. Longden, 1 Wheat. Rep. 91.

5.—3 Saund. 411.

assigned on the last day of September, 22d of the King; and defendant demurred. The court held, that the condition should refer to the recital only, by which the defendant was bound only for six months, and not longer.[1] This had been considered as a leading case ever since; and other analogous cases might 726*] be cited.[2] (2) The subsequent *acts of Congress on the same matter had so varied and enlarged the duties of the collector, as created by the statutes in force at the time the bond was given, that the sureties were not liable for moneys received under those acts, even admitting that they were liable beyond the continuance of the first commission. The learned counsel entered into a critical examination of the acts, to show that the duties of the officer were thus varied and enlarged, and cited the authorities in the margin to support the legal principle that such alteration in his official duties would discharge the sureties from further liability.[3] (3) That laches might be imputed to the government, through the negligence of their officers.[4] In the case of mere private individuals, the surety, or guarantee, may pay the debt, and proceed in chancery to compel the creditor to enforce his demand against the principal, which he could not do in the case of the government; and that was a sufficient reason to justify the court below in leaving it to the jury to say, whether the neglect of the officers of the treasury was not a waiver of the guaranty.[5] And 727*] even *in the case of a private individual, gross laches, or fraud, on the part of the creditor, will discharge the surety.[6] (4) The court below were not bound to direct the jury, that the subsequent payments should be applied to discharge subsequent balances; nor did it appear by the record that the United States attorney made such an election. The rule as between a private debtor and creditor, as to the appropriation of payments, is not applicable where the receiver is a public officer.[7] Where the whole case is complicated of law and fact, the whole may be left to the jury, unless some particular point is selected by the counsel for the consideration of the judge, and his opinion is asked upon that point.[8]

1.—Id. 415; Sergt. Williams' note, 5.

2.—Wright v. Russell, 3 Wils. 530; S. C. 2 W. Bl. R. 934; African Company v. Mason, cited in Stubbs v. Clough, Str. 227; Barker v. Parker, 1 T. R. 287; Barclay v. Lucas, 1 T. R. 291, note a; Metcalf v. Bruin, 12 East Rep. 400; The Wardens of St. Savior v. Bostwick, 5 Bos. & Pull. 175; Commonwealth v. Baynton, 4 Dall. 282; Armstrong v. The United States, 1 Peters' Rep. C. C. 46; Liverpool Waterworks Company v. Atkinson, 6 East Rep. 507.

3.—Bartlett v. The Attorney-General Parker, 277; Comyn. Dig. tit. Chancery, 2; Stratton v. Rastall, 2 T. R. 366; Ludlow v. Simond, 2 Caines' Cas. in Err.; 3 Wheat. Rep. 155, note 1, and cases there cited; 1 Bos. & Pull. 419; King v. Baldwin, 2 Johns. Ch. Rep. 554; 18 Ves. 20.

4.—The People v. Jansen, 7 Johns. Rep. 332; Hunt v. U. S. 1 Gall. 34.

5.—King v. Baldwin, 2 Johns. Ch. Rep. 56; Wright v. Russell, 2 W. Bl. 934; 5 Vin. 108, pl. 14; Paine v. Packard, 13 Johns. Rep. 174.

6.—Philips v. Astling, 2 Taunt. 206; Warrington v. Forbes, 8 East Rep. 245; Duval v. Trask, 13 Mass. Rep. 154; Hunt v. United States, 1 Gall. 34; 3 Wheat. Rep. 154, 155, note 1, and cases there collected.

7.—United States v. January, 7 Cranch, 575.

8.—Boorman v. Smith, 2 Serg. & Rawl. 464.

The Attorney-General, in reply, insisted that there was no limitation to the obligation of a surety, unless expressed on the face of the bond, or implied in law. In Lord Arlington v. Merrick,[9] the condition of the bond was expressly limited to six months. So all the other cases cited would be found to have some distinguishing feature; such as that the condition was to be faithful to the plaintiff, and the breach assigned was, that the defendant had failed to pay the plaintiff and his partner, *whom he had subsequently [*728 taken into the firm. There it was held, that the surety was not liable for subsequent defaults.[10] In the case of The People v. Jansen,[11] the statute of New York made it the express duty of the public officers to prosecute diligently, and with effect, the suits which had been commenced against the principal; and their neglect to perform this duty, actually occasioned the loss for which the sureties were sought to be made responsible. So, also, in the exchequer case of Bartlett v. The Attorney General,[12] a new duty was laid upon coals, by a statute passed subsequent to the giving of the bond by the collector, under which statute a new deputation was given, and new security taken; it was, therefore, very properly held, that the sureties on the first bond were not liable for the moneys received on account of this duty. But, in the present case, the bond is to continue during his continuance in office, and is to secure all duties collected during that term. If it were an annual office, it might have been different.[13] As to the two commissions, the practice of the government has been to consider them as one continuing commission. A different construction would render the bond practically ineffectual. The objection which seeks to impute laches to the government, on account of the mere omission of its officers to proceed against the *principal, on every periodical omission [*729 to account, is entirely novel, and, if it were to prevail, would be equally fatal to the most important interests of the public, and injurious to the sureties themselves, as it may often happen that the balance consists of outstanding duty bonds, which may soon afterwards be collected, and liquidate the balance. The law does not create any obligation to sue, which does not exist in the case of a private guaranty.

Mr. Justice Story delivered the opinion of the court:

In this case, the court cannot but lament the extreme irregularity and laxity of the pleadings, if, indeed, the informal minutes upon the record be entitled, in any measure, to the appellation of pleadings. Some apology is, indeed, to be found in the asserted inaccurate local practice in the state courts; but it is impossible, without breaking down the best settled principles of law, not to perceive that the very errors in the pleadings are, of themselves, sufficient to justify a reversal of the judgment, and an award of a repleader. The agreement

9.—3 Saund. 411.

10.—3 Wils. 530.

11.—9 Johns. Rep. 332, 340.

12.—Parker, 277.

13.—Curling v. Chalklen, 3 Maul. & Selw. 502.

of the parties, filed in the case, may, indeed, help the formal defects, but cannot be admitted to dispense with the substance of appropriate pleas; for, otherwise, it would be difficult to ascertain what was tried, or to be tried; and we might as well dispense with the declaration itself as with the subsequent pleadings. It is to be hoped that, in future, a more correct 730*] *practice will find its way into the District Court.

Three errors have been insisted upon by the government, as contained in the charge of the court below. The first is, that the judge limited the responsibility of the sureties upon the collector's bond, to the duties and obligations imposed by the acts of Congress, antecedently passed, thus excluding the liability created by the subsequent statutes. The second is, the direction of the judge, that the jury were at liberty to impute laches to the government, from the delay to call the collector to account, at the periods prescribed by law, and the consequent injury to the sureties. The third is, the direction that the payments made by the collector might, under the circumstances, be applied to the discharge of the balance due from collections made under the acts which were in force when the bond was given.

As to the first point. The collector was appointed, under the act of the 22d of July, 1813, ch. 16, for the assessment and collection of direct taxes and internal duties. In the 2d section it provides, "that one collector, etc., shall be appointed for each of the said collection districts, etc.; and if the appointment of the said collectors, or any of them, shall not be made during the present session, the President of the United States shall be, and is hereby empowered to make such appointment, during the recess of the Senate, by granting commissions, which shall expire at the end of their next session." The 18th section of the same act further provides, "that each collector 731*] *etc., shall give bond, with one or more good and sufficient sureties, etc., in at least double the amount of the taxes assessed in the collection district for which he may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office, according to law, and particularly for the due collection and payment of all moneys assessed upon such district." The condition of this bond principally refers, as will appear on an inspection of the act, to assessments of direct taxes. But the subsequent acts (act of the 24th of July, 1813, ch. 21, s. 14, and ch. 24, s. 6, and ch. 25, s. 3 and s. 10, and the act of the 3d of August, 1813, ch. 38, s. 2 and s. 5, and ch. 51, s. 13), laying internal duties, contain provisions enlarging the authority of the collector; and the act of 2d of August, 1813, ch. 55, expressly extends the liability under the bond, to the due collection and payment of all moneys accruing from the duties laid by these acts. So that there is no doubt that, as to bonds subsequently given, the language of the condition is to receive an interpretation which shall secure the fidelity of the collector under all these acts. The collector, whose bond is in question, was appointed by the President, on the 11th of November, 1813, and, by the terms of his commission, he was to hold his office during the pleasure of the President, "and until the end of the next session of the Senate of the United States, and no longer." The bond in question was given by the collector, and by the defendants, as his sureties, on the 4th of *December, of the same year; and it [*732 follows, in its terms, the requirements of the act of Congress. On the 24th of January, 1814, the President, with the advice and consent of the Senate, re-appointed the party collector, etc.; and by his new commission, he was to hold his office "during the pleasure of the President of the United States for the time being." No new bond was taken under this commission. Under these circumstances, the district judge held, that the liability of the sureties was strictly confined to the duties and obligations created by the acts passed antecedent to the date of the bond. And we are of opinion that this is the true construction of the condition of the bond. There is nothing in the original act, under which the appointment was made, which contemplates a permanent and continuing liability for all duties under all laws which might be subsequently passed. In its terms, the condition, as expounded by the other parts of the act, had a principal reference to the assessments of direct taxes; and it is extended farther in its operation, only by the express and positive directions of the act of 2d of August, 1813, ch. 55, s. 1. To this extent, therefore, it may well be of force; but to go beyond it, would be to exceed the legislative declaration, and create a general, where the act had fixed a limited, responsibility. If the argument on behalf of the government were correct, the provision, so solicitously placed in this last act, was wholly unnecessary; for the liability would expand with the new duties imposed by every successive act of the legislature. But the act itself *furnishes no ground [*733 for such an exposition; and we do not feel ourselves at liberty to give to contracts of this sort further efficacy than the laws and the parties must have had in their contemplation.

This point, however, becomes, of comparatively small importance in the cause, if another, which has been argued in this connection, cannot be maintained. We allude to the question as to the duration and force of the original commission of the collector. Strictly speaking, this question does not arise upon the present record. For, although the court below decided, that, in point of law, both commissions constituted but one continuing appointment, the second commission operating only as a confirmation of the first, yet, as the verdict was found for the defendants on another ground, and no exception was taken by them, it is not matter of error which can be assigned upon the present occasion. But, as it is manifest that the same question must arise upon any subsequent trial, if there should be a reversal of the judgment, and will form a most important, and, perhaps, decisive ground of argument; and as all the parties are desirous of our opinion on this point, and it has been fully argued from its bearing on the other points in the cause, and might have been material, if our decision on the first point had been different, we have no hesitation in declaring our opinion, that the decision of the court below was founded in mistake.

The act, under which this appointment was made, authorizes the President, in the recess [*734] of the Senate, *to make appointments, by granting commissions, which shall expire at the end of their next session. The first commission is, as has been already stated, in conformity to this provision of the act, and is, by express terms, limited to continue to the "end of the next session of the Senate, and no longer." It follows, therefore, both by the enactment of law and the form of the grant, that the first commission must have expired of itself at that period; and, as the next session of the Senate ended in April, 1814, that is the utmost extent to which it could reach. The bond in question was given with express reference to this commission; and its obligatory force was, consequently, confined to acts done while that commission had a legal continuance, and could not go beyond it. And here would have been the natural termination of the liability. But, in the meantime, a new appointment was made by the President, with the advice and consent of the Senate; and as soon as that was accepted by the collector, it was a virtual superseding and surrender of the former commission. The two commissions cannot be considered as one continuing appointment, without manifest repugnancy. The commissions are not only different in date, and given under different authorities and sureties, but they are of different natures. The first is limited in its duration to a specified period; the second is unlimited in duration, and during the pleasure of the President. If the latter operated merely as a confirmation of the former, then it confirmed its existence only during the original period fixed by law. But [*735] *such an effect is not pretended, and would be irreconcilable with the terms and intent of the commission. It has been suggested, that the practice of the government has been to consider such commissions as one continuing commission. But whatever weight the practice of the government may be entitled to, in cases of doubtful construction, it can have no influence to change the clear language of the law. In short, if the nomination to, and approval by the Senate, was a mere confirmation, and not equivalent to a new appointment, there was no necessity for the second commission; and yet, the argument supposes, that it could not be dispensed with; for if no commission had been issued, the first, by its own limitation, would have expired.

Then, as to the point of laches, we are of opinion that the charge of the court below, which supposes that laches will discharge the bond, cannot be maintained as law. The general principle is, that laches is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities. On the other hand, the mischiefs to the agents and their sureties would be scarcely less tolerable. For if, where the laws, as in the *present instance, requires [*736] quarterly accounts and settlements, a mere omission to account is to be deemed a breach of the bond, for which a suit must be immediately brought, upon the peril of loss from imputed laches; the collectors and their sureties would be oppressed with the most expensive and vexatious litigation; and their whole real estate, which by law is subjected to a lien, upon the commencement of a suit, would be perpetually embarrassed in its transfers. This consideration of public or private inconvenience is not to overrule the settled principles of law, but it is certainly entitled to a great weight, where a new doctrine is to be promulgated. It is admitted, that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature, between private individuals. Such is the clear result of the authorities. Why, then, should a more rigid principle be applied to the government? a principle which is at war with the general indulgence allowed to its rights, which are ordinarily protected from the bars arising from length of time and negligence? It is said that the laws require that settlements should be made at short and stated periods; and that the sureties have a right to look to this as their security. But these provisions of the law are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means *of judgment as the government itself; [*737] and the latter does not undertake to guaranty such fidelity. No case has been cited at the bar, in support of the doctrine, except that of The People v. Jansen, in 7 Johns. Rep. 332. In respect to that case, it may be observed that it is distinguishable from the present in some of its leading circumstances. But if it were not, we are not prepared to yield to its authority. It is encountered by other authorities, which have been cited at the bar; and the total silence in the English books, in a case of so frequent occurrence, affords strong reason to believe that it never has been supposed that laches would be fatal in the case of the government, where it would not affect private persons. Without going more at large into this question, we are of opinion that the mere laches of the public officers constitutes no ground of discharge in the present case.

The last ground respects the manner in which the court below laid down the law respecting the appropriation of payments. In our opinion, there is no error in the charge on this point. The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments, according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and a fortiori at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occuring, *and no balances are otherwise [*738]

adjusted than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments pro tanto of the debts antecedently due.

Upon the whole, it is the opinion of the court, that for the error of the District Court, on the question of laches, the judgment ought to be reversed, and a venire facias de novo awarded, with directions, also, to allow the parties liberty to amend their pleadings.

[Constitutional Law. Chancery.]

OSBORN et al., Appellants,

v.

THE PRESIDENT, Directors and Company of the Bank of the United States, Respondents.

The act of incorporation of the Bank of the United States gives the circuit courts of the United States jurisdiction of suits by and against the bank.

This provision in the charter is warranted by the 3d article of the constitution, which declares, that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

It is unnecessary for an attorney or solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney under the corporate seal.

Whatever authority may be necessary for an attorney or solicitor to appear for a natural or artificial person, it is not a ground of reversal 739*] *for error, in an appellate court, that such authority does not appear on the face of the record. It is a formal defect, which is cured by the statute of jeofails, and the 32d section of the judiciary act of 1789, ch. 20.

In general, the answer of one defendant in equity cannot be read in evidence against another. But where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule does not apply.

Where the defendant is restrained by an injunction, from using money in his possession, interest will not be decreed against him.

An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges.

In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party to the suit. But if the principal be not himself subject to the jurisdiction of the court (as in the case of a sovereign state), the rule may be dispensed with.

A court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks.

The circuit courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a state; and, as the state itself cannot, according to the 11th amendment of the constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the state, who are intrusted with the execution of such laws.

A state cannot tax the Bank of the United States; and any attempt, on the part of its agents and officers, to enforce the collection of such tax against the property of the bank, may be restrained by injunction from the Circuit Court.

APPEAL from the Circuit Court of Ohio.

The bill filed in this cause, was exhibited in the court below, at September term, 1819, in the name of the respondents, and signed by solicitors of the court, praying an injunction to restrain Ralph Osborn, auditor of the state of Ohio, *from proceeding against the [*740 complainants, under an act of the legislature of that state, passed February the 8th, 1819, entitled, "An act to levy and collect a tax from all banks, and individuals, and companies, and associations of individuals, that may transact banking business in this state, without being allowed to do so by the laws thereof." This act, after reciting that the Bank of the United States pursued its operations contrary to a law of the state, enacted, that if, after the 1st day of the following September, the said bank, or any other, should continue to transact business in the state, it should be liable to an annual tax of $50,000 on each office of discount and deposit. And that on the 15th day of September, the auditor should charge such tax to the bank, and should make out his warrant, under his seal of office, directed to any person, commanding him to collect the said tax, who should enter the banking-house, and demand the same, and if payment should not be made, should levy the amount on the money or other goods of the bank, the money to be retained, and the goods to be sold, as if taken on a fi. fa. If no effects should be found in the banking room, the person having the warrant was authorized to go into every room, vault, etc., and to open every chest, etc., in search of what might satisfy his warrant.

The bill, after reciting this act, stated that Ralph Osborn is the auditor, and gives out, etc., that he will execute the said act. It was exhibited in open court, on the 14th of September, and, notice of the application having been given to the defendant, *Osborn, [*741 an order was made, awarding the injunction on the execution of bonds and security in the sum of $100,000; after which, a subpœna was issued, on which the order that had been made for the injunction was indorsed by the solicitors for the plaintiffs; and a memorandum, that bond with security had been given by the plaintiffs, was indorsed by the clerk; and a power to James M'Dowell to serve the same, was indorsed by the marshal. It appeared, from the affidavit of M'Dowell, that both the subpœna and indorsement were served on R. Osborn, early in the morning of the 15th. On the 18th of the same month of September, a writ of injunction was issued on the same bill, which was served on R. Osborn and on John L. Harper. The affidavit of M'Dowell stated that he served the writ on Harper, while on his way to Columbus with the money and funds on which the same was to operate, as he under-

NOTE.—As to power of the United States to create a bank, see 4 L. ed. U. S. 579.

As to when the answer of a defendant in equity is evidence for or against himself or a co-defendant, see notes to 4 L. ed. U. S. 266; 5 L. ed. U. S. 303.

State taxation of national banks, see note to 45 L.R.A. 737.

stood; and that the writ was served on Osborn before Harper reached Columbus.

In September, 1820, leave was given to file a supplemental and amended bill, and to make new parties.

The amended bill charges, that subsequent to the service of the subpœna and injunction, to wit, on the 17th of September, 1819, J. L. Harper, who was employed by Osborn to collect the tax, and well knew that an injunction had been allowed, proceeded by violence to the office of the bank at Chilicothe, and took therefrom $100,000, in specie and bank notes, belonging to, or in deposit with, the plaintiffs. 742*] That this money *was delivered to H. M. Curry, who was then treasurer of the state, or to the defendant, Osborn, both of whom had notice of the illegal seizure, and paid no consideration for the amount, but received it to keep it on safe deposit. That Curry did keep the same until he delivered it over to one S. Sullivan, his successor as treasurer. That neither Curry nor Sullivan held the said money in their character as treasurer, but as individuals. The bill prays, that the said H. M. Curry, late treasurer, S. Sullivan, the present treasurer, and R. Osborn, in their official and private characters, and the said J. L. Harper, may be made defendants; that they may make discovery, and may be enjoined from using or paying away the coin or notes taken from the bank, may be decreed to restore the same, and may be enjoined from proceeding further under the said act.

The defendant, Curry, filed his answer, admitting that the defendant, Harper, delivered to him, about the 20th of September, 1819, the sum of $98,000, which, he was informed and believed, was a tax levied of the branch bank of the United States. He passed this sum to the credit of the state, as revenue; but, in fact, kept it separate from other moneys, until January or February, 1820, when the moneys in the treasury were seized upon by a committee of the House of Representatives; soon after which he resigned his office, and the moneys and bank notes, in the bill mentioned, still separate from other moneys in the treasury, came to the hands of S. Sullivan, the 742*] *present treasurer, who gave a receipt for the same.

The defendant, Sullivan, failing to answer, an attachment for contempt was issued, on which he was taken into custody. He then filed his answer, and was discharged.

This answer denies all personal knowledge of the levying, collecting, and paying over the money in the bill mentioned. It admits that he was appointed treasurer, as successor to Curry, on the 17th of February, 1820, and that he entered the treasury on the 23rd, and began an examination of the funds, among which he found the sum of $98,000, which he understood was the same that is charged in the bill; but this was not a fact within his own knowledge. He gave a receipt as treasurer, and the money has remained in his hands, as treasurer, and not otherwise. The sum of $98,000 remains untouched, out of respect to an injunction said to have been allowed by the Circuit Court, on a bill since dismissed. He admits the sum in his hands to correspond with the description in the bill, so far as that description goes, and annexes to his answer a description of the residue. He has no private individual interest in the money, and holds it only as state treasurer; admits notice, from general report, and from the late treasurer, that the said sum of $98,000 was levied as a tax from the bank, and that the bank alleged it to be illegal and void.

The cause came on to be heard upon these answers, and upon the decrees nisi, against Osborn and Harper, and the court pronounced a decree *directing them to restore to [*744 the bank the sum of $100,000, with interest on $19,830, the amount of specie in the hands of Sullivan. The cause was then brought, by appeal, to this court.

Mr. Hammond, for the appellants, contended, that the decree was erroneous, for the following reasons:

1. Because no authority is shown in the records, from the bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because the case made in the bill does not warrant the interference of a court of chancery by injunction or otherwise.

6. Because, if any case is made in the bill, proper for the interference of a court of chancery, it is against the state of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because the decree assumes that the Bank of the United States is not subject to the taxing *power of the state of Ohio, and [*745 decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

1. A sufficient authority must be shown for the institution of every legal proceeding. This principle is peculiarly applicable to the suits brought in the name of corporations; because such a body must always appear by attorney, either to institute or defend a legal proceeding. It cannot appear in person, and it can only constitute an attorney by written power, under its common seal. This doctrine is not impugned by the decision of this court in the case of The Bank of Columbia v. Patterson.[1] The old doctrine, that a corporation could not contract or promise, except by writing, under its common seal, is overruled in that case; and it was adjudged that a contract made by a committee duly authorized for that purpose, binds the corporation. It seems, also, to be intimated that a corporation may, by resolution or other act, not under their common seal, duly appoint and authorize an agent, whose contracts would bind them; and the case of Rex v. Bigg[2] is referred to as authority. But, upon looking into that case, it will be found, that the principle is merely laid down by counsel

1.—7 Cranch, 299.
2.—3 P. Wms. 419.

arguendo; and the counsel, by whom it is advanced, add, "But in case of anything of consequence, or the employing anyone to act in their behalf, in a matter which is not an ordinary 746*] service, a corporation *aggregate cannot do that without deed." Now, what can be of more consequence, than such a suit as this, commenced in effect, against a sovereign state, by this corporation? In Fleckner v. The Bank of the United States,[1] the court has gone no farther than to determine that the board of directors may, by resolution, authorize their cashier to transfer bills or notes, the property of the bank, and need not make a power under seal for that purpose. This is a very different matter from authority to prosecute such a suit as the present. It falls within the scope of the ordinary official duties of the cashier. But even admitting that any express authority from the bank, whether under the common seal or not, would have been sufficient in the present case, it is indispensable that such authority should be produced and filed. This has not been done, and therefore it must be concluded that the suit is wholly unauthorized by the corporation, in whose name it has been commenced.

2. The answer of the defendant, Sullivan, contains no admission that the notes and coin were the property of the plaintiff, or that the injunction was violated in taking them from their possession. In Hills v. Binney[2] the bill was filed by the creditor against an administrator, who, by his answer, stated, that he believed the debt was due. Mr. Fonblanque, for the plaintiff, expressed a doubt whether there 747*] was a sufficient foundation for a *decree. Lord Eldon inclined to think it sufficient; but Mr. Richards, as amicus curiæ, suggesting that it was doubtful, Mr. Fonblanque consented to exhibit an interrogatory. The admission there was much stronger than any in the answer of the defendant, Sullivan. He has nowhere said, that he believes the notes and coin to be the property of the plaintiffs; on the contrary, he avers that, personally, he knew nothing about the collection of the tax, except from general report, and the information of the late treasurer. No proof whatever, of general report, or of the declarations of the late treasurer, would be sufficient to establish any fact. Sullivan's admission of this general report, and of this information, gives it no higher character than it would be entitled to upon being proved. The admission does not support the decree, and there is no other proof in the case.

3. The decree against the defendants, Osborn and Harper, so far as it requires them to pay the amount of the coin and notes specified in the bill, to the plaintiffs, is erroneous, because the bill shows that the same were not in the possession of those defendants. The foundation upon which a court of equity proceeds, is to redress the party under its protection, not to punish the wrong-doers. When punishment is the object, process for contempt is resorted to. Equity will look at the situation of all the parties, and will distinguish among the defendants, who can, and who cannot, comply with such decree as, upon equitable principles, must be pronounced. A plaintiff in equity cannot *fasten upon the specific [*748 subject for which he sues, and obtain an order retaining it in the hands of one defendant, subject to a final decree, and obtain a decree for restitution against other defendants, who, by his own showing, have not the subject in their power. Admitting that it was necessary to make all concerned in the transaction defendants, in order to ascertain who had possession of the subject, yet when that fact was ascertained, no decree (except as to costs) could be pronounced against those who were not in possession of it, and who claimed no interest in it. Where a party acts under an authority which he supposes valid, but which the court adjudge to be void, he is not to be regarded as a principal wrong-doer, further than the purposes necessarily require. In a court of equity, he is equitably, not vindictively, responsible.

4. Under the circumstances of the case, the defendants ought not to be chargeable with interest upon the coin in question. It may be admitted, that, in general, where a defendant has wrongfully possessed himself of the plaintiff's money, and thus deprived him of the use of it, equity may compel him to account for interest. But here the injunction forbidding the use of the coin was obtained at the plaintiff's request. Its effect and operation were, to place it in the custody of the law. The defendants could not use it, and, consequently, cannot be charged with interest.

5. No case is made out in the original bill, warranting the interposition of a court of equity by injunction. The injunction, if sustained at all, *must be upon one of two [*749 principles; either that it was necessary to secure to the bank the enjoyment of a franchise or exclusive privilege, or to protect it from an irreparable mischief.

All the cases where injunctions have been granted, to protect parties in the enjoyment of a franchise, proceed upon the principle that the injury was consequential, not direct, and that it would be difficult, if not impossible, to estimate the damages. Thus, the proprietor of a machine, for which a patent has been granted, or of a book for which a copy-right has been obtained, may have an injunction to prevent others from using the machine, or vending the book. So, also, the proprietor of a toll-bridge or a turnpike-road, may have an injunction to prevent others from constructing and using a bridge or road, where it would be contrary to the terms of the plaintiff's grant. But in all these cases, the injunction is granted upon the principle that the act complained of is not only unlawful, and, therefore, unjustifiable, but that it is, in addition to its illegality, of a character for which compensation cannot be made in damages. But no case can be found of an injunction granted to protect the proprietor in the instances mentioned, against the commission of a mere trespass, where the party could have redress in damages, and where the trespass would not interfere with the franchise, further than every wrong interferes with the right of the individual upon whom it is inflicted. Wherever an injunction is granted for the protection of a franchise, the case must show that the party has the sole and exclusive *right to do the act, or transact the [*750 business, which he seeks to inhibit the defendant from performing. Thus, an injunction has

1.—8 Wheat. Rep. 338.
2.—6 Ves. Jun. 738.

been allowed to the East India Company, to prevent an interference with the trade exclusively secured to them by their charter.[1] But would an injunction be granted against seizing, by violence, the goods they may import, or doing injury to their ships when in port? So, a person entitled to an exclusive right of ferry, has been allowed an injunction to prevent ferrying by others.[2] But it does not follow that an injunction would be allowed, to prevent an injury which the proprietor might apprehend to his boats, or their tackle, or to the landing place. Here the original bill does not present a case for an injunction to secure the enjoyment of a franchise upon these principles. It seeks to be protected against an injury amounting to a trespass, and nothing more. The bill claims that it is one of the corporate franchises of the bank, to establish offices of discount and deposit, and transact banking business, anywhere, according to the discretion of the directors. But it is only when the franchise confers a sole and exclusive right, that the jurisdiction of a court of equity attaches, and it then attaches only so as to prevent others from invading that right, by attempting an actual participation in its use and enjoyment. It cannot be pretended that the charter of the bank confers upon it any ex- [*751 clusive right to carry on the *trade of banking. It cannot, therefore, come into a court of chancery to seek protection against any person for violating an exclusive franchise. If it be said that the privilege of exemption from state taxation is one of this nature, the answer is, that this privilege operates, not against individuals, but against the power authorized to lay and collect taxes. It does not operate against any individual, who is invested with no power of taxation, but who commits a trespass under color of levying a tax.

Nor can the injunction be supported upon the ground that the case presented required this extraordinary interference of the court, to protect the bank against irreparable mischief. It is but recently that injunctions have been issued to restrain the commission of an act amounting to trespass only. Lord Hardwicke says, "every common trespass is not a foundation for an injunction in this court."[3] Lord Kenyon, M. R., asserts, that "a court of chancery will not interfere, when the matter is merely in damages."[4] And Lord Eldon says: "I remember when, in a case of trespass, unless it grew into a nuisance, an injunction would have been refused."[5] The first reported case of an injunction in trespass, is that of Mitchel v. Dorrs, where the defendant had begun to dig coal in his own ground, and worked into that of the plaintiff. Lord Eldon said, "That is trespass, not waste. But I will grant [752* the injunction *upon the authority of a case before Lord Thurlow."[6] This last case was where the landlord owned two adjacent closes, and demised one. The tenant commenced mining for coal in the demised close, and continued to mine until he entered the close not demised. Lord Thurlow, after great hesitation, granted the injunction, upon the ground, as Lord Eldon himself asserts, of the irreparable ruin of the property as a mine, and it being a species of trade; and upon the principle of the court enjoining in matters of trespass, where irreparable damage is the consequence.[7] The next case was that of Hanson v. Gardiner,[8] where an injunction was granted upon the application of a person claiming in different rights, one of which was as lord of the manor, under the statute of Merton, against trespass by the commoners, and, upon hearing, the injunction was dissolved. An application was afterwards made by the devisees of an equity of redemption, in receipt of the rents, for an injunction against the mortgagee, claiming, as heir, to restrain him from cutting timber; but it was refused.[9] An injunction was subsequently granted, at the application of the landlord, to restrain a person charged to be in collusion with the tenant, from cutting or removing timber, or committing any other waste. Lord Eldon puts this upon the ground that it partakes more of *waste than in gen- [*753 eral cases, and says, he will not be bound as to what is to be done upon a mere trespass; though, he adds, that it is strange if there cannot be an injunction in that case, to prevent irreparable mischief. The next case of an injunction in trespass, is Crochford v. Alexander.[10] The plaintiff contracted to sell an estate to the defendant, who got possession from the tenant, and began to cut timber. The injunction was allowed; but the Lord Chancellor says: "I will grant this protection against cutting timber, until the power of the court to grant the injunction against trespass shall be fully discussed." It is singular, that in this case Lord Eldon should again state the case decided by Lord Thurlow, respecting the mines; and add, that Lord Thurlow considered it trespass, not waste, and refused the injunction. The injunction is justified by analogy; and reference is made to Robinson v. Byron,[11] which, upon examination, will be found not to be a case of trespass, but one where the defendant, having a command of the water, was about so to use it, within his own premises, as to throw it out and deluge the plaintiff; it was destruction. In Thomas v. Oakley,[12] the plaintiff was seized in fee of an estate, in which there was a stone quarry, and the defendant held a contiguous estate, with a right to enter the quarry and take stone for a special purpose, but was taking it for other purposes. *The coun- [*754 sel insisted that it was the course of modern authority, to afford assistance in cases of coal mines, timber, etc., to prevent irremediable mischief and injury, which damages could not compensate. Lord Eldon held, that upon the decisions which had taken place, the bill must be sustained. He refers to the first case decided by Lord Thurlow, and his hesitation, and adds, "But I take it that Lord Thurlow changed his opinion upon that; holding, that if

1.—1 Ves. 127.
2.—1 Ves. 476.
3.—3 Atk. 21.
4.—2 Bro. C. C. 65.
5.—7 Ves. Jun. 307.
6.—6 Ves. Jun. 147.
7.—7 Ves. Jun. 307.
8.—7 Ves. Jun. 305.
9.—Smith v. Collyer, 8 Ves. 89.
10.—15 Ves. 137.
11.—1 Bro. C. C. 588.
12.—18 Ves. 185; see also Kinder v. Jones, 17 Ves. 110, and Earl Cowper v. Baker, Id. 127.

the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which, in equity, he was entitled. The interference of the court is to prevent your removing that which is his estate. If this protection would be granted in the case of timber, coals, and lead ore, why is it not equally to be applied to a quarry?"

There is no analogy between these cases and the present. No estate of a stable and permanent character is to be injured. The naked suggestion in the bill is, that the plaintiffs verily believe that the defendant threatens to do an act amounting to a mere trespass. Lord Eldon says: "I never would grant an injunction, upon an affidavit stating that the deponent verily believes the defendant is about to cut timber."[1] Some act must be done, moving towards the commission of wrong; such as sending a surveyor to mark trees.[2] None of the cases stand upon a mere quia timet. But 755*] *here, not even a belief that the defendant meant to commit the trespass is asserted. Regard the case as against Osborn only and individually; separate him from the state tax, and from his office as auditor; and whether the bill is brought to protect a franchise or prevent a trespass, it cannot be maintained.

6. But, in fact, the bill is against the state, and as such, the Circuit Court has no jurisdiction of it. In this bill, all the component parts of a case against the state, are set out in their regular and proper order: the privilege; the measures set on foot to invade it; their unjust and oppressive character, and the prayer for relief against them. There is no allegation against any individual; no relief is prayed against any person in his private and individual character. The acts complained of are the acts of the legislature; the party charged with aggression on the plaintiff's right is the legislature; the relief prayed is against the acts of the legislature; the state is the sole party in interest. It is true, process is not prayed or awarded against the state; but the bill is substantially the same as it would have been, had the plaintiffs intended to make the state a formal party by process. In all ordinary cases, if the court sees from the face of the bill that the actual and principal party in interest is not before them, it will either dismiss the bill or stay the proceedings until proper parties are made. A decree, vitally affecting the interests of a principal, will never be pronounced, where his agent is the only party to the bill. In 756*] Vernon v. Blackerly,[3] *the suit was brought against the defendant, treasurer of the commissioners for building fifty new churches, to compel the payment of moneys claimed to be due from the commissioners. Lord Hardwicke dismissed the bill, saying, "it would be absurd that a bill should lie against a person who is only an officer, and subordinate to others, and has no discretionary power. It is absurd to make a party who acts ministerially, the sole party."

If, then, the state be the only party interested, and if the bill, in its terms, and in its effect, operates solely upon the state, the state ought to be made a party. If the Circuit Court cannot exercise jurisdiction where the state is a party direct, it ought not, it cannot, be permitted to obtain that jurisdiction, by an indirect mode of proceeding. This would be to disregard the substance of things, and found a jurisdiction upon arbitrary definition.

We maintain that the state of Ohio is, in fact, the sole defendant in this cause; and that the jurisdiction of the Circuit Court is excluded, (1) by the constitution of the United States; (2) by the judiciary act.

We contend, further, that if the subject-matter in controversy between the actual parties to this cause presents a case within the jurisdiction of the federal judiciary, that jurisdiction is vested exclusively in the Supreme Court, both by the constitution and by the judiciary act.

The constitution, after defining the cases in which the federal judiciary shall take cognizance, *declares, that "in all cases affect- [*757 ing ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction."

According to the interpretation given to the constitution by this court, in Cohens v. Virginia,[4] a state may be made a party, before the federal courts, wherever the case arises under the constitution, or a law of the United States; or where the controversy is between two states, or one state and a foreign state.

In this case, the controversy arises under the constitution of the United States, or under the act of incorporation, or under both. It is a case of original jurisdiction; and by the express letter of the constitution, the Supreme Court alone are authorized to take jurisdiction.

In Marbury v. Madison,[5] this court decided that it was not competent for Congress to invest the Supreme Court with original jurisdiction, in any other cases than those described in the constitution. It is supposed that the principle of this decision, and the reasoning of the court in support of it, both conduce to the conclusion, that where original jurisdiction is given by the constitution to the Supreme Court, Congress cannot distribute any part of such original jurisdiction to an inferior federal tribunal. It would hardly seem rational to decide that the framers of the constitution inserted this clause for no other purpose but that of *limiting the power of Congress, as to [*758 the cases in which they should give the Supreme Court original jurisdiction. There could have been no just ground for apprehending, that the national legislature would impose original jurisdiction upon the Supreme Court to a mischievous extent. Considering the character of the parties between whom the constitution invests the Supreme Court with this jurisdiction, it is a much more rational inference that it was intended to prevent Congress from subjecting them to the power of any inferior tribunal. "If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the Supreme Court should take original jurisdiction, in cases which might be supposed to affect them," the same solicitude would seem to require an interpretation, by which the original jurisdiction of

1.—Etches v. Lance, 7 Ves. 417.
2.—Jackson v. Cator, 5 Ves. 690.
3.—2 Atk. 144.
4.—6 Wheat. Rep. 378.
5.—1 Cranch, 174.

other courts should be excluded. If Congress be at liberty to give original jurisdiction to inferior courts, where the constitution has given it to the Supreme Court, it will be the easiest thing in nature to defeat that object, which the solicitude of the convention intended to secure. If these terms do not operate exclusively upon Congress, they cannot operate exclusively upon the state; so that the exemption of foreign ministers from liability in state tribunals, is not secured by the constitution, but depends upon an act of Congress, and may be put an end to whenever the national legislature choose.

In the case of Cohens v. Virginia, it is said, that "when the constitution declares the jurisdiction, in cases where a state shall be a party, 759*] to be *original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible, that its framers designed to include in the first-class, those cases in which jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution, or a law."[1]

It is allowed, that "it may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there;"[2] though it be immediately afterwards asked, "can it be affirmed that a state might not sue a citizen of another state in the Circuit Court?"[3] From the whole, this final conclusion is deduced: "The original jurisdiction of the Supreme Court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised, in consequence of the character of the party; and an original suit might be instituted in any of the federal courts, not to those cases in which an original suit might not be instituted in a federal court."

The result of this reasoning seems to be, that where the jurisdiction of the Federal Court attaches, in consequence of the character of the party, in that case no original suit can be brought against a state, except in the Supreme 760*] Court. But if a *state become liable to an action, in a case arising under the constitution, or a law of the United States, then any of the federal courts may entertain jurisdiction.

We cannot think that the court meant to assert this position; or that if they did, they will adhere to it. No good reason can be perceived for sustaining a distinction of this kind. The policy which exempts the states from the jurisdiction of inferior courts, is the same in both cases; and the terms of the constitution comprehend the one class of cases as well as the other. The words, "all cases," embrace as fully a case against a state, arising under the constitution, or a law, as they do a case between two states, or between a state and a foreign state. The same terms are used in defining the extent of the judicial power in the first class of cases described, and the court thus speak of their effect: "This clause extends the jurisdiction of the court to all cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article." The same may be said, with equal force, of the terms, when employed to define the original jurisdiction of the Supreme Court. The true reading and understanding are, "in all cases affecting ambassadors, other public ministers, and consuls, and in all those in which a state shall be a party, the Supreme Court shall have original jurisdiction." If there be any exception, by which a state can be sued in an original suit before an inferior federal tribunal, such *exception must be implied [*761 against the express words of the article, and can only be sustained "upon the spirit and true meaning of the constitution; which spirit and true meaning must be so apparent as to overrule the words which its framers have employed."

There is no difficulty in giving full force and effect to the constitutional distribution of jurisdiction, as we interpret it, without touching the appellate jurisdiction asserted in the case of Cohens v. Virginia. By that case, it is settled, that the judicial power of the United States extends to a class of cases which cannot originate in any federal tribunal, and that this jurisdiction must, of necessity, be appellate. The distribution of jurisdiction must be interpreted as if the judicial power was extended, by the letter of the constitution, to this class of cases, in express terms. The first member of the sentence must be understood as applicable only to cases in which original jurisdiction is vested in the federal judiciary. The second, to every description of appellate jurisdiction, whether it arise under the constitution, or be created by law. Thus, if a case arise under the constitution, or a law of the Union, in which an original suit may be sued against a state, the constitution requires such suit to be brought in the Supreme Court. If a state be plaintiff or defendant in a state court, and a question arise under the constitution, or a law of the Union, and a case be made at the trial, upon which the federal judicial power attaches, the constitution authorizes the Supreme Court to exercise appellate jurisdiction. *There is no occasion to [*762 confound the two classes of cases, or to bring the two kinds of jurisdiction into collision. The appellate jurisdiction of the Supreme Court may consistently be extended to the proper class of cases where a state is a party, without so interpreting the constitution as to subject the states to original actions in the inferior national tribunals.

But whatever may be the correct interpretation of the constitution upon this point, it has long been settled, that the circuit courts can exercise no jurisdiction but what is conferred upon them by law. The judiciary act does not vest them with jurisdiction where a state is a party. On the contrary, in a case like the present, it vests exclusive jurisdiction in the Supreme Court.

The judiciary act of 1789, c. 20, sec. 13, provides, that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens, and except also between a state and citizens of other states or aliens; in which latter case, it shall have

1.—6 Wheat. Rep. 393.
2.—Id. 395.
3.—Id. 396.

original, but not exclusive jurisdiction." This act, which distributes and defines the jurisdiction of the different federal courts, does not, in terms, vest the Circuit Court with jurisdiction in any case arising under the constitution or the laws of the United States. And in M'Intire v. Wood,[1] this court decided, that this portion of federal jurisdiction could not be exercised by the circuit courts, unless expressly con- [*763 ferred *by law. Neither does this act give jurisdiction to the Circuit Court, in any case where a state is a party; but, on the contrary, all the original jurisdiction that is given to the federal judiciary, where a state is a party, is vested in the Supreme Court, and, with certain exceptions, in that court exclusively. The case before the court comes not within any of the exceptions; so that if it be a case of federal jurisprudence, it is exclusively vested in the Supreme Court.

Should it be conceded that the state cannot be sued in the Circuit Court, and an attempt made to sustain the case and the jurisdiction against the individuals, upon the ground of necessity, lest there should be a failure of justice, it may be answered: First, that the reasons which exempt the state from direct responsibility, operate at least equally strong to exempt her from indirect responsibility. No necessity can warrant a judicial tribunal in disregarding the maxim, that that which cannot legally be directly done, cannot rightfully be effected by indirection.

A second, and a more decisive answer, may be given: the supposed necessity does not exist. The case arises under the constitution and the charter. A suit direct against the states may be prosecuted in the federal courts. The constitution has made the state amenable to justice before the Supreme Court of the nation. The national legislature have provided that this jurisdiction shall be exclusive. It cannot be defeated or evaded by the selection of improper parties, in subversion of established [*764 practice, and of correct and *well-settled principles. The bill might have been filed in the Supreme Court; the injunction might have been allowed by a judge of that court in vacation; the whole case might have been proceeded in as the framers of the constitution intended. The high and solemn measure of citing a sovereign state before a court of judicature, to defend its attributes of sovereignty, and the exercise of its power, ought not to be permitted to any authority but the highest tribunal of the nation. I say nothing of consequences; I look only to what is fit and proper in itself, adapted to the nature of man, to the organization of government, and consistent with the plain letter of the constitution.

If this were not the case, if the constitution had conferred jurisdiction, but Congress had omitted to make provision for exercising it by the Supreme Court, in an original form, still no necessity can justify an evasive assumption of it by any tribunal, much less by one to which the constitution never intended to intrust it. The bank must take the consequences, as in the case of other men who transact business, where Congress have failed to make provision for vesting in the courts all the jurisdiction conferred by the constitution.

In the case of M'Intire v. Wood, before cited, this court said: "When questions arise under the constitution of the United States, in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court; and this provision the legislature has thought sufficient, at present, for all the political purposes to be answered by *the clause of the constitu- [*765 tion which relates to the subject." It must remain sufficient until the law is changed, whatever inconvenience may result to individuals.

If, then, the case made in the bill be, in fact, a case against the state, in which the state is the sole party interested, and the defendants only ministerial agents, then the decree is erroneous, (1) Because the proper parties are not before the court; (2) Because the Circuit Court cannot, under either the constitution or laws or Congress, exercise jurisdiction over the proper party; (3) Because both the constitution and laws vests exclusive jurisdiction of the case made in the Supreme Court.

7. The last and the most important point in the case remains yet to be considered. It is, that the decree assumes that the Bank of the United States is not subject to the taxing power of the state of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

Upon this point, we ask the court to reconsider so much of their opinion in the case of McCulloch v. Maryland, as decides that the states have no rightful power to tax the Bank of the United States.

The question, whether the Bank of the United States, as now constituted, is exempt by the constitution of the Union, from the taxing power of the state, depends upon the nature and character of the institution. If it stands upon the same foundation with the mint and the post-office; if its business can justly be assimilated to the process *and [*766 proceedings of the federal courts, we admit, without hesitation, that it is entitled to the exemption it claims. The states cannot tax the offices, establishments, and operations, of the national government. It is not the argument of the opinion, in M'Culloch v. Maryland but the premises upon which that argument is founded, that we ask the court now to reexamine and reconsider.

Banking is, in its nature, a private trade; and is a business in which individuals may at all times engage, unless the municipal law forbid it. Where this is not the case, it is competent for individuals to contract together, and create capital to be employed in lending money, and buying and selling coins, bullion, promissory notes, and bills of exchange. No law is necessary to authorize a contract between individuals for concentrating capital to be thus employed; nor does the business itself depend upon any special laws for its creation or existence. An association thus formed, may take to themselves a name, and may establish rules and regulations to govern them in the transaction of their business, and to determine their relative rights and duties among themselves. The general law not only recognizes the obligation of this contract between the parties; it recognizes also the capacity of the association thus formed, to make contracts in

1.—7 Cranch, 505.

the name they have assumed, and the right of the individuals, as joint partners, or one party, to enforce those contracts. The whole is a private concern; the capital is private property; the business a private and individual 767*] trade; the *convenience and profit of private men the end and object. Such is the true character of a bank, constituted by individual stockholders. Its rights and privileges, its liabilities and disabilities, are all the rights, privileges, liabilities and disabilities of private persons.

If the individuals thus associated apply for and obtain, from the legislative power of the country, a special law, creating them a corporation, what change does it effect in their condition? A better answer cannot be given than that contained in the definition of a corporation by this court: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men with these qualities and capacities, that corporations were invented and are in use."[1]

768*] *If the character of a corporation, as here defined, be regarded in granting a charter to a banking company in the case stated, the change effected in the condition of a company by the charter, can be easily and readily comprehended. It relates to their character, not to their rights. It would not change the nature of their business, but would afford facility in transacting it. It would confer upon the whole one individual character, comprising, for particular purposes, the capacities of an individual; but it would exempt them from liabilities, only so far as an express exemption was stipulated or granted. By the charter, they would be constituted an invisible, intangible, and artificial being, capable of perpetual existence, and of acting as an individual in the management of their appropriate affairs. But this would operate only to change the form, it would not alter the substance of things. These would still consist of the individuals that composed the association, and of the business in which they were engaged.

This was distinctly decided in the case of The United States Bank v. Deveaux.[2] In that case it was contended, that the character of the individuals was completely merged in the charter of incorporation. But this court adjudged otherwise; they determined that they could look behind the charter, and notice the character of individuals; and the cases and the principles upon which this decision is founded, also establish, that *courts may look [*769 beyond the charter for all substantial and beneficial purposes.

When individuals, associated to carry on the trade of banking, apply to the legislature of the country for an act of incorporation, they found their application upon some benefit to be derived to the public from conferring upon them the character they ask. This public benefit may consist of the facilities afforded to the state, in the management of its fiscal concerns; or it may consist in the convenience to the community in the transaction of mercantile and other money affairs. It may arise from the payment of annual revenue, or a stipulated sum, into the public treasury. If the benefit to the public be considered a sufficient compensation for the faculty conferred, the corporation is created. But from this fact, in the language of this court, "nothing can be inferred which changes the character of the institution, or tranfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created."[3]

If, then, a banking association be formed, the capital collected, the mode of transacting the business settled, and the whole concern regulated and established, before any application be made for a charter, it is clear that the mere fact of enacting a law, creating the association a corporation, could not change its character.

It was a company of *individuals, con-[*770 ducting a private trade before it was incorporated, and it retained the same character afterwards. The charter was granted to give facility to the individuals in the management of their private affairs; not that, in virtue of that charter, they might share in the civil government of the country. For special purposes, it constituted them an immortal being; but of this being it has been correctly said, that "its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person."[4]

If in fact the incorporation be obtained before the association is formed, does it vary the principle? It is supposed and insisted that it does not. If the corporation be originated for the management of an individual concern; if it be based upon contract between individuals; if its great end and principal object be private trade and private profit, its character must be the same, whether the trade commenced precedent or subsequent to the incorporation; whether the individuals solicited the charter, or the legislature invited the individuals. The character of the association must be ascertained by the same rules, and it must be subject to the same legal consequences.

We may suppose, then, that individuals resident in every part of the Union, and in foreign countries, have associated for the purpose of establishing a bank, with a captial of $28,000,000;

1.—Dartmouth College v. Woodward, 4 Wheat. Rep. 634.
2.—5 Cranch, 84.
6 L. ed.

3.—Dartmouth College v. Woodward, 4 Wheat. Rep. 638.
4.—4 Wheat. Rep. 656.

that they have actually collected this capital 771*] *together in the city of Philadelphia, and, no law prohibiting such a measure, have commenced trading as bankers. Not finding sufficient employment for their capital at that place, they establish a banking-house in New York, one in Boston, and one in Baltimore, where they carry on a profitable business. It is perfectly clear, that all this may be done, if no state law be contravened, by individuals in their natural capacities. But it is equally clear, that the capital thus employed, and the business thus transacted, must be subject to the regulations of the respective states, and that the parties must be subject to all the inconveniences and embarrassments resulting from the death of its members, and from the transfers of its shares and interests; from the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for transferring their property, as well as the still greater inconvenience of pursuing its rights and enforcing its contracts in courts of justice.

Deriving great advantage from its trade, anxious to extend it into other states, and to be relieved from the embarrassments incident to a joint stock company not incorporated, the corporation apply to the Congress of the United States for an act of incorporation. But this Congress cannot confer, unless the association can be employed by the national government in the execution of some of the powers with which it is invested by the constitution. All the powers of the government must be carried into operation by individual agency, either through the medium of public officers, or contracts made with individuals. Can any public 772*] office be created, *or does one exist, the performance of which may, with propriety, be assigned to this association, when incorporated? If such office exist, or can be created, then the company may be incorporated, that they may be appointed to execute such office. Is there any portion of the public business performed by individuals upon contracts, that this association could be employed to perform, with greater advantage and more safety to the public, than an individual contractor? If there be an employment of this nature, then may this company be incorporated to undertake it.

There is an employment of this nature. Nothing can be more essential to the fiscal concerns of the nation, than an agent of undoubted integrity and established credit, with whom the public moneys can, at all times, be safely deposited. Nothing can be of more importance to a government than that there should be some capitalist in the country, who possesses the means of making advances of money to the government upon any exigency, and who is under a legal obligation to make such advances. For these purposes the association would be an agent peculiarly suitable and appropriate. There are also other minor employments, such as the transmission of the revenue from one place to another, for the performance of which this company would be a most safe and certain agent. As, then, this association may be thus connected with the public interest, and made useful and advantageous to the government, by conferring a charter upon them, the power of securing to the nation these benefits, advantages, and conveniences, *results to the national leg- [*773 islature. A just construction of their constitutional powers, invests them with authority to incorporate a banking company, upon the basis of contracting with the institution thus created, for the performance of certain public employments, beneficial to the nation, and necessary to be performed by some one.

The mere creation of a corporation does not confer political power or political character. So this court decided in Dartmouth College v. Woodward, already referred to. If I may be allowed to paraphrase the language of the Chief Justice, I would say, a bank incorporated, is no more a state instrument than a natural person performing the same business would be. If, then, a natural person, engaged in the trade of banking, should contract with the government to receive the public money upon deposit, to transmit it from place to place, without charging for commission or difference of exchange, and to perform, when called upon, the duties of commissioner of loans, would not thereby become a public officer, how is it that this artificial being, created by law for the purpose of being employed by the government for the same purpose, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? because the government has given it power to take and hold property in a particular form, and to employ that property for particular purposes, and in the disposition of it to use a particular name? because the government has sold it a privilege *for a large sum of money, and has [*774 bargained with it to do certain things; is it, therefore, a part of the very government with which the contract is made?

If the bank be constituted a public office, by the connection between it and the government, it cannot be the mere legal franchise in which the office is vested; the individual stockholders must be the officers. Their character is not merged in the charter. This is the strong point of the Mayor and Commonalty v. Wood, upon which this court ground their decision in the Bank v. Deveaux, and from which they say that cause could not be distinguished. Thus, aliens may become public officers, and public duties are confided to those who owe no allegiance to the government, and who are even beyond its territorial limits.

With the privileges and perquisites of office, all individuals holding offices ought to be subject to the disabilities of office. But if the bank be a public office, and the individual stockholders public officers, this principle does not have a fair and just operation. The disabilities of office do not attach to the stockholders; for we find them everywhere holding public offices, even in the national legislature, from which, if they be public officers, they are excluded by the constitution in express terms.

If the bank be a public institution of such character as to be justly assimilated to the mint and the postoffice, then its charter may be amended, altered, or even abolished, at the discretion of the national legislature. All public offices are created *purely for public [*775 purposes, and may, at any time, be modified in such manner as the public interest may require. Public corporations partake of the

same character. So it is distinctly adjudged in Dartmouth College v. Woodward. In this point, each judge who delivered an opinion concurred. By one of the judges it is said, that "public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interest belongs also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank, created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So, a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much 776*] *so, indeed, as if the franchises were vested in a single person."[1]

If this court adopt this reasoning of one of themselves, the point is decided. The act of incorporation, in the case supposed, does neither create a public office nor a public corporation. The association, notwithstanding their charter, remain a private association, the proprietors and conductors of a private trade, bound by contract, for a consideration paid, to perform certain employments for the government.

The qualities and capacities which are ordinarily conferred upon a private corporation, have already been stated. These Congress must have power to confer, for they cannot create a corporation unless they can confer the qualities and capacities requisite to its constitution. It must be remembered, that this power in the national legislature, to create a private corporation, is not a general, but a special power, limited to cases where the corporation, when created, may be employed by the government as an appropriate agent in the transaction of public affairs. It is not essential to the creation or existence of a corporation, that any uncommon or extraordinary privilege or exemption should be conferred upon it. It is, therefore, beyond question, that the admitted power of creating, in its strict and proper sense, does not include or imply a power to exercise discretion in conferring privileges. If this be attempted, it is open 777*] *for inquiry, whether such privilege be compatible with the constitution.

Before the act of incorporation, the association, we have supposed, was necessarily subject to the law of the state in which it transacted business; that law, whatever it might be, entered into and operated upon all their contracts. By that law, their property was protected, and for that protection the property was subject to equal ratable taxation. The ordinary qualities and capacities conferred upon a corporation, would not place the protection of the property under a different law, nor exempt it from bearing its proportion of legal burthens. To effect this, an extraordinary provision must be inserted in the charter. This kind of immunity is not incident to a corporation; the power to create one does not include the power to confer such immunity upon it. It is not essential to its creation or existence, and is not, therefore within the sphere of national legislation.

A state is invested with constitutional power to levy a tax upon stamps, and may extend its operation to all the dealings of individuals. It cannot subject the transactions of the national government to the payment of such tax, because the operations of that government are national, and not subject to the power of any of its parts. If the nation borrow money it is competent for the nation to decide upon the evidence to be given of the debt. It would be absurd to subject this national measure to the municipal regulations of one of its parts, and thus permit a part to assess a tax upon the whole. But if the national government incorporate *a company of private bankers, [*778 who, before they received their charter, were subject to the payment of this tax, their subsequent exemption from it would not seem to be a necessary consequence, unless they were constituted a public institution. If they remained mere private dealers, with only increased facilities, and a new faculty conferred upon them, it would seem a rational inference, that their private duties and liabilities also remained. Supposing them to remain a private corporation of trade, the tax collected from them would be abstracted, not from the national treasury, but from the pockets of private men. The supposition that this tax is incompatible with the capacity to trade, conferred in the charter, proceeds upon the hypothesis that that capacity partakes of the character of the government that confers it, and is, therefore, supreme. Unquestionably such would be the fact, if the bank were a public corporation; if it were created by the government for its own uses; and if the stock were exclusively owned by the government. But if it remain a private corporation, then the capacity given in the charter ought to be regarded as that which is adapted to the character of the party receiving it; a capacity properly appertaining to private individuals, which necessarily imports, that it is to be enjoyed like other individual rights, subject to the municipal law.

A stamp duty is one mode of collecting revenue from individuals engaged in private trade, but it is not the only mode. The principle which exempts the Bank of the United States from the *payment of a stamp duty im- [*779 posed by a state, is supposed to exempt it from the payment of any tax assessed by state authority. It is deemed an incident attached to the charter, because that charter is conferred by the supreme authority. It is said, that if any other than the supreme authority that confers the faculty is permitted to tax the trade

1.—4 Wheat. Rep. 668.

or business to be carried on under it, the faculty itself may be rendered useless, and the object of granting it entirely defeated. The power to confer the faculty, and the power to tax the business, if vested in different hands, are thus held to be incompatible, and from this incompatibility the exemption is deemed a necessary incident to the charter, because, without it, it cannot exist. For we must here repeat, that this court have said that a corporation "possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."[1]

This position involves several inquiries, which may be embraced in an examination of the reasons assigned for considering this exemption as an incident attached to the charter, and in an investigation of the powers of Congress to confer this exemption, in express terms, if it cannot be sustained as incidental to the very existence of the bank.

The fact that a private corporation, created by the sovereign or supreme power, is not therefore, clothed with any portion of the po- [*780] litical character *or political power of its creator, is asserted by the concurring opinions of the judges of this court, and is established by its judgment in the case of Dartmouth College v. Woodward. That an exemption from taxation for public purposes, by an inferior legislative power, is not incident to a corporation created by the supreme power, is a just inference from the doctrines laid down in the case just cited, and from the whole history of private corporations, down to the decision of this court in M'Culloch v. Maryland.

The power of assessing taxes is always a legislative power; but in our government, and in that of England, from which many of our institutions, and most of our principles of jurisprudence are derived, this power is exercised by other authorities than the national and state legislatures. Counties, cities, towns, boroughs and townships have bodies of magistracy authorized to assess taxes for various specific purposes. We have the high authority of Lord Coke himself, that the justices of a city, shire, or riding, in England, might assess a tax upon the property of a corporation, for the repair of bridges.[2] And in The King v. Gardner,[3] it was decided by the Court of King's Bench, that a corporation was subject to be assessed for poor rates, even as a corporation. In these cases, it was not pretended that exemption from taxation was an incident to the corporation.

[*781] *If a state legislature incorporate a company to construct a turnpike road, such charter would be predicated upon the advantage the community would derive from the road; yet no man would suppose that the horses, cattle, carriages and other implements employed and used by the company would be exempt from county levies, poor rates and other burthens to which the other property of the individuals was subject. And if a general tax upon business or income was assessed, it would not be pretended that the amount received for tolls would be exempt from this tax, upon the ground that a right to have the corporate property and corporate business exempt from taxation, was an incident of the charter. This argument is applicable to every species of individual business conducted by private corporations. If exemption from any particular tax be claimed, it is founded upon a privilege specifically granted in the charter; it is not claimed as an incident to the grant.

It is not uncommon, that almost every species of business carried on within the boundaries of a city, is subject to be taxed by the city magistracy, for city purposes. Should this general authority to tax extend to bankers, money-lenders, brokers and others trading in money, notes, stocks, bills of exchange, etc., would the mere fact, that the sovereign authority granted to the individual or individuals carrying on any one of these employments, a corporate character, operate to exempt such individual or individuals from the payment of a city tax, to which he was liable before the corporate character was bestowed upon him?

*Private corporations, emanating from [*782 state authority, and ultimately connected with the private and public welfare, are numerous in all our commercial cities. Such are fire and marine insurance companies. Are these regarded as exempt from taxes assessed by the city magistrates? Have they ever claimed such exemption? Has it ever been conceded to them? In all the cases put, it is evident that the body of inferior magistracy, authorized to levy a tax, if they be not limited as to the amount, which is frequently not the case, may assess upon the corporation an amount which their business could not pay, and thus defeat the object for which the charter was obtained. That such exemption, as an incident of their charter, has never been claimed by such corporations, is strong proof that it was not supposed to exist.

It may be said, that the inferior magistracy and the corporations, in the cases supposed both derive their authority from the same source, and that it is competent for the authority that created both, so to regulate and control their operations as to prevent one from being destroyed by the other. This may be granted, without affecting the argument. If the exemption be incident to the corporation, regulations are unnecessary. The power of the national legislature to confer this exemption, upon a corporation created by it, in express terms, is one thing; that it exists as an incident to the charter, without any express provision, is a very different proposition.

It is distinctly admitted, in the case of M'Culloch v. Maryland, that the real property of the *bank may be taxed, and that [*783 the stock held by residents of the state may be taxed. But it is asserted that the operations of the bank are exempt, because they are the means of the national government; and it is only by the total exemption of the operations of the bank from the taxing power of the states, that our institutions can be relieved from the absurdity of a power, in one government, to pull down what another may build up, and a right in one government to destroy what there is a right in another to preserve.

1.—4 Wheat. Rep. 636.

2.—2 Inst. 697, 700.

3.—Cowp. 83.

But if the real property of the bank and its stock may be taxed, it is as completely within the power of the states to destroy it by taxation, as it is by taxing its operations. The states may tax the stock owned by its citizens, so high as to compel them to retain it at a loss. Every state in the Union, by adopting this course, may paralyze the operations of the bank, as effectually as in any other mode. If the states act in concert, there is an end of the bank; and that which the national government have built up, is prostrated by the states. The concession, then, that the exemption is qualified, admits the very mischief which is set up to prevent. Whatever misapprehension may have prevailed with respect to the operations of the bank, it certainly never can be asserted that the individual stock of the members, or the real estate of the company, are the means of the government, and, as such, exempt from taxation. And while these are subject to taxation by the states, it would seem difficult to 784*] sustain the position upon *which the operations of the bank are held to be exempt.

We can well understand how an absolute exemption may be a consequence of the character of the corporation established. Certainly it would be an incident of this bank, were it established solely for public use, and were the stock wholly owned by the nation. But a qualified exemption must, in its very nature, depend upon specific provision. It is so connected with considerations of policy, and interwoven with the exercise of discretion, that it cannot be conceived how it is to exist otherwise than by special creation or enactment.

No such exemption, either general or qualified, has heretofore been regarded as an incident to the creation of a private corporation. On the contrary, every corporate privilege beyond the creation of individuality of character and of capacity, has been founded upon special grant. In the case of Head v. The Providence Insurance Company,[1] this court declared, that a private company, "in its corporate capacity, is the mere creature of the act to which it owes its existence. It may correctly be said to be precisely what the incorporating act has made it, and to be capable of exerting its faculties only in the manner in which that act authorizes." And this principle has been recognized in every case where the rights, privileges and powers of a corporation have been considered, except in respect to the bank.

785*] * If we examine the claim of this particular corporation, to attach to itself this exemption, as incident to its charter, upon what ground is it to be distinguished from private corporations generally? It is said, that it is an instrument employed by the national government in the execution of its powers, and for that reason cannot be taxed; that, in this particular, it is distinguishable from all other corporations.

In what sense is it an instrument of the government? and in what character is it employed as such? Do the government employ the faculty, the legal franchise, or do they employ the individuals upon whom it is conferred? and what is the nature of that employment? Does it resemble the post-office, or the mint, or the custom-house, or the process of the federal courts?

The postoffice is established by the general government. It is a public institution. The persons who perform its duties are public officers. No individual has, or can acquire, any property in it. For all the services performed, a compensation is paid out of the national treasury; and all the money received upon account of its operations, is public property. Surely there is no similitude between this institution and an association who trade upon their own capital, for their own profit, and who have paid the government a million and a half of dollars for a legal character and name, in which to conduct their trade.

Again, the business conducted through the agency of the post-office is not in its nature a private business. It is of a public character, and the *charge of it is expressly con- [*786 ferred upon Congress by the constitution. The business is created by law, and is annihilated when the law is repealed. But the trade of banking is strictly a private concern. It exists and can be carried on without the aid of the national legislature. Nay, it is only under very special circumstances that the national legislature can so far interfere with it as to facilitate its operations.

The postoffice executes the various duties assigned to it, by means of subordinate agents. The mails are opened and closed by persons invested with the character of public officers. But they are transported by individuals employed for that purpose, in their individual character, which employment is created by and founded in contract. To such contractors no official character is attached. These contractors supply horses, carriages, and whatever else is necessary for the transportation of the mails, upon their own account. The whole is engaged in the public service. The contractor, his horses, his carriage, his driver, are all in public employ. But this does not change their character. All that was private property before the contract was made, and before they were engaged in public employ, remain private property still. The horses and the carriages are liable to be taxed as other property, for every purpose for which property of the same character is taxed in the place where they are employed. The reason is plain; the contractor is employing his own means to promote his own private profit, and the tax collected is from the individual, though assessed upon the *means he uses to perform the public [*787 service. To tax the transportation of the mails, as such, would be taxing the operations of the government, which could not be allowed. But to tax the means by which this transportation is effected, so far as those means are private property, is allowable; because it abstracts nothing from the government; and because, the fact that an individual employs his private means in the service of the government, attaches to them no immunity whatever.

It is only in this character that the bank is in public employ. The business it transacts for the government originates in contract. It receives the public treasure upon deposit, and pays it out upon the checks of the proper officer. This is an individual business, transacted for the government precisely as if it were an individual concern. It receives the cash of individuals upon deposit in the same manner,

1.—2 Cranch, 167.

and in the same manner pays it out. It is one department of its trade, by which it makes individual profit. Any private person, or moneyed corporation, may be employed to do the same thing; and as to that, would be in the employment of the government; would be an instrument used by the government; a means of executing its powers. Yet it has never been supposed that such employment constituted a public office, or that the person employed was thereby invested with official character. All these contracts are made with a view to the profitable employment of individual exertion, and are performed by individual means, in the private personal character of the contractor. 788*] They are, of course, subject to *the municipal law; by it they must be protected and enforced, and, therefore, cannot be exempt from its exactions.

The carriages and horses of the contractor for transporting the mail, is a stronger case than that of the bank. The transportation of the mail is the principal object for which the team and vehicle are engaged; the business of carrying passengers and baggage is merely incidental. Public service is the first great object; its employment as a means of traveling, by individuals, is but secondary. But in the case of the bank, the private trade of the company is the great object of pursuit, and the end of their exertions; the public business is subordinate and incidental, and is, in reality, a very essential means of promoting that private gain, which is the principal, if not the sole object of the corporation.

Again, in the case of the mail, the contractor receives a stipulated sum, as a compensation for his services. He takes upon himself a burthensome and hazardous employment. But the bank, on the contrary, receive a privilege, a substantial pecuniary advantage, resulting necessarily in the augmentation of the private individual wealth of the stockholders; of this advantage they are the purchasers, not for the public account, but for private use.

The post-office, as such, that is, the mere legal entity created by the law, cannot be taxed, because it is a public institution. The moneys received for postage cannot be taxed, because they are public property. This immunity at- 789*] taches to their public *character. But the building in which the post-office is kept is a proper subject of taxation, because it is private property; and the fact that it is an instrument used or employed by the government, in the execution of its powers, attaches to it no immunity.

The mint, the custom-house, the process of the federal court, bear still less analogy to the bank than the postoffice. They partake less of the character of private business. The functions they perform are more palpably of a public nature, requiring the personal agency of individuals, rather than the employment of private property in their performance; especially the papers of the custom-house, and the proceedings of the federal courts. However much individuals may be interested, in the existence and the preservation of these documents, yet they are not, in their nature, subjects in which a right of property can be acquired. If it ever could have been supposed that these were subjects of taxation by the States, the argument of the opinion in the case of M'Culloch v. Maryland demonstrates the absurdity of such supposition. Because to all these institutions exemption from state taxation is attached, as an incident essential to their very existence, it does not follow that the same exemption attaches to the bank, unless its character, end and object are the same. It seems to us impossible that this can be maintained. If it cannot, what is there peculiar to the constitution of this corporation, that should attach to its charter an exemption not incident to other corporations? Surely some foundation for this very extraordinary *character, unknown to other [*790 establishments of the same nature, ought to be made out by those who claim it.

I am aware, that an indefinite, indistinct, confused idea exists, by which the charter, and the private trade, and the stockholders, and the government, are combined together, and the whole made to produce a something which cannot well be defined, but which is called a public institution. This might produce some legal effect, if we were compelled to contemplate this something only as a creation of the national government, by the name of the bank of the United States. If its legal envelope, and legal name, constituted its whole character, or if these could be used so as to shut out all further inquiry into that character, its claim to the incidents and immunities of a public institution might rest upon some sort of foundation. But this misconception of its character vanishes, when we are permitted to examine all its constituent parts. We have seen that the persons who compose it are not public officers; that the business it pursues is not a public business, and that its agency for the government is that of a private individual; from none of which it can derive any exemption not common to private corporations.

The charter itself, abstracted from the individuals upon whom it is conferred, must be without any operative effect. It is in the nature of a grant; but a grant is nothing, unless there be a grantee to take, as well as a subject to be granted. When an association of individuals is formed, and enable themselves to a grant of corporate franchises, *so as to [*791 give operative effect to that grant, they acquire in it a private vested right; it becomes their private property; and so long as they comply with its terms, they can no more be disturbed in the possession of it, by the grantors, than by a third person or stranger. Such is the situation of the bank. The charter is their property, derived, to be sure, from a public grant, but, nevertheless, as distinctly the private property of the individuals as if derived from a contract or grant from individuals, its former proprietors. Why is it an incident to this species of property, that it should be exempt from taxation by the states?

One reason only is offered. It is granted by the national government; and if the states can tax it, they may, in effect, render it useless to the grantees. But the states may confessedly exercise this power over the employments and property of individuals. All property is held subject to it, when held by individuals, no matter whence it is derived. In Ohio, the state cannot tax the public lands, while owned by the government, nor for five

years after they become the property of individuals. She is bound by compact on this point. But it never was conceived, that because it was once owned by the nation, and the title to the individual derived from a national grant, the states could not tax it. Restricted as this power of taxation is in the state of Ohio, yet there can be no possible difficulty in so employing it as to defeat all future sales of public lands within that state. It is only to provide by law for assessing such tax upon all lands hereafter sold, to be collected after the 792*] expiration *of five years from the sale, as would render the lands a burden to the proprietor, and the object would be effected. Yet the power to do this would hardly be held a sufficient ground for attaching to lands thus sold, an exemption from state taxation as incident to the grant. Why should a grant of franchises be distinguished from a grant of land, when the grantee, in both cases, receives it in confirmation of a purchase from the government, to be held as his own individual property? We are warranted by the opinion of at least one of the judges of this court, in asserting, that "a grant of franchises is not, in point of principle, distinguishable from a grant of any other property."[1] If this be correct, then there can be no reason for attaching any exemption to a grant of franchises, because the grant is conferred by the national government. The grantee must hold the property subject to all the burthens which might be imposed upon it, had he obtained it from any other source.

It may be objected, that this doctrine asserts a power in the states to tax the patent rights granted by the national government. And why not? By the grant it is constituted individual property; but does the power conferred upon the national government, to secure to the authors of useful inventions the exclusive use of their machines, necessarily attach to the patent for such exclusive right an exemption from taxation also? Is it not enough, that the in- 793*] ventor of a new species of property *may be secured in a monopoly of its employment? Does the mere fact of conferring such monopoly, of necessity imply a right to enjoy it exempt from the burthens to which other property is subject? How far is this exemption to be carried? Would it exempt a steam loom from a general tax upon looms? or a steam mill from a general tax upon mills? Would a barrel of flour be subject to taxation, if, in the process of manufactory, it were carried from the meal chest to the cooling room upon a miller's shoulder; but exempt if it were hoisted by elevators, be gathered to the bolt-hopper by a hopper-boy? Does this exemption attach to the grant, only in the hands of the monopolist, or extend also to his grantees of the monopoly? Is the exemption to be withdrawn so soon as the invention passes into the hands of the mechanic for practical purposes? or does it adhere to the machinery, and attach to the fabric manufactured? At whatever point it is withdrawn, the same consequences may follow. The power of state taxation, if it attach at all, may be so used as to render the patent of very little value. If the patent itself, or the machinery when constructed, or the employment of such machinery, or the fabrics manufactured by it, may be taxed, an excessive tax can, in one way as well as another, affect the benefits derived by the patentee from the patent, and may even prevent its use. Still, in this respect, it stands upon the same footing with other private property, and there is no sound reason for conferring upon it any *higher privilege. Every- [*794 thing in the nature of property, produced by the labor of the husbandmen and the mechanic, may be taxed. They have no other security that the tax may not be excessive and oppressive, than what is afforded by their weight in government, and a sense of justice in legislative assemblies. If the powers of genius be so applied as to produce anything in which the inventor claims a property, this product of labor must be treated as other productions of the same class. No special exemptions are necessary incidents of its invention or creation. So far, then, as there is a just analogy between the bank and patent rights, so far they are alike to be looked upon as private property, and no exemption from taxation can be conceded to either, as an incident of the franchise conferred upon them by a grant from the national legislature.

Last of all, this exemption from taxation is not an incident essential to the very existence of the bank; the bank may exist without it; may exist beneficially without it, as we contend, did exist for twenty years without it, and was extensively useful. This exemption may conduce much to its convenience, and, perhaps, very considerably to its profit. But many things may be convenient and beneficial in the account of mercantile profit or bank dividends, which are not necessary to the very existence of the corporation. Certainly the exemption from taxation is of this character. It is not incident to the corporation. If necessary to secure to it the most beneficial uses of its corporate franchises, it must obtain it by a special *grant; it must be specially in- [*795 serted. An inquiry, how far Congress have constitutional power to do this, were they to attempt it, would still further elucidate the erroneous character of the position, that it is an incident of the charter, independent of special grant.

Mr. Clay, for the respondents, declined arguing the question of the right of the state of Ohio to tax the bank, considering it as finally determined by the former decision of the court, which was supported by irresistible arguments, to which he could add no farther illustration. But this was not, like the law of Maryland, a case of taxation. It was a law enacted for the purpose of expelling the branches of the bank from the state of Ohio, by inflicting penalties amounting to a prohibition. It might be called a bill of pains and penalties. An examination of its provisions would show that the penalties were greater in amount than the entire dividends. It was unequal and unjust in its operations. It was a confiscation, and not a tax. It was the same on the branch at Cincinnati, which had a capital of one million and a half, with that at Chilicothe, which had only a capital of half a million of dollars. It was obvious, that if one state could, in this manner, expel one of the offices of discount and deposit from its territory, every state

1.—4 Wheat. Rep. 684.

might do the same thing. If one state may expel a branch, another state may expel the parent bank itself; and thus this great institution of the national government would be extirpated [*796] and destroyed *by the local governments, within whose territory it was established.

Is it possible, that against this highly penal law, there is no preventive, peacable remedy? that the bank must submit to the alternative of withdrawing its branches, or of paying the penalty? that it must do this, not for one year, but for the whole period of its existence? Is it possible that our jurisprudence should be so defective that the law of the whole may be defeated in its operation by a single part? that if a state should lay a duty on imports or tonnage, contrary to the express provisions of the constitution, no adequate means could be found to prevent its collection by the officers of the state government?

All these propositions must be maintained by our opponents, or they must surrender their cause. It is, accordingly, contended by them, that the remedy is misconceived, (1) because the state is not made a party. But if such parties are before the court, as will enable it to make an effectual decree, it will proceed, although there be improper parties made, or parties omitted, who might have been made. Such is the practice where jurisdiction is sustained in the Circuit Court against some parties, against whom an effectual decree can be made, although others are omitted, on account of their being absent, or citizens of the same state with the plaintiff. The true ground seems to be, that if the court can give redress; if its decree can be rendered effectual; if the party can [*797] *be put in possession of the thing claimed, the court will proceed. Here the party omitted is a sovereign state, who is entirely exempt from jurisdiction. The court will therefore proceed against the other proper parties.

But it is also insisted that the remedy is misconceived, because a state is the real party defendant. We deny that a collateral or contingent interest will necessarily make a party who must be joined.

The state is not a formal party on the record; and that the state is not necessarily a party, by reason of its incidental interest, is conceded by the admission that the bank might have recovered in trover, trespass, or detinue, against the defendants, who actually took the money. That the suit concerns the public acts of an officer of the state government, who is one of the defendants, does not make the state itself a necessary party. This is the settled law of the court. In the case of The United States v. Peters,[1] it was held that, although the interests of a state may be ultimately affected by the decision of a cause, yet if an effectual remedy can be had, without making the state a defendant to the suit, the courts of the United States are bound to exercise jurisdiction. So, in England, in The Grenada case, the fiscal rights of the sovereign were drawn directly in question, and finally determined, in a suit brought by an individual, to recover back from the collector of the customs of the island, the amount of duties unconstitutionally *lev- [*798] ied by that officer.[2] The party there was not compelled to resort to his petition of right, or any other mode of proceeding peculiar to claims against the crown. The immunity of one of the states of this Union from suits in the courts of justice, is not greater than that of the crown in England. The constitution merely ordains that a state, in its sovereign capacity, shall not be sued. It does not ordain that the citizen shall not have justice done him, because a state may happen to be collaterally interested. It does not ordain that a law of the United States shall be violated, to the prejudice of a citizen, because a law of the state happens to come under consideration. If the state of Ohio is a party, so is the government of the United States a party in its sovereign interests, which are more sacred and important than mere proprietary interests. But even if the state be a party, that circumstance would not oust the jurisdiction of the court, in a case arising under the constitution and laws of the Union. There the nature of the controversy, and not the character of the parties, must determine the question of jurisdiction. Such is conceived to be the spirit and effect of the decision of the court in the case of Cohens v. Virginia. It is competent for Congress to determine what court shall have jurisdiction in this class of cases, which it has done as to the bank, by giving it the right of suing in the circuit courts of the Union.

Again, if the state is to be considered a party, *it is a party plaintiff. The state [*799] is the actor, and the bank is a defendant. In form it may not be so, but the substance is to be regarded. The injunction is essentially a defensive proceeding. Suppose the state, or even the United States, had recovered a judgment against the bank, might not the proceedings upon that judgment be enjoined? And is the nature of the case varied because the proceeding is here in pais? Suppose the state had proceeded by distraining for the tax, and the bank had replevied, who would have been both the real and technical plaintiff in that case? The whole case is to be considered according to its true nature and character, which is, that of a proceeding by the state to recover a tax or penalty; and the bank resorts to its natural protector for defense, by means of an injunction, which is a parental, preventive, peaceable remedy.

It is said that this is a case of trespass only, and that the party ought to have been left to his appropriate remedy at law. But this is not a case of a solitary remediable trespass. It is one of annual, of repeated, vexatious occurrence, for which an injunction is the appropriate remedy. All injunctions are discretionary, and granted upon the peculiar circumstances of the case. The jurisdiction of a court of equity as to injunctions, has been always considered a most useful one, and, of late years, they have been dispensed with a much more liberal hand than formerly. They are granted to prevent fraud or injustice; to stay proceedings in other courts; to restrain the infringement of patent and copyrights; to restrain the

1.—5 Cranch, 115.

2.—Campbell v. Hall, Cowp. 204.

800*] *transfer of negotiable instruments, where the transfer will defeat the object of the suit; to stay waste, in which case they have superseded the common law remedy by writ of estrepement. In the case of patents and copyrights, it is not necessary to establish previously the right at law, for it is grounded on an act of parliament, and appears by record.[1] The principle on which injunctions in all these cases are granted, is to prevent a wrong where damages would not give adequate relief. So, there are cases where bills of peace have been brought, though a mere general right was claimed by the plaintiff, and no privity between him and the defendants, nor any general rights on the part of the defendants, and where many more might be concerned than those brought before the court. Such are bills for duties, as in the case of The City of London v. Perkins. In the present case, it is quite clear that it would be an idle mockery to compel the parties to resort to their legal remedy, which would be wholly inadequate to prevent the destruction of their franchise.

As to the formal objection of the defect of a warrant of attorney from the bank, authorizing these proceedings, it is now too late to take that objection, even if it could have been available at any stage of the suit. It is matter of form only, which should have been pleaded in abatement. It is cured by the provisions of the judiciary act of 1789, ch. 20, s. 34.

801*] *Mr. Wright, for the appellants, in reply, insisted, that a special authority must be shown for the institution of the suit in the name of a corporation, which could only appear by attorney, under its common seal. Admitting, however, that the corporation might, by a mere resolution of the board of directors, authorize the suit, following the analogy of the cases of The Bank of Columbia v. Patterson, and Fleckner v. The Bank of the United States, such resolution must appear on the record, in the same manner as a warrant of attorney. Nor are the defendants precluded by the appeal from taking advantage of this defect. A decree is a judicial act. Its validity depends upon there being a party before the court, legally competent to ask it. A corporation can only appear by its attorney or solicitor, duly authorized; and if this authority is not apparent upon the face of the record, the decree is erroneous, and cannot be supported.

There are no proofs or admissions sufficient to charge the defendant, Sullivan. He knows nothing of his own knowledge. The information from his predecessor in office, Currie, is no proof. The bill charges that he received the money as a deposit, without any interest in it. The answer states that he receives and holds it as a public officer, and has no private interest in it. The case in 6 Ves. Jun. 738, was a much stronger admission than this, and yet it was held insufficient. The answer of one defendant cannot affect another. The answer of a party having no interest, cannot affect a per-

802*] son having an interest. The *answer of Sullivan and Currie could not affect the state of Ohio, against which the decree operated, and whose treasury was entered, in order to execute the writ of sequestration.

It is impossible to determine whether the injunction is meant to be supported upon the ground of preventing an irreparable injury, or of protecting the franchise of the plaintiffs. No case has been shown of an injunction to prevent a mere trespass on chattels, or where the injury intended is not an interference in the enjoyment of the plaintiff's exclusive privileges, but only a trespass upon their property, for which they have an adequate remedy, by suit at law, in various forms of action. Mere general principles, upon which courts of equity may have proceeded a certain length in interposing by injunction, will not warrant the extending this extraordinary remedy still further. Some analogous case must be found to support this injunction.

An injunction binds no person but the parties to the suit.[2] Here the sole interest is in the state of Ohio. She is, therefore, an indispensable party to the bill. But she cannot be made a party, because she cannot be sued. The inevitable consequence is, that the court below cannot take jurisdiction of the cause. Where, indeed, the proceeding is in rem, or operates upon the subject-matter in controversy, disconnected from the persons interested; if it can be shown that any person interested, who is subject to the jurisdiction of *the court, is [*803 absent beyond the reach of its process, it is not necessary to make such a person a party. But here the party omitted is a sovereign state, who is within reach of process, but is not subject to the jurisdiction, and cannot be brought before the court. The case of Cohens v. Virginia does not apply. The case relates exclusively to the appellate jurisdiction of the Supreme Court, and merely establishes the doctrine, that where the state commences a suit in its own courts, and a question arises under the constitution, laws and treaties of the Union, the defendant may bring the cause before this court by appeal or writ of error. The appellate process is not considered as a suit against the state, within the meaning of the 11th amendment. The Grenada case, in England, is equally inapplicable.[3] It was an action of assumpsit, brought to recover back the amount of certain duties paid to the collector of the island, and which had been retained in his hands, by the consent of the Attorney-General, for the express purpose of trying the question as to the validity of the King's proclamation, by which the duties were imposed. The court determined that the King had precluded himself from the exercise of his power of prerogative legislation over a conquered country, by previously authorizing the establishment of a colonial legislature, and, therefore, gave judgment for the plaintiff. The present suit is substantially a suit against the state. The 11th amendment to the constitution was intended to protect the state effectually from the *suit of an individual, not to permit [*804 its sovereign rights to be drawn in question, and its property to be taken indirectly by suing its officers. In the case of the United States v.

1.—1 Madd. Ch. 113, 123, 128, and the cases there cited.

2.—7 Ves. 255; 4 Johns. Ch. Rep. 25.

3.—Cowp. 204.

Peters, the interference of the state was by a law passed subsequent to the decree, and intended to operate directly upon it, and defeat its execution. A court of law, from necessity, sometimes allows suits to be maintained against mere agents, who are the active parties, in cases of trespass or other torts; but it is the invariable practice of the Court of Chancery to proceed against the parties really interested, and the omission of any of them is a fatal defect. The policy which exempts the states from being sued in the courts of the Union, is the same, whether the case arise under the constitution and laws of the United States, or whether the jurisdiction is founded upon the character of the parties. The terms of the exemption equally comprehend both classes of cases.

The court having expressed a wish that the cause should be re-argued upon the point of the constitutionality and effect of the provision in the charter of the bank, which authorizes it to sue in the circuit courts of the Union, it was this day again argued upon that point (in connection with the case of The Bank of the United States v. The Planters' Bank of Georgia, in which the same question was involved), by Mr. Clay, Mr. Webster and Mr. Sergeant for the jurisdiction, and by Mr. Harper, Mr. Brown and Mr. Wright against it.

805*] *In favor of the jurisdiction, it was argued, (1) that the jurisdiction was expressly and unequivocally conferred by the act of 1816, s. 7, incorporating the bank. The terms used were free from all ambiguity, and they were introduced for the avowed purpose of giving jurisdiction to the circuit courts. In the case of The Bank of the United States v. Deveaux,[1] it had been decided that the former national bank had not, by virtue of its charter, a right to sue in the federal courts. That charter gave it a right "to sue and be sued, in courts of record, or any other place whatsoever," which it was determined did not confer the privilege of suing in the courts of the Union, they not being expressly mentioned. But no doubt was intimated that those courts would have had jurisdiction, if they had been mentioned in the act. It was to supply this defect that Congress adopted the phraseology which is contained in the present charter, giving the bank power "to sue and be sued in all state courts having competent jurisdiction, and in any circuit court of the United States." Power in the party "to sue," confers jurisdiction on the court. Jurisdiction is always given for the sake of the suitor, never for the sake of the court. It was most natural to give the privilege to the suitor, and that necessarily carries with it the jurisdiction; for without the jurisdiction, he cannot enjoy the right. To authorize the bringing of a suit, is to authorize a suit to be entertained. The patent laws, and many 806*] other statutes *of Congress, have been construed to give jurisdiction by the use of similar terms.

2. That Congress had constitutional authority to confer this jurisdiction on the circuit courts. It was "a case arising under the constitution and laws of the United States." Every case, in which the bank of the United States is a party, is, in the strictest literal interpretation of the clause, a case arising under a law and the constitution of the United States. But for the law, the case would never have existed. But for the continued existence of the law, it could not continue to exist. If, by any conceivable means, the law were to be determined, the case must be at an end. There is, therefore, an inseparable, indissoluble connection between the law and the case, as cause and effect. The case owes its being to the law, and only to the law. The establishment of a corporation is a legislative creation of a faculty, of a moral being, invisible and intangible, but with capacities, powers and privileges, rights and duties. The rights it may require, the wrongs it may suffer, the obligations it may incur, the injuries it may inflict, the acts it may do, its power to do, or to endure, are all derived from, and dependent upon, the charter. To the charter it owes its being, its continued existence, its qualities and properties. The charter defines its duties, and affords the only measures of its responsibilities. Every act it performs, derives its validity from the charter only, and whenever it deals with another, it deals under and according to the charter. In the same manner, whoever deals with it, deals under and according to the charter. *Its [*807 capacity to contract, and to sue and be sued, all are derived from that source. It cannot come into court, without bringing the law in its hand. It is bound in every case to show that it is acting within the limits of its corporate powers, as defined in that law. There can be no case, where the bank is a party, in which questions may not arise under the laws of the United States. In every such case, it must appear that it was duly created, continues to exist, has power to contract, and to bring the suit. All these matters arising under the laws of the United States, and under no other. Suppose an officer created by act of Congress, could not Congress confer on him the privileges of suing and being sued, in his official capacity, in the courts of the Union? Such an officer has two capacities, private and official, and may be subject to different jurisdictions, according as either is affected. But a corporation has but one capacity, and its faculties cannot be divided. Wherever an authority is given, all that is done by virtue of that authority, is done under it. Everything done by the bank, is done under the charter.

If it should be contended that the character of the case depends upon the questions to arise in it, the answer is, that it is not so restricted by the constitution; and that it cannot be previously known what particular questions may arise in the progress of the cause. The principal draws to it the incident, or accessory. The character of the case depends upon its general nature. Every suit brought by the bank, is for the funds placed in its charge, under the law of the United States.

*But the question here is about the [*808 exercise of a sovereign power, given for great national purposes. Those who framed the constitution, intended to establish a government complete for its own purposes, supreme within its sphere, and capable of acting by its own proper powers. They intended it to consist of three co-ordinate branches, legislative,

1.—5 Cranch, 61, 85, 86.

executive, and judicial. In the construction of such a government, it is an obvious maxim, "that the judicial power should be competent to give efficacy to the constitutional laws of the legislature."[1] The judicial authority, therefore, must be co-extensive with the legislative power.[2] It would be quite as reasonable to leave the execution of the laws of the Union to the state executives, as to leave the exposition of them to the state judiciaries. It was intended that the federal judiciary should expound all the laws of the government, and that the federal executive should execute them all. This association is so inseparable that the power of legislation carries with it the power of establishing judicial tribunals. It is so with respect to the power of exclusive legislation within the District of Columbia. So the power of establishing postoffices and post-roads, involves that of providing judicial means for the punishment of mail robbers. Most of the statutes for the punishment of crimes are founded on the same basis. The great object, then of 809*] the *constitutional provision, respecting the judiciary, must make it co-extensive with the power of legislation, and to associate them inseparably, so that where one went, the other might go along with it. The first part of the article, where the jurisdiction is made to depend upon the nature of the controversy, is employed for this purpose, not to limit and restrain. But it was necessary, for great purposes of public policy, to extend it to other cases, where the jurisdiction is made to depend upon the character of the parties. These are the subject of the remaining part of the article. In that part of it which relates to cases arising under the constitution, laws, and treaties of the Union, there is a redundancy in the language: "All cases." The pleonasm is here meant to perform its usual office, to be emphatic. It marks the intention, and affords a principle of construction. The additional terms, "all cases in law and equity," also serve to heighten the effect, and to show that nothing of this essential power was to be put to hazard. Surely such a clause must be construed liberally. It is a maxim applicable to the interpretation of a grant of political power, that the authority to create must infer a power effectually to protect, to preserve, and to sustain.[3] It is no less a maxim, that the power to create a faculty of any sort must infer the power to give it the means of exercise. A grant of the end is necessarily a grant of the means. The constitutional power of Congress to create a bank is derived altogether 810*] *from the necessity of such an institution, for the fiscal purposes of the Union. It is established, not for the benefit of the stockholders, but for the benefit of the nation. It is part of the fiscal means of the nation. Indeed, "the power of creating a corporation is never used for its own sake, but for the purpose of effecting something else."[4] The bank is created for the purpose of facilitating all the fiscal operations of the national government. All its powers and faculties are conferred for this purpose, and for this alone; and it is to be supposed that no other or greater powers are conferred than are necessary to this end. The collection and administration of the public revenue is, of all others, the most important branch of the public service. It is that which least admits of hindrance or obstruction. The bank is, in effect, an instrument of the government, and its instrumental character is its principal character. That is the end; all the rest are means. It is as much a servant of the government as the treasury department. The two faculties of the bank, which are essential to its existence and utility, are, its capacity to hold property, and that of suing and being sued. The latter is the necessary sanction and security of the former, and of all the rest. The former must be inviolable, and the latter must be sufficient to secure its inviolability. But it is not so, if Congress cannot erect a forum, to which the bank may resort for justice. A needful operation of the government becomes dependent upon foreign support, *which may be given, but which may [*811 also be withheld. There is no unreasonable jealousy of the state judicatures; but the constitution itself supposes that they may not always be worthy of confidence, where the rights and interests of the national government are drawn in question. It is indispensable that the interpretation and application of the laws and treaties of the Union should be uniform. The danger of leaving the administration of the national justice to the local tribunals, is not merely speculative. In Ohio, the bank has been outlawed; and if it cannot seek redress in the federal tribunals, it can find it nowhere. Where is the power of coercion in the national government? What is to become of the public revenue while it is going on. Congress might not only have given original, but it might have given exclusive jurisdiction, in the cases mentioned in the 25th section of the judiciary act of 1789, c. 20; instead of which, it has contented itself with giving an appellate jurisdiction, to correct the errors of the state courts, where a question incidentally arises under the laws and treaties of the Union. But here the question is, whether the government of the United States can execute one of its own laws, through the process of its own courts. The right of the bank to sue in the national courts, is one of its essential faculties. If that can be taken away, it is deprived of a part of its being, as much as if it were stripped of its power of discounting notes, receiving deposits, or dealing in bills of exchange.

Against the jurisdiction, it was said, that by the act incorporating the old Bank of the United *States, authority is given to [*812 the corporation "to sue, etc., in courts of record, or any other place whatsoever." By the present charter, it is empowered "to sue, etc., in all state courts having competent jurisdiction, and in any circuit court of the United States." No difference is perceived in the legal effect of these two acts. Both give the same privileges. The circuit courts of the Union are "courts of record;" and an authority to sue in courts of record, or any other place whatsoever, is an authority to sue in the circuit courts. So that, if Congress were competent, under the constitution, to vest such a jurisdiction in the federal courts, it was vested by the first act of incorporation. But in the case of The Bank

1.—Cohens v. Virginia, 6 Wheat. Rep. 414.
2.—The Federalist, No. 80; Cohens v. Virginia, 6 Wheat. Rep. 384.
3.—M'Culloch v. Maryland, 4 Wheat. Rep. 426.
4.—M'Culloch v. Maryland, 4 Wheat. Rep. 411.

of the United States v. Deveaux,[1] the court says, that "by the judiciary act, the jurisdiction of the circuit courts is extended to cases where the constitutional right to plead and be impleaded in the courts of the Union, depends on the character of the parties; but where that right depends on the nature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same state claiming lands under grants from different states. Unless, then, jurisdiction over this cause has been given to the Circuit Court, by some other than the judiciary act, the Bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the United States." The court then 813*] proceeds to consider, *whether jurisdiction had been given to the Circuit Court by the act incorporating the bank, and determines that it had not. The judiciary act, nor no other law of Congress, can extend the jurisdiction of the federal courts beyond the constitutional limits. The charter attempted to confer jurisdiction on the state courts, in cases where the bank is a party. This provision, and that empowering it to sue in the circuit courts of the Union, are both equally void. The act must therefore be restricted, so as to give the corporation authority to sue and be sued in such courts only as are competent to take jurisdiction. This court has determined that the right of the corporation to litigate in the courts of the Union, depends upon the character (as to citizenship) of the members which compose the body corporate, and that a corporation, as such cannot be a citizen, within the meaning of the constitution.[2] There is here no averment on the record, that the plaintiffs have a right to sue, upon the ground of the corporation being citizens of a different state from the defendants; nor could such averment have been made, consistently with the truth of the fact.

It had been said that every suit brought by the bank, arises under the laws of the United States, because the bank, with all its powers and faculties, was created, and existed, by a law of the United States. So it might be said of an alien who is naturalized by the laws of 814*] the Union, that *he derives his citizenship from those laws. But, could Congress, therefore, authorize all naturalized citizens to sue in the courts of the Union? A clear distinction exists between a party and a cause; the party may originate under a law with which the cause has no connection. A revenue officer may commit a trespass while executing his official duties, and if he justifies under the statutes of the United States, a question will arise under them, in which an appellate jurisdiction is given to this court, to correct the errors of the state courts. But could Congress give additional jurisdiction to the federal courts, in all suits brought by or against the revenue officers? In M'Intyre v. Wood,[3] this court says, "when questions arise under the constitution of the United States, in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court; and this provision the legislature has thought sufficient at present for all the political purposes to be answered by the clause of the constitution which relates to the subject." And it may be added, that it must remain sufficient until the law shall be changed by some unequivocal provision within the constitutional competency of Congress to make.

It was also contended, that every right that accrues to the bank in its corporate character, upon which a suit can be maintained, is to be regarded as arising under the charter, and, consequently, under a law of the United States. But the jurisdiction *of the federal [*815 courts, if it attach at all, must attach either to the party or to the case. The party and his rights cannot be so mixed together as that the legal origin of the first shall give character to the latter. A controversy regarding a promissory note or bill of exchange cannot be said to arise under an act of Congress, because the bank which is created by an act of Congress, has purchased the note or bill. Neither the rules of evidence, nor the law of contract, can be regulated by the national legislature. But, in the case supposed, no question can arise, except under the law of contract and the rules of evidence. No law of Congress is drawn into question, and its correct decision cannot possibly depend upon the construction of such law. The bank cannot come into the federal courts as a party suing for a breach of contract or a trespass upon its property; for, neither its character as a party, nor the nature of a controversy, can give the court jurisdiction. The case does not arise under its charter. It arises under the general or local law of contract, and may be determined without opening the statute book of the United States. The privilege conferred upon the bank in its charter, to sue in the circuit courts, must be limited, not only by the criterion indicated; it must also be limited by the general provisions of the judiciary act, regulating the exercise of jurisdiction in the circuit courts. It cannot sue upon a chose in action assigned to it, unless the jurisdiction would have attached between the original parties; it cannot sue a party in the Circuit Court, *over whom [*816 the existing laws give the Supreme Court exclusive jurisdiction. The privilege must be enjoyed, subject to existing laws. As to the legislation of Congress in giving to the courts of the Union cognizance of criminal offenses, that depended on the plain principle, that where a power is granted, all its incidents pass. Congress has power to legislate on various subjects. It is an incident, that they may enforce obedience to the laws they make on those subjects, by punishing offenses against them. Thus, for example, the right to punish perjury, and the falsification of judicial records, as essential to the administration of justice. Hence, Congress has assumed the power of punishing those offenses, when connected with the proceedings in the courts of the Union. So, in the case of patents, the grant creates the right; and the power to secure to inventors the exclusive benefit to their discoveries, could not be executed without giving the patentees a right to sue in those courts.

1.—5 Cranch, 85.

2.—Hope Insurance Company v. Boardman, 5 Cranch, 61.

3.—7 Cranch, 505.

Mr. Chief Justice Marshall delivered the opinion of the court, and after stating the case, proceeded as follows:

At the close of the argument, a point was suggested, of such vital importance as to induce the court to request that it might be particularly spokn to. That point is, the right of the bank to sue in the courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

817*] *The appellants contest the jurisdiction of the court on two grounds:

1st. That the act of Congress has not given it.

2d. That, under the constitution, Congress cannot give it.

1. The first part of the objection depends entirely on the language of the act. The words are, that the bank shall be "made able and capable in law," "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States."

These words seem to the court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," "in every circuit court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this court, in The Bank of the United States v. Deveaux, 5 Cranch, 86. In that case it was decided that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal courts. The words of the 3d section of that act are that the bank may "sue and be sued," etc., "in courts of record, or any other place whatsoever." The court was of opinion that these general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privi-

818*] lege to sue in the *courts of the United States; and this opinion was strengthened by the circumstance that the 9th rule of the 7th section of the same acts, subjects the directors, in case of excess in contracting debt, to be sued in their private capacity, "in any court of record of the United States, or either of them." The express grant of jurisdiction to the federal courts, in this case, was considered as having some influence on the construction of the general words of the 3d section, which does not mention those courts. Whether this decision be right or wrong, it amounts only to a declaration, that a general capacity in the bank to sue, without mentioning the courts of the Union, may not give a right to sue in those courts. To infer from this, that words expressly conferring a right to sue in those courts do not give the right, is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the circuit courts of the United States, if Congress can confer it.

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the bank to sue in the federal courts.

In support of this clause, it is said that the legislative, executive, and judicial powers, of every well-constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law. All governments *which [*819 are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principal in view. The 2d article vests the whole executive power in the President; and the 3d article declares, "that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

The suit of The Bank of the United States v. Osborn et al., is a case, and the question is, whether it arises under a law of the United States.

The appellants contend that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from *the jurisdiction of the federal [*820 courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original or appel-

late form, or both, as the wisdom of Congress may direct. With the exception of these cases, in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction 821*] of the inferior courts is excluded *by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find, in the constitution, no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate that in any such case the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the circuit courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact 822*] and law. Some *of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action, be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has *received that shape which may [*823 be given to it by another tribunal, into which he is forced against his will.

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the bank.

When a bank sues, the first question which presents itself, and which lies at the foundation of the cause is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a *law of the United [*824 States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is *compelled, in every case, [*825 to show its validity. The case arises em-

phatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case; is its origin; is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

The clause giving the bank a right to sue in the circuit courts of the United States, stands on the same principle with the acts authorizing officers of the United States who sue in their own names, to sue in the courts of the United States. The Postmaster-General, for example, cannot sue under that part of the constitution which gives jurisdiction to the federal courts, in consequence of the character of the party, nor is he authorized to sue by the judiciary act. He comes into the courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said, that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It 826*] depends absolutely *on that law, and cannot exist a moment without its authority.

If it be said that a suit brought by the bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true with respect to suits brought by the Postmaster-General. The plea in bar may be payment, if the suit be brought on a bond, or non assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster-General to sue in the courts of the United States, has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the constitution which asserts the right of the legislature to give original jurisdiction to the circuit courts, in cases arising under a law of the United States.

The clause in the patent law, authorizing suits in the circuit courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defense exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, or establish the position, that the case does not arise under a law of the United States.

It is said that a clear distinction exists be- 827*] tween *the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank.

This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the bank arises out of this law.

A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is *distinguishable in nothing from [*828 a native citizen, except so far as the constitution makes the distinction. The law makes none.

There is, then, no resemblance between the act incorporating the bank, and the general naturalization law.

Upon the best consideration we have been able to bestow on this subject, we are of opinion that the clause in the act of incorporation enabling the bank to sue in the courts of the United States, is consistent with the constitution, and to be obeyed in all courts.

We will now proceed to consider the merits of the cause.

The appellants contend, that the decree of the Circuit Court is erroneous.

1. Because no authority is shown in the record, from the bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions, sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because the case made in the bill does not *warrant the interference of a court of [*829 chancery, by injunction.

6. Because, if any case is made in the bill proper for the interference of a court of chancery, it is against the state of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because the decree assumes that the Bank of the United States is not subject to the taxing power of the state of Ohio, and decides

that the law of Ohio, the execution of which is enjoined, is unconstitutional.

These points will be considered in the order in which they are made.

1. It is admitted that a corporation can only appear by attorney, and it is also admitted that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted that this authority must be under seal. On the contrary, the principle decided in the cases of The Bank of Columbia v. Patterson, etc., is supposed to apply to this case, and to show that the seal may be dispensed with. It is, however, unnecessary to pursue this inquiry, since the real question is, whether the non-appearance of the power in the record be error, not whether the power was insufficient in itself.

Natural persons may appear in court, either by themselves or by their attorney. But no man has a right to appear as the attorney of another, without the authority of that other. In ordinary cases, the authority must be produced, because there is, in the nature of things, no prima facie evidence that one man is 830*] in fact the attorney of another. *The case of an attorney-at-law, an attorney for the purpose of representing another in court, and prosecuting or defending a suit in his name, is somewhat different. The power must indeed exist, but its production has not been considered as indispensable. Certain gentlemen, first licensed by government, are admitted by order of court, to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state, or of the Union.

The argument supposes some distinction, in this particular, between a natural person and a corporation; but the court can perceive no reason for this distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived why the same evidence should not be required, that the individual professing to represent him has authority to do so, which would be required if he were incapable of appearing in person. The universal and familiar practice, then, of permitting gentlemen of the profession to appear without producing a warrant of attorney, forms a rule, which is as applicable in reason to their appearance for a corporation, as for a natural person. Were it even otherwise, the 831*] practice is *as uniform and as ancient, with regard to corporations, as to natural persons. No case has ever occurred, so far as we are informed, in which the production of a warrant of attorney has been supposed a necessary preliminary to the appearance of a corporation, either as plaintiff or defendant, by a gentleman admitted to the bar of the court. The usage, then, is as full authority for the case of a corporation as of an individual. If this usage ought to be altered, it should be a rule to operate prospectively, not by the reversal of a decree pronounced in conformity with the general course of the court, in a case in which no doubt of the legality of the appearance had ever been suggested.

In the statutes of jeofails and amendment, which respect this subject, the non-appearance of a warrant of attorney in the record has generally been treated as matter of form; and the 32d section of the judiciary act may very well be construed to comprehend this formal defect in its general terms, in a case of law. No reason is perceived why the courts of chancery should be more rigid in exacting the exhibition of a warrant of attorney than a court of law; and, since the practice has, in fact, been the same in both courts, an appellate court ought, we think, to be governed in both by the same rule.

2. The second point is one on which the productiveness of any degree in favor of the plaintiffs most probably depends; for, if the claim be not satisfied with the money found in the possession of Sullivan, it is, at best, uncertain whether *a fund, out of which it [*832 can be satisfied, is to be found elsewhere.

In inquiring whether the proofs or admissions in the cause be sufficient to charge Sullivan, the court will look into the answer of Currie, as well as into that of Sullivan. In objection to this course, it is said that the answer of one defendant cannot be read against another. This is generally, but not universally, true. Where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule is not admitted to apply. Thus, if an ancestor die, pending a suit, and the proceedings be revived against his heir, or if a suit be revived against an executor or administrator, the answer of the deceased person, or any other evidence, establishing any fact against him, might be read also against the person who succeeds to him. So, a pendente lite purchaser is bound by the decree, without being even made a party to the suit; a fortiori, he would, if made a party, be bound by the testimony taken against the vendor.

In this case, if Currie received the money taken out of the bank, and passed it over to Sullivan, the establishment of this fact, in a suit against Currie, would seem to bind his successor, Sullivan, both as a privy in estate, and as a person getting possession pendente lite, if the original suit had been instituted against Currie. We can perceive no difference, so far as respects the answer of Currie, between the case supposed and the case as it stands. If Currie, who was the predecessor of Sullivan, admits that he received the money of *the bank, the fact seems to bind all [*833 those coming in under him, as completely as it binds himself. This, therefore, appears to the court to be a case in which, upon principle, the answer of Currie may be read.

His answer states, that on or about the 19th or 20th of September, 1819, the defendant, Harper, delivered to him, in coin and notes, the sum of $98,000, which he was informed and believed to be the money levied on the bank as a tax, in pursuance of the law of the state of Ohio. After consulting counsel on the question, whether he ought to retain this sum within his individual control, or pass it to the cred-

it of the state on the books of the treasury, he adopted the latter course, but retained it carefully in a trunk, separate from the other funds of the treasury. The money afterwards came to the hands of Sullivan, the gentleman who succeeded him as treasurer, and gave him a receipt for all the money in the treasury, including this, which was still kept separate from the rest.

We think no reasonable doubt can be entertained, but that the $98,000, delivered by Harper to Currie, were taken out of the bank. Currie understood and believed it to be the fact. When did he so understand and believe it? At the time when he received the money. And from whom did he derive his understanding and belief? The inference is irresistible that he derived it from his own knowledge of circumstances, for they were of public notoriety, and from the information of Harper. In the necessary course of things, Harper, who was sent, as Currie must have known, on this 834*] business, *brings with him to the treasurer of the state a sum of money, which, by the law, was to be taken out of the bank, pays him $98,000 thereof, which the treasurer receives and keeps, as being money taken from the bank, and so enters it on the books of the treasury. In a suit brought against Mr. Currie for this money, by the state of Ohio, if he had failed to account for it, could any person doubt the competency of the testimony to charge him? We think no mind could hesitate in such a case.

Currie, then, being clearly in possession of this money, and clearly liable for it, we are next to look into Sullivan's answer, for the purpose of inquiring whether he admits any facts which show him to be liable also.

Sullivan denies all personal knowledge of the transaction; that is, he was not in office when it took place, and was not present when the money was taken out of the bank, or when it was delivered to Currie. But when he entered the treasury office, he received this sum of $98,000, separate from the other money of the treasury, which, he understood from report, and was informed by his predecessor, from whom he received it, was the money taken out of the bank. This sum has remained untouched ever since, from respect to the injunction awarded by the court.

We ask, if a rational doubt can remain on this subject.

Mr. Currie, as treasurer of the state of Ohio, receives $98,000, as being the amount of a tax imposed by the legislature of that state on 835*] *the Bank of the United States; enters the same on the books of the treasury; and, the legality of the act by which the money was levied being questioned, puts it in a trunk, and keeps it apart from the other money belonging to the public. He resigns his office, and is succeeded by Mr. Sullivan, to whom he delivers the money, informing him, at the same time, that it is the money raised from the bank; and Mr. Sullivan continues to keep it apart, and abstains from the use of it, out of respect to an injunction, forbidding him to pay it away or in any manner to dispose of it. Is it possible to doubt the identity of this money?

Even admitting that the answer of Currie, though establishing his liability as to himself, could not prove even that fact as to Sullivan; the answer of Sullivan is itself sufficient, we think, to charge him. He admits that these $98,000 were delivered to him, as being the money which was taken out of the bank, and that he so received it; for, he says, he understood this sum was the same as charged in the bill; that his information was from report, and from his predecessor; and that the money has remained untouched, from respect to the injunction. This declaration, then, is a part of the fact. The fact, as admitted in his answer, is not simply that he received $98,000, but that he received $98,000 as being the money taken out of the bank—the money to which the writ of injunction applied.

In a common action between two private individuals, such an admission would, at least, be sufficient to throw on the defendant the burthen of *proving that the money, which [*836 he acknowledges himself to have received and kept as the money of the plaintiff, was not that which it was declared to be on its delivery. A declaration, accompanying the delivery, and constituting a part of it, gives a character to the transaction, and is not to be placed on the same footing with a declaration made by the same person at a different time. The answer of Sullivan, then, is in the opinion of the court, sufficient to show that these $98,000 were the specific dollars for which this suit was brought. This sum having come to his possession with full knowledge of the fact, in a separate trunk, unmixed with money, and with notice that an injunction had been awarded respecting it, he would seem to be responsible to the plaintiff for it, unless he can show sufficient matter to discharge himself.

3. The next objection is, to the decree against Osborn and Harper, as to whom the bill was taken for confessed.

The bill charges that Osborn employed John L. Harper to collect the tax, who proceeded by violence to enter the office of discount and deposit at Chilicothe, and forcibly took therefrom $100,000 in specie and bank notes; and that, at the time of the seizure, Harper well knew, and was duly notified, that an injunction had been allowed, which money was delivered either to Currie or Osborn.

So far as respects Harper and Osborn, these allegations are to be considered as true. If the act of the legislature of Ohio, and the official *character of Osborn, constitute a de- [*837 fense, neither of these defendants are liable, and the whole decree is erroneous; but if the act be unconstitutional and void, it can be no justification, and both these defendants are to be considered as individuals who are amenable to the laws. Considering them, for the present, in this character, the fact, as made out in the bill, is, that Osborn employed Harper to do an illegal act, and that Harper has done that act; and that they are jointly responsible for it, is supposed to be as well settled as any principle of law whatever.

We think it unnecessary, in this part of the case, to enter into the inquiry respecting the effect of the injunction. No injunction is necessary to attach responsibility on those who conspire to do an illegal act, which this is, if not justified by the authority under which it was done.

4. The next objection is, to the allowance of interest on the coin, which constituted a part

of the sum decreed to the complainants. Had the complainants, without the intervention of a court of equity, resorted to their legal remedy for the injury sustained, their right to principal and interest would have stood on equal ground. The same rule would be adopted in a court of equity, had the subject been left under the control of the party in possession, while the right was in litigation. But the subject was not left under the control of the party. The court itself interposed, and forbade the person, in whose possession the property was, to make any use of it. This order having been obeyed, places the defendant in the same 838*] *situation, so far as respects interest, as if the court had taken the money into its own custody. The defendant, in obeying the mandate of the court, becomes its instrument, as entirely as the clerk of the court would have been had the money beeen placed in his hands. It does not appear reasonable that a decree which proceeds upon the idea that the injunction of the court was valid, ought to direct interest to be paid on the money which that injunction restrained the defendant from using.

5. The fifth objection to the decree is, that the case made in the bill does not warrant the interference of a court of chancery.

In examining this question, it is proper that the court should consider the real case, and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, auditor of the state of Ohio, to restrain him from executing a law of that state, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, who is a state officer, from performing any official act enjoined by statute; and whether a court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnishes no authority or protection to the officer who is about to proceed under it. This must be assumed, because, in the arrangement 839*] of his argument, *the counsel who opened the cause has chosen to reserve that point for the last, and to contend that, though the law be void, no case is made out against the defendants. We suspend, also, the consideration of the question, whether the interest of the state of Ohio, as disclosed in the bill, shows a want of jurisdiction in the Circuit Court, which ought to have arrested its proceedings. That question, too, is reserved by the appellants, and will be subsequently considered. The sole inquiry, for the present, is, whether, stripping the case of these objections, the plaintiffs below were entitled to relief in a court of equity, against the defendants, and to the protection of an injunction. The appellants expressly waive the extravagant proposition that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law. The question, then, is reduced to the single inquiry, whether the case is cognizable in a court of equity. If it is, the decree must be affirmed, so far as it is supported by the evidence in the cause.

The appellants allege that the original bill contains no allegation which can justify the application for an injunction, and treat the declarations of Ralph Osborn, the auditor, that he should execute the law, as the light and frivolous threats of an individual that he would commit an ordinary trespass. But surely this is not the point of view in which the application for an injunction is to be considered. The legislature of Ohio had passed *a law [*840 for the avowed purpose of expelling the bank from the state; and had made it the duty of the auditor to execute it as a ministerial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the bank of its chartered privileges so far as they were to be exercised in that state. It must expel the bank from the state; and this is, we think, a conclusion which the court might rightfully draw from the law itself. That the declarations of the auditor would be fulfilled, did not admit of reasonable doubt. It was to be expected that a person continuing to hold an office would perform a duty enjoined by his government, which was completely within his power. This duty was to be repeated until the bank should abandon the exercise of its chartered rights.

To treat this as a common casual trespass, would be to disregard entirely its true character and substantial merits. The application to the court was, to interpose its writ of injunction to protect the bank, not from the casual trespass of an individual, who might not perform the act he threatened, but from the total destruction of its franchise, of its chartered privileges, so far as respected the state of Ohio. it was morally certain that the auditor would proceed to execute the law, and it was morally certain that the effect must be the expulsion of the bank from the state. An annual charge of $100,000 would more than absorb all the advantages of the privilege, and would consequently annul it.

*The appellants admit that injunc- [*841 tions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies the same remedy ought to be afforded. The interference of the court in this class of cases, has most frequently been to restrain a person from violating an exclusive privilege, by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the court rather strengthened than weakened? Had the privilege of the bank been exclusive, the argument admits that any other person, or company, might have been enjoined, according to the regular course of the Court of Chancery, from using or exercising the same business. Why would such person or company have been enjoined? To prevent a permanent injury from being done to the party entitled to the franchise or privilege; which injury, the appellants say, cannot be estimated in damages. It requires no argument to prove that the injury is greater, if the whole privilege be destroyed, than if it be divided; and, so far as respects the estimate of damages, although precise accuracy

may not be attained, yet a reasonable calculation may be made of the amount of the injury, so as to satisfy the court and jury. It will not be pretended that, in such a case, an action at law could not be maintained, or that the materials do not exist on which a verdict might be 842*] *found, and a judgment rendered. But in this, and many other cases of continuing injuries, as in the case of repeated ejectments, a Court of Chancery will interpose. The injury done, by denying to the bank the exercise of its franchise in the state of Ohio, is as difficult to calculate, as the injury done by participating in an exclusive privilege. The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition, and protects the privilege. The same conservative principle, which induces the court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and in many cases of destruction, will, we think, apply to this. Indeed, trespass is destruction, where there is no privity of estate.

If the state of Ohio could have been made a party defendant, it can scarcely de denied that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited, to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit.

This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is 843*] done, be himself *above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing? We put out of view the character of the principal as a sovereign state, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the court? The appellants found their distinction on the legal principle that all trespasses are several as well as joint, without inquiry into the validity of this reason, if true. We ask, if it be true? Will it be said that the action of trespass is the only remedy given for this injury? Can it be denied that an action on the case, for money had and received to the plaintiff's use, might be maintained? *We [*844 think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us, for the opinion that an injunction may not be awarded to restrain the agent, with as much propriety as it might be awarded to restrain the principal, could the principal be made a party.

We think the reason for an injunction is much stronger in the actual, than it would be in the supposed case. In the regular course of things, the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only; and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a court of equity. The injury would, in fact, be irreparable; and the cases are innumerable in which injunctions are awarded on this ground.

But, were it even to be admitted that the injunction, in the first instance, was improperly awarded, and that the original bill could not be maintained, that would not, we think, materially affect the case. An amended and supplemental bill, making new parties, has been filed in the cause, and on that bill, with the proceedings under it, the decree was pronounced. The question is, whether that bill and those proceedings support the decree.

The case they make is, that the money and *notes of the plaintiffs, in the Circuit [*845 Court, have been taken from them without authority, and are in possession of one of the defendants, who keeps them separate and apart from all other money and notes. It is admitted that this defendant would be liable for the whole amount in an action at law; but it is denied that he is liable in a court of equity.

We think it a case in which a court of equity ought to interpose, and that there are several grounds on which its jurisdiction may be placed.

One, which appears to be ample for the purpose, is, that a court will always interpose to prevent the transfer of a specific article, which, if transferred, would be lost to the owner. Thus, the holder of negotiable securities, indorsed in the usual manner, if he has acquired them, fraudulently, will be enjoined from negotiating them; because, if negotiated, the maker or indorser must pay them.[1] Thus, too, a transfer of stock will be restrained in favor of a person having the real property in the article. In these cases, the injured party would have his remedy at law; and the probability that this remedy would be adequate, is stronger in the cases put in the books than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay. But it is the province of a court of equity, in such cases, to arrest the injury, and prevent the wrong. The remedy is more beneficial and complete than the law can give. The money of the bank, if mingled with the other money *in the treasury, and put [*846 into circulation, would be totally lost to the

1.—1 Mad. 154, 155.

owners; and the reason for an injunction is, at least, as strong in such a case, as in the case of a negotiable note.

6. We proceed now to the 6th point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a court of chancery, it is against the state of Ohio, in which case the Circuit Court could not exercise jurisdiction.

The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the state of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the state from executing the law. It is, then, a controversy between the bank and the state of Ohio. The interest of the state is direct and immediate, not consequential. The process of the court, though not directed against the state by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the state, and the court ought not to proceed without making the state a party. If this cannot be done, the court cannot take jurisdiction of the cause.

The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in 847*] the cause, until the *state was before the court. But this was not in the power of the bank. The eleventh amendment of the constitution has exempted a state from the suits of citizens of other states, or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by the state, and on the property in their hands.

Before we try this question, by the constitution, it may not be time misapplied, if we pause for a moment and reflect on the relative situation of the Union with its members, should the objection prevail.

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a state, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains that, if a state shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by the ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous 848*] penalties, *from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail themselves of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on a bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business: but, in both cases, the officer levying the penalty acts under a void authority, and the power *to re- [*849 strain him is denied as positively in the one as in the other.

The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the constitution, from the direct action of state agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular state to resist the execution of those laws.

The state of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a state, can be sustained against such agent, because they would be substantially against the state itself, in violation of the 11th amendment of the constitution.

That the courts of the Union cannot entertain a suit brought against a state by an alien, or the citizen of another state, is not to be controverted. Is a suit, brought against an individual, for any cause whatever, a suit against a state, in the sense of the constitution?

*The 11th amendment is the limitation [*850 of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

The words of the constitution, so far as they respect this question, are: "The judicial power shall extend to controversies between two or more states, between a state and citizens of an-

other state, and between a state and foreign states, citizens, or subjects."

A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which "a state shall be a party."

The words of the 11th amendment are: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of a foreign state."

The Bank of the United States contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

The appellants admit that the jurisdiction of the court is not ousted by any incidental or consequential interest, which a state may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the state, through its officers.

851*] *If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person has been considered as a party, who is not made so in the record. But the court will not review those decisions, because it is thought a question growing out of the constitution of the United States requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the courts of any other country.

Do the provisions, then, of the American constitution, respecting controversies to which a state may be a party, extend, on a fair construction of that instrument, to cases in which the state is not a party on the record?

The first in the enumeration, is a controversy between two or more states.

There are not many questions in which a state would be supposed to take a deeper or more immediate interest, than in those which decide on the extent of her territory. Yet the constitution, not considering the state as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different states. If each state, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the constitution, as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves that the constitution does not

852*] *consider the state as a party in such a case.

Jurisdiction is expressly granted in those cases only where citizens of the same state claim lands under grants of different states. If the claimants be citizens of different states, the court takes jurisdiction for that reason. Still, the right of the state to grant, is the essential point in dispute; and in that point the state is deeply interested. If that interest converts the state into a party, there is an end of the cause; and the constitution will be construed to forbid the circuit courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same state.

We are aware that the application of these cases may be denied, because the title to the state comes on incidentally, and the appellants admit the jurisdiction of the court, where its judgment does not act directly upon the property or interests of the state; but we deemed it of some importance to show that the framers of the constitution contemplated the distinction between cases in which a state was interested, and those in which it was a party, and made no provision for a case of interest, without being a party on the record.

In cases where a state is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the state, what rule has the constitution given, by which this interest *is to be measured? If no rule [*853 be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

The next in the enumeration, is a controversy between a state and the citizens of another state.

Can this case arise, if the state be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one state should seize property for taxes belonging to a man who supposes himself to reside in the other state, and who seeks redress in the Federal Court of that state in which the officer resides. The interest of the state is obvious. Yet it is admitted that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the state. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the state against him, may plead in bar the judgment of a court of *competent jurisdic- [*854 tion. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the state, in the hands of its officer. And yet the argument admits that the action, in such a case, would be sustained. But, suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

It would be tedious to pursue this part of the

inquiry farther, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a state may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But, before we review them, we will notice one where the nature of the controversy is, in some degree, blended with the character of the party.

If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But suppose a suit to be brought which affects the interest of a foreign minister, or by which the 855*] person of his secretary, *or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of states, whose immediate or remote interest were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is, "controversies to which the United States shall be a party."

Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

Let us examine this question.

Suits brought by the Postmaster-General are 856*] *for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet, these suits could not be instituted in the courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

The judicial power of the Union is also extended to controversies between citizens of different states; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, it the executor be a resident of another state, the jurisdiction of the federal courts could be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined, in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in *no manner affects the jurisdiction of [*857 the court? The plain and obvious answer is, because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record.

Were a state to be the sole legatee, it will not, we presume, be alleged that the jurisdiction of the court, in a suit against the executor, would be more affected by this fact than by the fact that any other person, not suable in the courts of the Union, was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the state.

This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the 2d section of the 3d article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the constitution be construed as it *would have [*858 been construed, had the jurisdiction of the court never been extended to suits brought against a state, by the citizens of another state, or by aliens.

The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the state for the money taken out of the bank was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is to its being enforced against the specific article taken, and by the decree of this court. But it has been shown, we think, that an action of detinue might be maintained for that article, if the bank has possessed the means of describing it, and that the

interest of the state would have been an obstacle to the suit of the bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It 859*] was in a *court of equity alone that the relief would be real, substantial and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated.

It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the state of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

7. Is that law unconstitutional?

This point was argued with great ability, and decided by this court, after mature and deliberate consideration, in the case of M'Culloch v. The State of Maryland. A revision of that opinion has been requested; and many considerations combine to induce a review of it.

The foundation of the argument in favor of the right of a state to tax the bank, is laid in the suposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concerned, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual cir- 860*] cumstance of its being *employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of M'Culloch v. The State of Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready-made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its *agency [*861 for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a bank? This question was answered in the case of M'Culloch v. The State of Maryland. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, *the vital part of the corporation; it is [*862 its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence To tax its faculties, its trade and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other.

It is urged, that Congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be caried on by a private individual, or company, as well as by a corporaton. As this profession or business may be taxed, regulated, or restrained, when conducted by ar individual, it may likewise be taxed, regulated, or restrained, when conducted by a corporation.

The general correctness of these propositions need not be controverted. Their particular application to the question before the court is

alone to be considered. We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be en- 863*] dowed with the same faculties, *for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

Were the Secretary of the Treasury to be authorized, by law, to appoint agencies throughout the Union, to perform the public functions of the bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor, and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operations of the government, would each state in the Union possess 864*] a right to *control these operations? The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist, must always be answered in the affirmative.

Congress was of opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature. But, were it not to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government, is too obvious for controversy; and who will venture to affirm that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and, if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution.

The appellants admit that, if this faculty be necessary, to make the bank a fit instrument for the purposes of the government, Congress possesses the same power to protect the machine in *this, as in its direct fiscal op- [*865 erations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The court has already stated its conviction that, without this capacity to trade with individuals, the bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests.

It is contended that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the court.

It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted, that all who are employed in them, are protected, while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental *to, and [*866 is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.

That department has no will, in any case. If the sound construction of the act be, that it exempt the trade of the bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the states, courts are as much bound to give it that construction as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

The appellants rely greatly on the distinction between the bank and the public institutions, such as the mint or the post-office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in Congress. Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors.

It will not be contended that the directors, or 867*] *other officers of the bank, are officers of government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the state to control its operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained. Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control.

If the trade of the bank be essential to its character as a machine for the fiscal operations of the government, that trade must be as exempt from state control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation, as on that of discounting the notes of individuals. No distinction is taken between them.

Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of M'Culloch v. 868*] The State *of Maryland, and is of opinion that the act of the state of Ohio, which is certainly much more objectionable than that of the state of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.

It being then shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, and that this suit is not against the state of Ohio within the view of the constitution, the state being no party on the record, the only real question in the cause is, whether the record contains sufficient matter to justify the court in pronouncing a decree against the defendants? That this question is attended with great difficulty, has not been concealed or denied. But when we reflect that the defendants, Osborne and Harper, are incontestably liable for the full amount of the money taken out of the bank; that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the bank, unless the form of having made an entry on the books of the treasury can countervail the fact, that it was, in truth, kept untouched, in a trunk, by itself, as a deposit, to await *the event of the pending suit respect- [*869 ing it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury, nor put into circulation. Were it to be admitted that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrong-doer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances, we think, a court of equity may afford its aid, on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes, from putting them into circulation; or a person having the apparent ownership of stock really belonging to another, from transferring it. The suit, then, might be as well sustained in a court of *equity as in a court of law, and the [*870 objection that the interests of the state are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued—of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in Hoyt v. Gelston, in the case of The Apollon, and in the case of Doddridge's Lessee v. Thompson and Wright, and in many others. An independent foreign sovereign cannot be sued, and does not appear in court. But a friend of the court comes in, and, by suggestion, gives it to understand that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The court must proceed to investigate the assertion, and examine the title. In the case at bar, the tribunal established by the constitution, for the purpose of deciding, ultimately, in all cases of this description, had solemnly determined, that a state law imposing a tax on the bank of the United States, was unconstitutional and void, before the wrong was committed for which this suit was brought.

We think, then, that there is no error in the decree *of the Circuit Court for the [*871 district of Ohio, so far as it directs restitution

of the specific sum of $98,000, which was taken out of the bank unlawfully, and was in the possession of the defendant, Samuel Sullivan, when the injunction was awarded, in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of $2,000, by the defendants, Ralph Osborne and John L. Harper; but that the same is erroneous, so far as respects the interest on the coin, part of the said $98,000, it being the opinion of this court, that, while the parties were restrained by the authority of the Circuit Court from using it, they ought not to be charged with interest. The decree of the Circuit Court for the district of Ohio is affirmed, as to the said sums of $98,000 and $2,000; and reversed, as to the residue.

Mr. Justice Johnson. The argument in this cause presents three questions: (1) Has Congress granted to the Bank of the United States an unlimited right of suing in the courts of the United States? (2) Could Congress constitutionally grant such a right? and (3) Has the power of the court been legally and constitutionally exercised in this suit.

I have very little doubt that the public mind will be easily reconciled to the decision of the court here rendered; for, whether necessary or unnecessary originally, a state of things has now grown up, in some of the states, which 872*] renders all *the protection necessary, that the general government can give to this bank. The policy of the decision is obvious, that is, if the bank is to be sustained; and few will bestow upon its legal correctness, the reflection that it is necessary to test it by the constitution and laws under which it is rendered.

The Bank of the United States is now identified with the administration of the national government. It is an immense machine, economically and beneficially applied to the fiscal transactions of the nation. Attempts have been made to dispense with it, and they have failed; serious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned; and it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury; and all this, not only without expense to the government, but after paying a large bonus, and sustaining actual annual losses to a large amount; furnishing the only possible means of embodying the most ample security for so immense a charge.

Had its effects, however, and the views of its framers, been confined exclusively to its fiscal uses, it is more than probable that this suit, and the laws in which it originated, would never have had existence. But it is well known, that with that object was combined another, of a very general and not less important character.

The expiration of the charter of the former bank, led to state creations of banks; each new 873*] bank increased *the facilities of creating others; and the necessities of the general government, both to make use of the state banks for their deposits, and to borrow largely of all who would lend to them, produced that rage for multiplying banks, which, aided by the emoluments derived to the states in their creation, and the many individual incentives which they developed, soon inundated the country with a new description of bills of credit, against which it was obvious that the provisions of the constitution opposed no adequate inhibition.

A specie-paying bank, with an overwhelming capital, and the whole aid of the government deposits, presented the only resource to which the government could resort, to restore that power over the currency of the country, which the framers of the constitution evidently intended to give to Congress alone. But this necessarily involved a restraint upon individual cupidity, and the exercise of a state power; and, in the nature of things, it was hardly possible for the mighty effort necessary to put down an evil spread so wide, and arrived to such maturity, to be made without embodying against it an immense moneyed combination, which could not fail of making its influence to be felt, wherever its claimances could reach, or its industry and wealth be brought to operate.

I believe that the good sense of a people, who know that they govern themselves, and feel that they have no interests distinct from those of their government, would readily concede to the bank, thus circumstanced, some, if not all the rights here *contended for. But I [*874 cannot persuade myself that they have been conceded in the extent which this decision affirms. Whatever might be proper to be done by an amendment of the constitution, this court is only, at present, expounding its existing provisions.

In the present instance, I cannot persuade myself that the constitution sanctions the vesting of the right of action in this bank, in cases in which the privilege is exclusively personal, or in any case, merely on the ground that a question might possibly be raised in it, involving the constitution, or constitutionality of a law, of the United States.

When laws were heretofore passed for raising a revenue by a duty on stamped paper, the tax was quietly acquiesced in, notwithstanding it entrenched so closely on the unquestionable power of the states over the law of contracts; but had the same law which declared void contracts not written upon stamped paper, declared that every person holding such paper should be entitled to bring his action "in any circuit court" of the United States, it is confidently believed that there could have been but one opinion on the constitutionality of such a provision. The whole jurisdiction over contracts might thus have been taken from the state courts, and conferred upon those of the United States. Nor would the evil have rested there; by a similar exercise of power, imposing a stamp on deeds generally, jurisdiction over the territory of the state, whoever might be parties, even between citizens of the same state—jurisdiction of suits instituted for the recovery of legacies *or distributive [*875 portions of intestates' estates—jurisdiction, in fact, over almost every possible case might be transferred to the courts of the United States. Wills may be required to be executed on stamped paper; taxes may be, and have been, imposed upon legacies and distributions; and, in all such cases, there is not only a possibility

but a probability, that a question may arise, involving the constitutionality, construction, etc., of a law of the United States. If the circumstance that the questions which the case involves are to determine its character, whether those questions be made in the case or not, then every case here alluded to, may as well be transferred to the jurisdiction of the United States, as those to which this bank is a party. But still farther, as was justly insisted in argument, there is not a tract of land in the United States, acquired under laws of the United States, whatever be the number of mesne transfers that it may have undergone, over which the jurisdiction of the courts of the United States might not be extended by Congress, upon the very principle on which the right of suit in this bank is here maintained. Nor is the case of the alien, put in argument, at all inapplicable. The one acquires its character of individual property, as the other does its political existence, under a law of the United States; and there is not a suit which may be instituted to recover the one, nor an action of ejectment to be brought by the other, in which a right acquired under a law of the United States does not lie as essentially at the basis of the right of action, as in the suits brought by this bank. 876*] *It is no answer to the argument, to say that the law of the United States is but ancillary to the constitution, as to the alien; for the constitution could do nothing for him without the law; and, whether the question be upon law or constitution, still if the possibility of its arising be a sufficient circumstance to bring it within the jurisdiction of the United States courts, that possibility exists with regard to every suit affected by alien disabilities; to real actions in time of peace—to all actions in time of war.

I cannot persuade myself, then, that, with these palpable consequences in view, Congress ever could have intended to vest in the Bank of the United States the right of suit to the extent here claimed. And, notwithstanding the confidence with which this point has been argued, an examination of the terms of the act, and a consideration of them with a view to the context, will be found to leave it by no means a clear case, that such is the legal meaning of the act of incorporation. To be sure, if the act had simply and substantively given the right "to sue and be sued in the circuit courts of the United States," there could have been no question made upon the construction of those words. But such is not the fact. The words are, not that the bank shall be made able and capable in law, to sue, etc., but that it shall, "by a certain name," be made able and capable in law to do the various acts therein enumerated. And these words, under the force of which this suit is instituted, are found in the ordinary incorporating clause of this act, a 877*] clause *which is well understood to be, and which this court, in the case of Deveaux, has recognized to be, little more than the mere common place or formula of such an act. The name of a corporation is the symbol of its personal existence; a misnomer there is fatal to a suit (and still more fatal as to other transactions). By the incorporating clause, a name is given it, and, with that name, a place among created beings; then usually follows an enumeration of the ordinary acts in which it may personate a natural man; and among those acts, the right to sue and be sued, of which the court, in Deveaux's case, very correctly remarks, that it is "a power which, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear as a corporation in any court which would by law have cognizance of the cause if brought by individuals." With this qualification, the clause in question will be construed as an enumeration of incidents, instead of a string of enactments; and such a construction is strongly countenanced by the concluding sentence of the section; for, after running through the whole routine of powers, most of which are unquestionably incidental, and needed no enactment to vest them, it concludes thus: "and generally to do and execute all and singular the acts, matters, and things, which to them it shall and may appertain to do." And, in going over the act, it will be found, that whenever it is contemplated to vest a power not incidental, it is done by a specific provision, made *the subject of a distinct clause; [*878 such is that power to transact the business of the loan-office of the United States. And, indeed, there is one section of the act which strikingly exhibits the light in which the law-makers considered the incorporating clause. I mean the tenth; which, notwithstanding that the same clause in the seventh section, which is supposed to confer this sweeping power to sue, confers also, in terms equally comprehensive, the power to make laws for the institution, and "to do and execute all and singular the matters and things, which to them it shall and may appertain to do," contains an enactment in the following words: "That they shall have power to appoint such officers, clerks and servants, under them, for executing the business of the corporation, and to allow them such compensation for their services, respectively, as shall be reasonable; and shall be capable of exercising such other powers and authorities for the well governing and ordering the officers of the said corporation, as shall be prescribed by the laws, regulations and ordinances of the same;" a section which would have been altogether unnecessary had the seventh section been considered as enacting, instead of enumerating and limiting. I consider the incorporating clause, then, not as purporting the absolute investment of any power, but as the usual and formal declaration of the extent to which this artificial should personate the natural person, in the transactions incident to ordinary life, or to the peculiar objects of its creation; and, therefore, not vesting the right to sue in the courts of the United *States, but only the right of [*879 personating the natural man in the courts of the United States, as it might, upon general principles, in any other courts of competent jurisdiction. And this, I say, is consonant to the decision in Deveaux's case, and sustained by abundant evidence on the face of the act itself. Indeed, any other view of the effect of the section converts some of its provisions into absolute nonsense.

It has been argued, and I have no objection to admit, that the phraseology of this act has

been varied from that incorporating the former bank, with a view to meet the decision in Deveaux's case. But it is perfectly obvious, that in the prosecution of that design, the purport of Deveaux's case has been misapprehended. The court there decide that the jurisdiction of the United States depended, (1) on the character of the cause; (2) on the character of the parties; that the judiciary act confined the jurisdiction of the circuit courts to the second class of cases, and the incorporating act contained no words that purported to carry it further. Whether the legislative power of the United States could extend it as far as is here insisted on, or what words would be adequate to that purpose, the case neither called on the court to decide, nor has it proposed to decide. If anything is to be inferred from that decision on those points, it is unfavorable to the sufficiency of the words inserted in the present act. For, the argument of the court intimates that where the legislature propose to give jurisdiction to the courts [*880 of the United States, they do *it by a separate provision, as in the case of the action of debt for exceeding the sum authorized to be loaned. And on the words of the incorporating section, it makes this remark, "that it is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear as a corporation in any court, which would by law have cognizance of the cause if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they be." Now, the difference of phraseology between the former act and the present, in the clause in question, is this: the former has these words, "may sue and be sued, etc., in courts of record or any other place whatsoever;" the present act has substituted these words, "in all state courts having competent jurisdiction, and in any circuit court of the United States." Now, the defect here could not have been the want of adequate words, had the intent appeared to have been, to enlarge the jurisdiction of any particular court. For, if the circuit courts were courts of record, the right of suit given was as full as any other words could have made it. But, as the court in its own words assigns the ground of its decision, the clause could not have been intended to enlarge the jurisdiction of the state courts, and therefore could not have been intended to enlarge that of the federal courts, much less to have extended it to the smallest sum possible. Therefore it concludes, that the clause is one [*881 of mere enumeration, containing, *as it expresses it, "the powers which, if not incident to a corporation, are conferred by every incorporating act, and are not understood to enlarge," etc. If, then, this variation had in view the object which is attributed to it, the words intended to answer that object have been inserted so unhappily as to neutralize its influence; but I think it much more consistent with the respect due to the draftsman, who was known to have been an able lawyer, to believe that, with such an object in view, he would have pursued a much more plain and obvious course, and given it a distinct and unequivocal section to itself, or at least have worded it with more marked attention. This opinion is further supported, by considering the absurdities that a contrary opinion would lead to.

A literal translation of the words in question is impossible. Nothing but inconsistencies present themselves, if we attempt to apply it without a reference to the laws and constitution of the United States, forming together the judicial system of the Union. The words are, "may sue and be sued, etc., in any state court having competent jurisdiction, and in any circuit court of the United States." But why should one member of the passage be entitled to an enacting effect, and not the residue? Yet, who will impute to the legislature or the draftsman, an intention to vest a jurisdiction by these words in a state court? I do not speak of the positive effect; since the failure of one enactment, because of a want either of power to give or capacity to receive, will not control *the effect as to any other en- [*882 actment. I speak of the intent or understanding of the law-maker, who must have used these words, as applicable to the state courts, in an enacting sense, if we suppose him to have used them in that sense, as to the courts of the United States. Yet I should be very unwilling to impute to him, or to the legislature of the country, ignorance of the fact that such an enactment, if it was one, could not give a right to sue in the state courts, if the right did not exist without it. Or, in fact, that such enactment was altogether unnecessary, if the legislative power, which must give effect to such an enactment, was adequate to constitute effectually this body corporate.

But why should this supposed enactment go still farther, and confer the capacity to be sued, as well as to sue, either in the courts of the one jurisdiction or the other? Did the law-givers suppose that this corporation would not be subject to suit, without an express enactment for that purpose also? Or was it guilty of the more unaccountable mistake, of supposing that it could confer upon individuals, indiscriminately, this privilege of bringing suits in the courts of the United States against the bank? that, too, for a cause of action originating, say, in work and labor, or in a special action on the case, or perhaps, ejectment to try title to land mortgaged by a person not having the estate in him, or purchased of a tortious holder for a banking-house? I cannot acquiesce in the supposition; and yet, if one is an enactment, and *takes effect as such, [*883 they are all enactments, for they are uttered eodem flatu.

My own conclusion is, that none of them are enactments, but all merely declaratory; or, at most, only enacting, in the words of the court, in the case of Deveaux, that the bank may, by its corporate name and metaphysical existence bring suit, or personate the natural man, in the courts specified, as though it were in fact a natural person; that is, in those cases in which, according to existing laws, suits may be brought in the courts specified respectively.

Indeed, a more unrestricted sense given to the words of the act, could not be carried into execution; a literal exercise of the right of suit, supposed to be granted, would be impossible. Can the Bank of the United States be sued (in the literal language of the act) "in any circuit

court of the United States?" in that of Ohio, or Louisiana, for instance? Locality, in this respect, cannot be denied to such an institution; or, at least, it is only incidentally, by distress infinite, or attachment, for instance, that such a suit could be maintained. Nor, on the other hand, could the bank sue literally in any circuit court of the United States. It must, of necessity, be confined to the Circuit Court of that district in which the defendants resides, or is to be found. And thus, at last, we circumscribe these general words, by reference to the judicial system of the United States, as it existed at the time. And why the same restriction should not have been imposed as to amount, which is imposed as to all other suit-
884*] ors, *to wit, $500 and upwards, is to me inscrutable, except on the supposition that this clause was not intended for any other purpose than that which I have supposed. The United States have suffered no other suitors to institute a suit in its courts for less than that sum, and it is hard to conceive why the bank should be permitted to institute a suit to recover, if it will, a single cent. This consideration is expressly drawn into notice by this court, in the case of Deveaux, and if it was entitled to weight then, in fixing the construction of the incorporating section, I see no reason why it should be unnoticed now.

I will dwell no longer on a point which is in fact secondary and subordinate; for if Congress can vest this jurisdiction, and the people will it, the act may be amended, and the jurisdiction vested. I next proceed to consider, more distinctly, the constitutional question on the right to vest the jurisdiction to the extent here contended for.

And here I must observe, that I altogether misunderstood the counsel who argued the cause for the plaintiff in error, if any of them contended against the jurisdiction, on the ground that the cause involved questions depending on general principles. No one can question that the court which has jurisdiction of the principal question, must exercise jurisdiction over every question. Neither did I understand them as denying that, if Congress could confer on the circuit courts appellate, they could confer original jurisdiction. The argument went to deny the right to assume jurisdiction on a mere hypothesis. It was one
885*] of *description, identity, definition; they contended that, until a question involving the construction or administration of the laws of the United States did actually arise, the casus fœderis was not presented, on which the constitution authorized the government to take to itself the jurisdiction of the cause. That until such a question actually arose, until such a case was actually presented, non constat, but the cause depended upon general principles, exclusively cognizable in the state courts; that neither the letter nor the spirit of the constitution sanctioned the assumption of jurisdiction on the part of the United States at any previous stage.

And this doctrine has my hearty concurrence in its general application. A very simple case may be stated to illustrate its bearing on the question of jurisdiction between the two governments. By virtue of treaties with Great Britain, aliens holding lands were exempted from alien disabilities, and made capable of holding, aliening, and transmitting their estates, in common with natives. But why should the claimants of such lands, to all eternity, be vested with the privilege of bringing an original suit in the courts of the United States? It is true, a question might be made, upon the effect of the treaty, on the rights claimed by or through the alien; but until that question does arise, nay, until a decision against the right takes place, what end has the United States to subserve in claiming jurisdiction of the cause? Such is the present law of the United States, as to all but this one distinguished party; and that law was passed *when the doctrines, the views and [*886
ends of the constitution, were, at least, as well understood as they are at present. I attach much importance to the 25th section of the judiciary act, not only as a measure of policy, but as a cotemporaneous exposition of the constitution on this subject; as an exposition of the words of the constitution, deduced from a knowledge of its views and policy. The object was, to secure a uniform construction and a steady execution of the laws of the Union. Except as far as this purpose might require, the general government had no interest in stripping the state courts of their jurisdiction; their policy would rather lead to avoid incumbering themselves with it. Why, then, should it be vested with jurisdiction in a thousand causes, on a mere possibility of a question arising, which question, at last, does not occur in one of them? Indeed, I cannot perceive how such a reach of jurisdiction can be asserted, without changing the reading of the constitution on this subject altogether. The judicial power extends only to "cases arising," that is, actual, not potential cases. The framers of the constitution knew better than to trust such a quo minus fiction in the hands of any government.

I have never understood anyone to question the right of Congress to vest original jurisdiction in its inferior courts, in cases coming properly within the description of "cases arising under the laws of the United States;" but surely it must first be ascertained, in some proper mode, that the cases are such as the constitution describes. By possibility, a constitutional question may be raised in *any conceivable suit that may be insti- [*887
tuted; but that would be a very insufficient ground for assuming universal jurisdiction; and yet, that a question has been made, as that, for instance, on the bank charter, and may again be made, seems still worse, as a ground for extending jurisdiction. For the folly of raising it again, in every suit instituted by the bank, is too great to suppose it possible. Yet this supposition, and this alone, would seem to justify vesting the bank with an unlimited right to sue in the federal courts. Indeed, I cannot perceive how, with ordinary correctness, a question can be said to be involved in a cause, which only may possibly be made, but which, in fact, is the very last question that there is any probability will be made; or rather, how that can any longer be denominated a question, which has been put out of existence by a solemn decision. The constitution presumes that the decisions of

the supreme tribunal will be acquiesced in; and after disposing of the few questions which the constitution refers to it, all the minor questions belong properly to the state jurisdictions, and never were intended to be taken away in mass.

Efforts have been made to fix the precise sense of the constitution, when it vests jurisdiction in the general government, in "cases arising under the laws of the United States," To me, the question appears susceptible of a very simple solution; that all depends upon the indentity of the case supposed; according to which idea, a case may be such in its very existence, or it may become such in its progress. An action may "live, move, and have 888*] *its being," in a law of the United States; such is that given for the violation of a patent-right, and four or five different actions given by this act of incorporation; particularly that against the president and directors for over-issuing; in all of which cases the plaintiff must count upon the law itself as the ground of his action. And of the other description, would have been an action of trespass, in this case, had remedy been sought for an actual levy of the tax imposed. Such was the case of the former Bank v. Deveaux, and many others that have occurred in this court, in which the suit, in its form, was such as occur in ordinary cases, but in which the pleadings or evidence raised the question on the law or constitution of the United States. In this class of cases, the occurrence of a question makes the case, and transfers it, as provided for under the twenty-fifth section of the judiciary act, to the jurisdiction of the United States. And this appears to me to present the only sound and practical construction of the constitution on this subject; for no other cases does it regard as necessary to place under the control of the general government. It is only when the case exhibits one or the other of these characteristics, that it is acted upon by the constitution. Where no question is raised, there can be no contrariety of construction; and what else had the constitution to guard against? As to cases of the first description ex necessitate rei, the courts of the United States must be susceptible of original jurisdiction; and as to all other cases, I should hold them, also, susceptible of original jurisdiction, 889*] if it were practicable, *in the nature of things, to make out the definition of the case, so as to bring it under the constitution judicially, upon an original suit. But until the plaintiff can control the defendant in his pleadings, I see no practical mode of determining when the case does occur, otherwise than by permitting the cause to advance until the case for which the constitution provides shall actually arise. If it never occurs, there can be nothing to complain of; and such are the provisions of the twenty-fifth section. The cause might be transferred to the Circuit Court before an adjudication takes place; but I can perceive no earlier stage at which it can possibly be predicated of such a case, that it is one within the constitution; nor any possible necessity for transferring it then, or until the court has acted upon it to the prejudice of the claims of the United States. It is not, therefore, because Congress may not vest an original jurisdiction, where they can constitutionally vest in the circuit courts appellate jurisdiction, that I object to this general grant of the right to sue; but, because that the peculiar nature of this jurisdiction is such as to render it impossible to exercise it in a strictly original form, and because the principle of a possible occurrence of a question as a ground of jurisdiction, is transcending the bounds of the constitution, and placing it on a ground which will admit of an enormous accession, if not an unlimited assumption, of jurisdiction.

But, dismissing the question of possibility, which, I must think, would embrace every other case as well as those to which this bank is a party, in what *sense can it be pre- [*890 dicated of this case, that it is one arising under a law of the United States? It cannot be denied that jurisdiction of this suit in equity could not be entertained, unless the court could have had jurisdiction of the action of trespass, which this injunction was intended to anticipate. And, in fact, there is no question that the bank here maintains that the right to sue extends to common trespass, as well as to contracts, or any othher cause of action. But suppose trespass in the common form instituted; the declaration is general, and the defendant pleads not guilty, and goes to trial. Where is the feature in such a cause that can give the court jurisdiction? What question arises under a law of the United States? or what question that must not be decided exclusively upon the lex loci, upon state laws? Take also the case of a contract, and in what sense can it be correctly predicated of that, that in common with every other act of the bank, it arises out of the law that incorporates it? May it not with equal propriety be asserted that all the crimes and all the controversies of mankind, arise out of the fiat that called their progenitor into existence. It is not because man was created, that he commits a trespass, or incurs a debt; but because, being indued with certain faculties and propensities, he is led by an appropriate motive to the one action or the other. Sound philosophy attributes effects to their proximate causes. It is but pursuing the grade of creation from one step to another, to deduce the acts of this bank from state law, or even divine law, with as much correctness as from the law of *its immediate crea- [*891 tion. Its contracts arise under it own acts, and not under a law of the United States; so far from it, indeed, that their effect, their construction, their limitation, their concoction, are all the creatures of the respective state laws in which they originate. There is a satisfactory illustration of the distinction between contracts which draw their existence from statutes, and those which originate in the acts of man, afforded by this act of incorporation itself. It will be unnecessary to look beyond it. The action of debt before alluded to, given by the ninth clause of the seventh section, against the directors, to anyone who will sue, is one of those factitious or statute contracts which exist in, and expire with, the statute that creates it. Not so with the ordinary contracts of the bank; upon the expiration of the charter, they would be placed in the state of the credits of an intestate before administration; there is no one to sue for them; but the moral obliga-

tion would remain, and a court of equity would enforce it against their debtors, at the suit of the individual stockholders. Nor would this be on the principle of contracts executed under power of attorney; for, the law applicable to principals would govern every question in such cases. All the acts of the corporation are executed in their own right, and not in the right of another. A personal existence, with all its incidents, is given to them, and it is in right of that existence that they are capable of acting, and do act.

Nor, indeed, in another point of view, is it strictly predicable of this bank, that its acts 892*] arise *out of, because its existence is drawn from, a law of the United States. It is because it is incorporated, not because incorporated by a law of the United States, that it is made capable of exercising certain powers incidentally, and of being vested with others expressly. The same effects would follow, if incorporated by any other competent legislative power. The law of the United States creates the bank, and the common law, or state law more properly, takes it up and makes it what it is. Who can deny, that in many points the incidents to such an institution may vary in different states, although its existence be derived from the general government? It is the case with a natural alien, when adopted into the national family. His rights, duties, powers, etc., receive always a shade from the lex loci of the state in which he fixes his domicile.

If this right to sue could be vested at all in the bank, it is obvious that it must have been for one or more of three causes: (1) That a law of the United States incorporated it; (2) that a law of the United States vested in it the power to sue; or (3) that the power to defend itself from trespasses as applicable to this case strictly, or to contract debts as applicable to the Georgia case, was conferred on it by a law of the United States expressly.

The first I have considered. On the second, no one would have the hardihood to contend that such a grant has any efficacy, unless the suits come within the description of cases arising under a law of the United States, 893*] independently of the *grant of the right to sue; and it only remains to add a few more remarks on the third ground.

Of the power to repel trespasses, and to enter into contracts, as mere incidents to its creation, I trust I have shown that neither comes within the description of a case arising under a law of the United States. But where will we find, in the law in question, any express grant of power relative to either? The contracts on which the Georgia case is founded, are declared on as common promissory notes, payable to bearer. Now, as mere incidents, I have no doubt of an action being sustainable in a state court in both cases. But if an express grant is relied on, as bringing this, or the case of a contract, within the description of "a case arising under a law of the United States," then I look through the law in vain for any express grant, either to make the contract or repel the trespass. It is true, the sweeping terms with which the incorporating section concludes, import, that "by that name it shall and may be lawful for the bank to do and execute all and singular the acts, matters and things, which to them it shall and may appertain to do." But this contains no grant of either, since the inquiry, at last, must be into the incidents of such an institution, and, as incidents, they needed not these words to sustain them; nor could those words give any more force to the right. So that, at last, we are referred to the mere fact of its corporate existence, for the basis of either of the actions, or either of the powers here insisted on, as bringing this cause within the constitutional definition. Having a legal *existence as an incorporated [*894 banking institution, it has a right to security in its possessions, and to the performance of its contracts; but that right will be precisely the same, if incorporated by a state law, or even, as was held in the case of Terrett v. Taylor, if having a common law corporate existence. The common law, or the state law, is referred to by the law of the United States, as the source of these incidents, when it speaks of the acts which are appurtenant to it; and I know of no other law that can define them, or confer them as incidents. Suppose a naturalization act passed, which, after specifying the terms and conditions upon which an alien shall become a citizen, proceeds to declare, "that, as a citizen, he shall lawfully do and execute all and singular the acts, matters and things, which to 'a citizen,' or 'to him as a citizen,' it shall and may appertain to do," would not these words be a mere nullity? His new existence, and the relations with the society into which he is introduced, that grow out of that connection, give him the right to defend his property or his existence (as in this case), and to enter into and enforce those contracts which, as an alien, he would have been precluded from. He was no more a citizen, without an act of Congress, than this was a bank. Finally, after the most attentive consideration of this cause, I cannot help thinking that this idea of taking jurisdiction upon an hypothesis, or even of assuming original, unlimited jurisdiction, of all questions arising under a law of the United States, involves some striking inconsistencies. A court may take cognizance of a question *in a cause, [*895 and enter a judgment upon it, and yet not have jurisdiction of the cause itself. Such are all questions of jurisdiction, of which every court, however limited its jurisdiction, must have cognizance in every cause brought before it. So, also, I see not why, upon the same principle, a law expressly violating the constitution, may not be made the groundwork of a transfer of jurisdiction. Cases may arise, and would arise, under such a law; and if the simple existence, or possibility of such a case, is a sufficient ground of jurisdiction, and that ground sufficient to transfer the whole case to the federal judiciary, the least that can be said of it is, that it was not a case within the mischief intended to be obviated by the constitution. I shall say no more on this subject, but proceed to one which also acts forcibly on my judgment in forming my opinion in this cause.

I will not undertake to define the limits within which the discretion of the legislature of the Union may range, in the adoption of

measures for executing their constitutional powers. It is very possible, that in the choice of means as "proper and necessary" to carry their powers into effect, they may have assumed a latitude not foreseen at the adoption of the constitution. For example, in order to collect a stamp duty, they have exercised a power over the general law of contracts; in order to secure debts due the United States, they have controlled the state laws of estates of deceased persons and of insolvents' estates; in the distributions and the powers of individuals themselves, when insolvent, in the assignment of 896*] their *own estates; in the exercise of various powers, they have taken jurisdiction over crimes which the state laws took cognizance of; and all this, being within the range of their discretion, is aloof from judicial control, while unaffectedly exercised for the purposes of the constitution. Nor, indeed, is there much to be alarmed at in it, while the same people who govern the states, can, where they will, control the legislature of the United States.

Yet, certainly, there is one limit to this chain of implied powers, which must lie beyond the reach of legislative discretion. No one branch of the general government can new-model the constitutional structure of the other.

Much stress was laid, in the argument, upon the necessity of giving co-ordinate extent to the several departments of a government; but it was altogether unnecessary to bring this consideration into the present case. As a ground of policy, this is not its proper place; and as a ground of construction, it must be needless, when applied to the constitution in which the judicial power so very far transcends both the others, in its acknowledged limits.

The principle is, that every government should possess the means of protecting itself; that is, of construing and enforcing its own laws. But this is not the half of the extent of the judicial power of the Union. Its most interesting province is to enforce the equal administration of laws, and systems of laws, over which the legislative power can exercise no control. And thus, the judicial power is 897*] distributed into the two *classes: (1) That which is defined by the circumstances of the case; and (2) that which depends upon the circumstances of the person. On the first, I have endeavored to show, that the end is adequately effected by the provisions of the 25th section of the judiciary act, and, practically, can be exercised in no other way. But with regard to the second class, the argument turns against the United States; and every reason that may be urged in favor of eking out the jurisdiction in the first class of cases, reacts forcibly to confine the jurisdiction strictly within its constitutional limits, as to the second class. When the alien, or the citizen of another state, or the grants of another state, are implicated, the state courts open their tribunals to the judiciary of the United States, and recognize their power as co-ordinate. Their citizens, their territory, their laws, all are subjected to a power quite foreign to the states, and judicial power is literally poured out upon the courts of the Union, without stint.

How interesting, then, is it to the states, that the number of those persons who claim the privilege of coming into the courts of the United States should be strictly limited. Cases, since they arise out of laws, etc., of the United States, must be very limited in number; but persons may bring into the courts of the United States any question and every question, and, if this law be correctly construed, for any, the very smallest possible amount.

But if the plain dictates of our senses be relied on, what state of facts have we exhibited here? *Making a person, makes a case; [*898 and thus, a government which cannot exercise jurisdiction unless an alien or citizen of another state be a party, makes a party which is neither alien nor citizen, and then claims jurisdiction because it has made a case. If this be true, why not make every citizen a corporation sole, and thus bring them all into the courts of the United States quo minus? Nay, it is still worse, for there is not only an evasion of the constitution implied in this doctrine, but a positive power to violate it. Suppose every individual of this corporation were citizens of Ohio, or, as applicable to the other case, were citizens of Georgia, the United States could not give any one of them, individually, the right to sue a citizen of the same state in the courts of the United States; then, on what principle could that right be communicated to them in a body? But the question is equally unanswerable, if any single member of the corporation is of the same state with the defendant, as has been repeatedly adjudged.

One of the counsel who argued this cause in behalf of the bank, has denominated it a bundle of faculties. This is very true; but those faculties are substituted for the organization of a natural person; and it is perfectly certain, that when it comes into this court, it must be treated as a person. It is altogether inadmissible, to refine away the principles of jurisprudence, so as to consider it in any other light than that of a person. As such, it sues out a writ, declares, pleads, takes judgment, and levies an execution. If it is not a *person, [*899 it has no standing in this court; it must, therefore, abandon this suit, or be subjected to personal disabilities. Gentlemen have a right to take what ground here they please, to sustain this action; but it is perfectly clear to me that the act of Congress was intended to vest this right as a personal right, or not at all. Let anyone look through this act, and notice the unrestricted latitude that has been assumed in vesting the right to sue both by and against this bank, and he will see that either there is no general right to sue given in the seventh section, now relied on, or that it is given under the general power granted to pass all laws necessary to carry the powers of the general government into execution. The proviso to the 17th section is a remarkable proof of this. It puts the limits of judicial power altogether out of view. If Congress, in legislating on this subject, did intend such a grant as is here contended for, it must be presumed that they did not advert to the consideration that granting to an individual a right to sue was enlarging the jurisdiction of the court. It never can be supposed that they meant to assume the power of adding to the number of persons who might constitutionally become suitors in the courts of

the United States. But every difficulty vanishes when we limit the meaning of the language of the act, by a reference to the context. In fact, a general power to bring actions in the courts of the United States, is so peculiarly and explicitly personal on the face of the constitution, that it is hard to perceive how Congress could have for a moment lost sight of the restrictions 900*] *imposed, in this respect, upon the judicial power.

Nor had the bank any idea that this power was vested in it, upon the ground that every possible case in which it might be involved in litigation, came within the constitutional definition of cases arising under laws, etc., of the United States. In its averments, those on which it claims jurisdiction, it simply takes two grounds: (1) That it was incorporated by an act of Congress. (2) That the right to sue was given it by an act of Congress. But there is no averment that the cause of action was a case arising under a law of the United States. It well knew that it was a case emphatically arising out of an act of the state of Ohio, operating upon the domicile of the bank, which, although purchased in right of an existence metaphysically given it by Congress, was acquired and held according to the laws of Ohio, acting upon its own territory. Technically, these averments cover only two grounds; they affirm, (1) that the bank, being incorporated by Congress, had, therefore, a right to sue; (2) that being incorporated, and having the right to sue conferred upon it by an act of Congress, therefore it could maintain this action. But yet neither, nor both of these, could give the right, unless in one of the cases defined in the constitution, which case is not the subject of an averment. I would not willingly place the case on the ground of mere technicality; and, therefore, only make the observation to show that the ground assumed in argument is an afterthought. I believe that, 901*] until this argument, the *ground now made was never thought of; and I am at a loss to conceive how it is possible to maintain the position that all possible cases in which this bank shall sue or be sued, come within the description now contended for. Take, for instance, a trespass or a fraud committed by the bank, and suit brought by the injured party, in what sense could they be said to be cases arising under a law of the United States? Or, take the case of ejectment, suppose to recover part of the premises of the banking-house in Philadelphia, and not a question raised in the suit, but what arises under the territorial laws of the country, and what circumstances characterize that as a case of the proper description to give this court jurisdiction? If this cause of action arises under a statute, why is not the statute referred to, and the provision particularly relied on, if there is any other than what the averments specify?

Various instances have been cited and relied on, in which this right of suit in the courts of the United States has been given to particular officers of the United States. But on these I would remark, that it is not logical to cite as proofs the exercise of this right, in instances which may themselves be the subject of constitutional questions. It cannot be intended to surprise this court into the recognition of the constitutionality of the laws so cited. But there is a stronger objection; no such instance is in point, until it be shown that Congress has authorized such officers to bring their private contracts and private controversies into the courts of the United States. In all the *cases cited, the individual [*902 is acting distinctly as the organ of government; but let them take the character of a mere contractor, a factor, a broker, a common carrier, and then let laws authorizing them to sue in the courts of the United States be passed, and I will acknowledge the cases to be in point; though I will still dispute the principle, that a repetition of error can convert an act into law or truth. The distinction is a clear one between all these cases and the bank. The latter is a mere agent or attorney, in some instances; in others, and especially in the cases now before the court, it is a private person, acting on its own account, not clothed with an official character at all. But the acts of public officers are the acts of government; and emphatically so, in suits by the Postmaster-General; the money to be recovered being the property of the United States, it may be considered that they are parties to the suit, just as those states are to the suits by or against their Attorney-General, where he is by law authorized to bring and defend suits in his own name officially. When the United States are parties, the grant of jurisdiction is general. But there is express law also for every contract that the postmaster enters into, or it will be in vain for him to bring his suit in his own name or otherwise. It would be in vain for him to rely simply on his being made postmaster under an act of Congress; in which point alone, there would seem to exist any analogy between his case and that of the bank.

As to the instance of the action given under the patent law, it has been before remarked, that so *entirely is its existence blend- [*903 ed with an act of Congress, that to prosecute it, it is indispensable that the act should be set forth as the ground of action. I rather think it an unfortunate quotation, since it presents a happy illustration of what we are to understand by those cases arising under a law of Congress, which in their nature admit of an exercise of original jurisdiction. The plaintiff must recover, must count upon the act of Congress; the constitutional characteristic appears on the record before the defendant is called to answer; and the repeal of the statute before judgment, puts an end to his right altogether. Various such cases may be cited. But how the act of Congress is to be introduced into an action of trespass, ejectment, or slander, before the defendant is called to plead, I cannot imagine.

Upon the whole, I feel compelled to dissent from the court, on the point of jurisdiction; and this renders it unnecessary for me to express my sentiments on the residue of the points in the cause.

Decree affirmed, except as to interest on the amount of the specie in the hands of the defendant, Sullivan.

904*] [*Constitutional Law.]

THE BANK OF THE UNITED STATES v. THE PLANTERS' BANK OF GEORGIA.

The circuit courts of the United States have jurisdiction of suits brought by the Bank of the United States against another bank, incorporated under a law of a state, and of which the state itself is a stockholder, together with private individuals, who are citizens of the same state with some of the stockholders of the Bank of the United States.

The Bank of the United States may sue in the circuit courts, as indorsee or bearer of a promissory note, although the original payee or indorser could not sue in the same courts, being a citizen of the same state with the defendants.

The circumstance that a state is a member of a private corporation, will not give this court original jurisdiction of suits where the corporation is a party, or oust the circuit courts of the jurisdiction vested in them by law.

THIS cause was brought up on a certificate of a division of opinion between the judges of the Circuit Court of Georgia, upon the questions arising in it, and was argued by the same counsel with the preceding case of Osborn v. The Bank of the United States.

Mr. Chief Justice Marshall delivered the opinion of the court:

In this case, the petition of the plaintiffs, which, according to the practice of the state of Georgia, is substituted for a declaration, is founded on promissory notes, payable to a person named in the note, "or bearer," and states 905*] that the notes were *"duly transferred, assigned and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified; and that the defendants, in consideration of their liability, assumed," etc.

The Planters' Bank pleads to the jurisdiction of the court, and alleges that it is a corporation, of which the state of Georgia, and certain individuals, who are citizens of the same state with some of the plaintiffs, are members. The plea also alleges that the persons to whom the notes mentioned in the petition were made payable, were citizens of the state of Georgia, and, therefore, incapable of suing the said bank in a circuit court of the United States; and being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that court.

To this plea the plaintiffs demurred, and the defendants joined in demurrer.

On the argument of the demurrer, the judges were divided on two questions:

1. Whether the averments in the declaration be sufficient in law to give this court jurisdiction of the cause.

2. Whether, on the pleadings in the same, the plaintiffs be entitled to judgment.

The first question was fully considered by the court in the case of Osborn v. The Bank of the United States, and it is unnecessary to repeat the reasoning used in that case. We are of opinion that the averments in the declaration are sufficient to give the court jurisdiction of the cause.

906*] *2d. The second point is understood to involve two questions:

1. Does the circumstance that the state is a corporator, bring this cause within the clause in the constitution which gives jurisdiction to the Supreme Court where a state is a party, or bring it within the 11th amendment?

2. Does the fact that the note is made payable to a citizen of the state of Georgia, or bearer, oust the jurisdiction of the court?

1. Is the state of Georgia a party defendant in this case? If it is, then the suit, had the 11th amendment never been adopted, must have been brought in the Supreme Court of the United States. Could this court have entertained jurisdiction in the case?

We think it could not. To have given the Supreme Court original jurisdiction, the state must be plaintiff or defendant as a state, and must, as a state, be a party on the record. A suit against the Planters' Bank of Georgia is no more a suit against the state of Georgia than against any other individual corporator. The state is not a party, that is, an entire party, in the cause.

If this suit could not have been brought originally in the Supreme Court, it would be difficult to show that it is within the 11th amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the constitution; and if this case be not one of which the Supreme Court could have taken original jurisdiction, it is not within the amendment. *This is not, we think, a [*907 case in which the character of the defendant gives jurisdiction to the court. If it did, the suit could be instituted only in the Supreme Court. This suit is not to be sustained because the Planters' Bank is suable in the federal courts, but because the plaintiff has a right to sue any defendant in that court, who is not withdrawn from its jurisdiction by the constitution, or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it.

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all *the privileges of [*908 that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal courts, by the circumstance that the state is a corporator.

2. We proceed next to inquire, whether the jurisdiction of the court is ousted by the circumstance that the notes on which the suit was instituted, were made payable to citizens of the state of Georgia.

Without examining whether, in this case, the original promise is not to the bearer, the court will proceed to the more general question, whether the bank, as indorsee, may maintain a suit against the maker of a note [*909 909*] payable to a citizen of *the state. The words of the judiciary act, section 11, are, "nor shall any district or circuit court have cognizance of any suit, to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

This is a limitation on the jurisdiction conferred by the judiciary act. It was apprehended that bonds and notes, given in the usual course of business, by citizens of the same state, to each other, might be assigned to the citizens of another state, and thus render the maker liable to a suit in the federal courts. To remove this inconvenience, the act which gives jurisdiction to the courts of the Union over suits brought by the citizen of one state against the citizen of another, restrains that jurisdiction, where the suit is brought by an assignee, to cases where the suit might have been sustained, had no assignment been made. But the bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States.

If the Bank could not sue a person who was a citizen of the same state with any one of its members, in the Circuit Court, this disability would defeat the power. There is, probably, not a commercial state in the Union, some of [*910 910*] whose citizens *are not members of the Bank of the United States. There is, consequently, scarcely a debt due to the bank, for which a suit could be maintained in a federal court, did the jurisdiction of the court depend on citizenship. A general power to sue in any circuit court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one.

We think, then, that the charter gives to the bank a right to sue in the circuit courts of the United States, without regard to citizenship; and that the certificate on both questions must be in favor of the plaintiff.

Mr. Justice Johnson. This cause is one in which, from the great importance of the questions it gave rise to, was certified to this court, on a pro forma difference of opinion, that it might undergo the fullest investigation, and give time for the maturest reflection.

The first of the points certified involved the question of jurisdiction; for my opinion on which, I must refer to the case of Osborn et al. v. The Bank of the United States, argued in conjunction with this, and decided this term.

That opinion is final on the judgment which I must give in the cause; but there were other questions, which, although not touched upon in the argument here, were very ably argued in the court below, and on which, having formed an opinion, I will make some remarks.

*The case of The Bank v. Deveaux, [*911 having decided that this court will look into the individual characters of the corporators plaintiffs, in order to give jurisdiction, where it depends on circumstances of the person, it was contended in the court below, that this court was bound, in justice, to look behind the charter of the bank defendant, in order to determine the individual characters of the corporators defendants also. And the pleas were so drafted as to exhibit to the court two grounds on which to decide against the jurisdiction of the Circuit Court, as depending on individual character. The one was, that a citizen of one state was suing a citizen of the same state; the other, that the state of Georgia was a defendant, being a member of the corporation defendant, and was exempt from suit under the 11th amendment. And on both these grounds, I see not how I can refuse my assent to the doctrine of the pleas. The case of Deveaux forms, I presume, one of the canons of this court. On no other ground can that decision be law, but that the individual corporators were the real parties plaintiffs. The same principle, when applied to the corporation defendant, will make the individual corporators here the real defendants to the suit. If, then, the real plaintiffs and the real defendants are so related in personal character, as to preclude this court from taking jurisdiction, I see no ground on which we can sustain the demurrer, unless we reverse the decision in Deveaux's case.

So, also, with regard to the state of Georgia. An original suit against that state for the recovery *of a debt, could not be main- [*912 tained. Yet, if an original suit against a corporation be an original suit against each corporator, I see not wherein the case differs from that of a direct suit against the state. Suppose the case of a joint bond, given by a state and individuals, to an individual contractor, citizen of another state, what would except a suit on such a bond from the operation of the 11th amendment of the constitution? If it be said that the amendment al-

luded to has regard only to suits instituted against states in their sovereign capacity, I would ask, in what other capacity can a state appear, or even exist? In every possible form and shape, it is a sovereign state, or it is nothing. And this very stock, held in this bank, is the property of the people of Georgia, held by them in the name and capacity of the state of Georgia. If any dispute were to arise on the title to the stock, in what capacity could they sue or be sued for the interest held by them in the stock, unless in their sovereign capacity? It is not because it imparts its own immunities to the other stockholders, that this action cannot be maintained, but because that the judicial power must reach each and every defendant, in order to bring a case within the prescribed limits of the constitution. Each defendant occupies his own peculiar rank, claims his own peculiar immunities; but they are not suable in the courts of the United States, as long as any one of them is exempted from suit in those courts.

I am here expressing a technical opinion, founded on the authority of the case of 913*] The Bank v. *Deveaux. That decision brings it strictly within the letter of the 11th amendment; although I am ready to admit that, unaffected by that decision, it is not within its purview. Although not responsible for that decision, I acknowledge its obligation, until overruled.

The last question which the pleadings in this cause present, arises out of the nature of the contract, the form of the declaration, and that provision of the judiciary act, which precludes suits by an assignee of choses in action, when the suit could not be brought in the courts of the United States, as between the original parties.

The plaintiff counts upon a number of promissory notes, payable to A, B, or bearer, commonly called bank notes, delivered to A, B, and by him "transferred, assigned, and set over" to the plaintiffs in this action. The plea states, that, as between the original promisor and promisee, suit could not have been brought in the circuit courts of the United States; and, therefore, it cannot, as between the present parties, the promisor and assignee. As all the facts are admitted by the demurrer, it is difficult to see on what ground this case is to be excepted from the operation of the provisions of the judiciary act on this subject. Whatever difficulties may be suggested, on the technical meaning of the term assignment, it is very clear that he who acquires a chose in action, by mere delivery, has been recognized in the laws of the United States as an assignee. If any considerations could be introduced into the case, besides what the pleadings bring out, there might be *much reason to doubt, whether the [*914 case of bank bills, properly so called, and particularly so declared on, came within the general law applicable to promissory notes; but here, non constat, that the notes declared upon were ever thrown into circulation, as the representative of property, as a currency, a substitute for gold and silver.

But the case does not rest here. This ground of defense depends not on a constitutional provision, but on an act of Congress; and if it be true that the unrestricted right to sue on all its contracts be vested in the Bank of the United States, whatever their origin, or whatever their amount, it follows that such a provision amounts to a repeal of the law here relied on. I rather think that the improbability of such a provision being intended by the legislature, operates against the construction that would sustain it. But if such be the legal construction of the incorporating act, there can be no doubt of its being fatal to this plea.

Certificate.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Georgia, and on the questions in said cause, on which the judges of the said Circuit Court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion, 1. That the averments in the declaration in said cause, are sufficient in law to give the said Circuit Court jurisdiction in said cause.

2. That, on the pleadings in the same, the plaintiffs are entitled to judgment.

All which is ordered to be certified to the said Circuit Court.

ROSE'S NOTES

COMPLETELY REVISED EDITION

1917

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NOTES

ON THE

UNITED STATES REPORTS.

IX WHEATON.

9 Wheat. 1–240, 6 L. Ed. 23, GIBBONS v. OGDEN.

Power over interstate commerce and with Indians is in Congress, and is limited only by Constitution.

The proposition in the syllabus has been applied by the recent citations as follows:

Approved in United States v. Northern Securities Co., 120 Fed. 727, and State v. Duckworth, 5 Idaho, 647, 95 Am. St. Rep. 202, 51 Pac. 457, both following rule; Adair v. United States, 208 U. S. 180, 13 Ann. Cas. 764, 52 L. Ed. 445, 28 Sup. Ct. 277, holding act of June 1, 1898, making it offense for carrier engaged in interstate commerce to discharge employee for membership in labor union exceeded power of Congress over commerce; Howard v. Illinois Central R. Co., 207 U. S. 492, 52 L. Ed. 307, 28 Sup. Ct. 141, holding Employers' Liability Act exceeded powers of Congress over commerce; McCray v. United States, 195 U. S. 55, 56, 49 L. Ed. 95, 96, 24 Sup. Ct. 769, upholding oleomargarine act of 1902; Downes v. Bidwell, 182 U. S. 281, 45 L. Ed. 1104, 21 Sup. Ct. 784, holding Porto Rico by treaty of cession became territory of United States, but not within revenue clause, Constitution, art. I, § 8; Howard v. Illinois C. R. Co., 148 Fed. 999, holding void Federal Employers' Liability Act of 1906; J. Rosenbaum Grain Co. v. Chicago etc. Ry. Co., 130 Fed. 48, State railroad commission cannot require railroad to abolish proportional tariffs which apply only to interstate shipments and were adopted with approval of interstate commerce commission; United States v. Morris, 125 Fed. 324, holding conspiracy between two or more persons to prevent negro citizen from leasing land is in violation of Constitution and laws within U. S. Comp. Stats. 1901, p. 3712; De Pass v. Bidwell, 124 Fed. 622, holding section 5, Act April 12, 1900, c. 191 (31 Stat. 77), providing for revenue of Porto Rico, is constitutional; United States v. Slater, 123 Fed. 121, holding act of May 29, 1884 (23 Stat. 31), making it a misdemeanor to drive cattle with contagious disease from one

State to another is within power of Congress to enact; Kansas City S. Ry. Co. v. Board of Railroad Commrs., 106 Fed. 356, 363, holding State has no power to regulate railroad charges between two points in same State, where course of transportation is largely in another State; In re B. G. Wilson, 10 N. M. 36, 60 Pac. 75, holding § 2, Sess. Laws 1899, p. 101 (N. M.), as applying to sale of coal oil in territory in original packages, is unconstitutional; St. Louis etc. Ry. v. Smith, 20 Tex. Civ. 459, 49 S. W. 631, holding Rev. Stats. 1895, tit. 102, c. 7, giving livestock sanitary commissioner authority to prohibit importation of diseased cattle is constitutional.

The doctrine enunciated in the syllabus has been commented on in the following cases, in which the main controversy was on the point whether or no the power committed to Congress was exclusive or concurrent with the States: Dissenting opinion in City of New York v. Miln, 11 Pet. 158, 9 L. Ed. 670, arguing for exclusive power; License Cases, 5 How. 602, 603, 604, 605, 12 L. Ed. 300, 301, 302, as having decided Congress had power over navigation; Passenger Cases, 7 How. 395, 400, 12 L. Ed. 749, 751, the concurring opinion of McLean approved the rule generally, and the opinion of Wayne, pp. 411, 433, 434, 12 L. Ed. 756, 765, held that the power was exclusively in Congress; another judge in s. c., p. 545, 12 L. Ed. 812, argued that according to the principal case the exercise of any State power must not be such as to conflict directly with an existing act of Congress; Hall v. De Cuir, 95 U. S. 499, 24 L. Ed. 551, held that whenever the terms of the grant or the nature of the power granted required an exclusive exercise by Congress, all power in the State was absolutely gone; Mobile Co. v. Kimball, 102 U. S. 699, 26 L. Ed. 240, court said the question had been left open but had been truly stated in Cooley v. Wardens of Philadelphia, 12 How. 299-321, 13 L. Ed. 996, 1006; Walling v. Michigan, 116 U. S. 455, 29 L. Ed. 694, 6 Sup. Ct. 457, court referred to repeated decisions that any State regulation of commerce except in matters of local concern was repugnant to its freedom; Robbins v. Shelby District, 120 U. S. 492, 30 L. Ed. 696, 7 Sup. Ct. 593, held that exclusive power of Congress was now established whenever the subject was national in character, or admitted only of one uniform system; the subject was again brought up in the dissenting opinions in Leisy v. Hardin, 135 U. S. 150, 34 L. Ed. 147, 10 Sup. Ct. 699, in discussing Mobile Co. v. Kimball, supra, and in Minot v. Philadelphia etc. R. R. Co., 2 Abb. (U. S.) 342, Fed. Cas. 9645, the result of the decisions was held to be that States had no power to regulate any but internal commerce. See In re Saunders, 52 Fed. 804, 18 L. R. A. 551, where authorities are collected on exclusive authority of Congress; Mitchell v. Steelman, 8 Cal. 371, holding that when exercised the power of Congress was exclusive; Santo v. Iowa, 2 Iowa, 202, 63 Am. Dec. 501, in a general discussion of the subject the court said the decision of the principal case was that the power was not exclusive in Congress until exercised.

The exclusive power of Congress was admitted in Sweatt v. Boston etc. R. R. Co., 3 Cliff. 351, 5 N. B. R. 241, Fed. Cas. 13,684, where it was held

that transportation of freight and passengers between States was commerce within the meaning of the Constitution; United States v. Bridleman, 7 Sawy. 247, 7 Fed. 898, holding the power to regulate intercourse with Indians included power to punish for crimes committed on Indians wherever the Indian tribes existed; United States v. Boston & Albany R. R. Co., 15 Fed. 211, as to laws governing transportation of animals between States, with penalties attached; United States v. Craig, 28 Fed. 796, as to the assisted immigration act of 1885; United States v. Gould, 25 Fed. Cas. 1378, as to regulation to slave trade; Hinson v. Lott, 40 Ala. 135, as to regulation of foreign and interstate commerce; In re Perkins, 2 Cal. 432, laying down three canons of exclusive congressional power; Lick v. Faulkener, 25 Cal. 421, in issuing United States notes; People v. Rensselaer etc. R. R. Co., 15 Wend. 131, **30 Am. Dec. 40**, as to regulation of the coasting trade; Lawrence v. Hodges, 92 N. C. 677, **53 Am. Rep. 437**, prescribing methods of sale and transfer of vessels.

But on the same point of exclusive jurisdiction the principle laid down was distinguished in License Cases, 5 How. 581, **12 L. Ed. 291**, separate opinion of Taney, holding it did not warrant the rule of exclusive power; Passenger Cases, 7 How. 499, **12 L. Ed. 793**, separate opinion that the court had emphatically disclaimed all intention of passing on the question; Ex parte Crandall, 1 Nev. 309, 310, where the court held the question was not involved in, and had been expressly waived by, the principal case.

The concurrent legislative power of the States was affirmed in the following cases: Groves v. Slaughter, 15 Pet. 504, 511, **10 L. Ed. 821, 823**, as to the prohibition and regulation of slavery; Western Union Tel. Co. v. Pendleton, 95 Ind. 13, **48 Am. Rep. 693**, collecting and reviewing decisions, and affirming, as a proper exercise of the police power, a law imposing a penalty on telegraph companies for failing to transmit a message; Hardy v. A., T. & S. F. R. R. Co., 32 Kan. 714, 5 Pac. 12, as to the maximum freight law, holding it did not apply to interstate commerce, else it would be void, collecting and reviewing authorities; dissenting opinion in Commonwealth v. Huntley, 156 Mass. 248, **15 L. R. A. 845**, 30 N. E. 1132, discussing State power to regulate the importation of liquor; Walcott v. People, 17 Mich. 93, sustaining State law requiring express companies to pay a tax on current business within the State; Western Union Tel. Co. v. Tyler, 90 Va. 299, **44 Am. St. Rep. 911**, 18 S. E. 280, holding State law providing under penalty for prompt delivery of telegrams, was not a regulation of commerce.

Aside from the foregoing respecting exclusive and current powers, the following citations hold various State legislation unconstitutional under the syllabus principle: Brown v. Maryland, 12 Wheat. 446, **6. L. Ed. 688**, and In re Saunders, 52 Fed. 805, **18 L. R. A. 551**, law requiring importers of foreign goods to pay a license fee; Leisy v. Hardin, 135 U. S. 108, **34 L. Ed. 132**, 10 Sup. Ct. 683, to prevent sale of imported liquors in original packages; Brennan v. Titusville, 153 U. S. 301, **38 L. Ed. 722**, 14 Sup. Ct. 832, imposition of license tax on soliciting agents of manufacturers of

another State; Kaeiser v. Illinois Central R. R. Co., 5 McCrary, 499, 18 Fed. 153, so much of a law providing for a tariff of maximum charges on railways as related to through shipments; Mobile etc. R. R. Co. v. Sessions, 28 Fed. 594, as to the Mississippi Railroad Commission; Cuban S. S. Co. v. Fitzpatrick, 66 Fed. 66, provisions in the Constitution and statutes of Louisiana prohibiting foreign seamen from loading and unloading their own ships; Ex parte Jervey, 66 Fed. 959, South Carolina dispensary act, when applied to persons bringing liquor into State without attempting to unload; State v. P. W. etc. R. R. Co., 4 Houst. 204, 205, act of 1864, imposing a tax on passengers in so far as it operates on persons entering into, departing from or passing through the State; Webb v. Dunn, 18 Fla. 724, law imposing a port fee on all vessels entering the port of Pensacola; dissenting opinion in Munn v. People, 69 Ill. 102, arguing that law regulating public warehouses was unconstitutional; Hollida v. Hunt, 70 Ill. 113, 22 Am. Rep. 66, law to regulate sale of patents; Sherlock v. Alling, 44 Ind. 195, showing that laws burdening commerce had been held invalid; Louisiana v. Kennedy, 19 La. Ann. 426, tax on property brought from other States for sale or reshipment until it became part of common property of State; Stanley v. Wabash etc. R. R. Co., 100 Mo. 439, 8 L. R. A. 550, 13 S. W. 710, law requiring of railway companies double-deck cars for transportation of sheep, so far as it related to interstate traffic; Coxe v. State, 144 N. Y. 408, 39 N. E. 403, holding State could not make grant of marshlands with power to inclose and obstruct navigation; Chapman v. Miller, 2 Spear, 778, pilot ordinance of city of Charleston; Railroad Commrs. v. Railroad Co., 22 S. C. 236, 238, act to regulate freights to points outside the State.

Distinguished in dissenting opinion in Adair v. United States, 208 U. S. 184, 13 Ann. Cas. 764, 52 L. Ed. 446, 28 Sup. Ct. 277, majority holding void act of 1898, making it an offense for carrier engaged in interstate commerce to discharge employee for membership in labor union; State v. Delaware etc. R. R. Co., 30 N. J. L. 479, as not applicable to a State law laying a tax on transportation of passengers and things within a State.

Constitutionality of State regulations of interstate commerce. Note, 27 Am. St. Rep. 549, 550, 551.

Commerce is more than traffic; it is commercial intercourse between nations and parts of nations in all its branches, and includes navigation. It is regulated by prescribing rules for carrying on that intercourse.

The following recent cases approve the doctrine above laid down: International Text-Book Co. v. Pigg, 217 U. S. 106, 27 L. R. A. (N. S.) 500, 18 Ann. Cas. 1103, 54 L. Ed. 685, 30 Sup. Ct. 481, holding intercourse by mail between person doing business in different States was interstate commerce, and State statute requiring license to carry on correspondence school is void; Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 474, 54 L. Ed. 289, 30 Sup. Ct. 155, holding equipment of interstate carrier,

including cars for carrying its own fuel, were subject to interstate commerce commission; Union Bridge Co. v. United States, 204 U. S. 385, **51 L. Ed. 533**, 27 Sup. Ct. 367, holding under power to regulate commerce, Congress could require removal of bridge obstructing navigation; St. Clair Co. v. Interstate Transfer Co., 192 U. S. 458, 465, **48 L. Ed. 520**, 523, 24 Sup. Ct. 301, 303, holding county cannot recover penalty for carrying on, without ferry license, transportation of cars across Mississippi River, between Illinois and Missouri; Leovy v. United States, 177 U. S. 632, **44 L. Ed. 919**, 20 Sup. Ct. 801, holding mere capacity to pass in boat from one stream to another is not sufficient to constitute navigable water under act of Congress, September 19, 1890; United States v. Burch, 226 Fed. 975, holding removal in automobile of woman from one State to another for immoral purpose was interstate commerce within meaning of white slave act; Bracey v. Darst, 218 Fed. 495, holding stocks, bonds, debentures and other securities were subject matter of interstate commerce; Kalen v. United States, 196 Fed. 889, 116 C. C. A. 450, upholding white slave act as exercise of power to regulate commerce; United States v. Tucker, 188 Fed. 743, holding sale and shipment by mail to another State was interstate commerce; United States v. Westman, 182 Fed. 1018, holding white slave act related to interstate commerce; Riverside Mills Co. v. Atlantic Coast Line R. Co., 168 Fed. 989, holding commerce included subject, vehicle, agent and operations by which exchange of goods is effected; Smeltzer v. St. Louis etc. R. Co., 158 Fed. 651, upholding provision of commerce act making initial carrier liable for loss on connecting lines; United States v. Colorado etc. R. Co., 157 Fed. 331, **13 Ann. Cas. 893, 15 L. R. A. (N. S.) 167, 85 C. C. A. 27**, holding safety appliance act not void because affecting interstate commerce; In re Charge to Grand Jury, 151 Fed. 838, in discussing essentials of conspiracy in restraint of trade among several States; Snead v. Central of Georgia Ry. Co., 151 Fed. 612, 613, and Spain v. St. Louis etc. R. Co., 151 Fed. 523, 524, both upholding Employers' Liability Act of 1906; Brooks v. Southern Pac. Co., 148 Fed. 991, holding void Federal Employers' Liability Act of 1906; United States v. Scott, 148 Fed. 434, holding void Federal act of 1898, prohibiting interstate carriers from discriminating against union labor; Reilley v. United States, 106 Fed. 901, 902, 904, holding any person who carries a lottery ticket from one State to another is within provision of act of March 2, 1895; Stubbs v. People, 40 Colo. 419, **122 Am. St. Rep. 1068, 13 Ann. Cas. 1025, 11 L. R. A. (N. S.) 1071**, 90 Pac. 1115, holding void act prohibiting importation of docked horses; Williams v. Fears, 110 Ga. 589, 35 S. E. 701, holding imposition of tax on person engaged in hiring laborers in Georgia to be employed in another State (Tax Act Ga. 1898), is not a regulation of interstate commerce; Vandalia R. Co. v. Stilwell, 181 Ind. 292, 104 N. E. 298, 5 N. C. C. A. 503, holding "commerce" included means and vehicles by which traffic is accomplished; State v. Lowry, 166 Ind. 381, **9 Ann. Cas. 350, 4 L. R. A. (N. S.) 528**, 77 N. E. 731, holding importation of cigarettes for personal use was interstate commerce, and not within anti-cigarette act of 1905; Ryman Steamboat Line Co. v. Commonwealth, 125 Ky. 257, **10 L. R. A. (N. S.) 1187**, 101

S. W. 403, holding Congress had jurisdiction over Cumberland River as navigable highway; Commonwealth v. Breakwater Co., 214 Mass. 17, 100 N. E. 1038, holding power of Congress under act requiring inspection of hull and equipment of sea-going barges extended to boiler used for loading and weighing anchor; Marconi Wireless Telegraph Co. v. Commonwealth, 218 Mass. 565, 106 N. E. 313, holding foreign corporation engaged in interstate commercial business not subject to State corporation tax; International Text-Book Co. v. Gillespie, 229 Mo. 414, 129 S. W. 927, holding foreign corporation conducting correspondence school was engaged in interstate commerce; Lehigh etc. Coal Co. v. Borough of Junction, 75 N. J. L. 925, 15 L. R. A. (N. S.) 514, 68 Atl. 807, holding transportation of goods by owner to self as consignee in another State for storage and sale in specific quantities was not interstate commerce exempt from local tax; Sioux Remedy Co. v. Cope, 28 S. D. 403, 133 N. W. 685, holding contract for shipment of goods from plaintiff in another State to defendant involved interstate commerce; Catlin & Powell v. Schuppert, 130 Wis. 650, 110 N. W. 820, holding where resident of Wisconsin by letter employed New York stock broker to purchase stock there and transmit stock to Wisconsin through usual collection agents, it was act of interstate commerce; Loverin & Browne Co. v. Travis, 135 Wis. 329, 115 N. W. 831, holding soliciting orders by agent in one State for sale of goods which, by contract, are to reach purchasers in another, and delivery thereof, were acts of interstate commerce; dissenting opinion in United States v. Delaware & H. Co., 164 Fed. 252, majority holding void commodities clause of commerce act; dissenting opinion in Western Union Tel. Co. v. Hughes, 104 Va. 244, 51 S. E. 226, where points of transmission and destination of telegram sent over lines of single company were within same State, fact that part of transmission was made in another State does not make it interstate business; Pedersen v. Delaware etc. R. R., 184 Fed. 741, arguendo. The earlier cases which relate to navigation are: United States v. Coombs, 12 Pet. 78, 9 L. Ed. 1006, holding that Federal jurisdiction extended to theft from a cast-away ship on the sea beach above high-water mark; Henderson v. Mayor of New York, 92 U. S. 270, 23 L. Ed. 548, holding statutes of New York and Louisiana imposing a passenger tax, payable by master of a vessel, void; Lord v. Steamship Co., 102 U. S. 544, 26 L. Ed. 226, holding that when navigating the high seas between ports of the same State, a vessel of the United States was subject to the regulating power of Congress; The Thomas Swan, 6 Ben. 45, Fed. Cas. 13,931, holding the regulating power included the control for that purpose of all the navigable waters of a State accessible from another State; Martin v. Acker, Blatchf. & H. 280, Fed. Cas. 9155, holding that an action for wages by a seaman on a vessel plying between ports of the same State was within the Federal admiralty jurisdiction; The Cheeseman v. Two Ferry Boats, 2 Bond, 372, Fed. Cas. 2633, holding that a ferryboat engaged in carrying traffic and intercourse between States was subject to congressional legislation; Blanchard v. The Martha Washington, 1 Cliff. 472, Fed. Cas. 1513, holding the act of Congress of July, 1850, concerning

the registry of vessels was constitutional; The James Morrison, Newb. 246, Fed. Cas. 15,465, holding that the right of Congress did not extend to regulate all navigation but only where it could regulate commerce; The Gretna Green, 20 Fed. 901, holding the navigation laws did not apply to a case of a vessel plying wholly within a State; United States v. Burlington etc. Ferry Co., 21 Fed. 333, holding that the carrying of passengers was commercial intercourse; United States v. Guess, 48 Fed. 588, holding Revised Statutes, section 4499, imposing a penalty for navigating contrary to regulations, was constitutional; North Bloomfield Gravel Min. Co. v. United States, 88 Fed. 674, sustaining act of Congress of March, 1893, regulating hydraulic mining in California; Mitchell v. Steelman, 8 Cal. 372, applying the rule to an act of Congress requiring registration of ships' mortgages; Wiswall v. Potts, 5 Jones Eq. 190, holding Congress could require the recording of vessels engaged in foreign or interstate commerce, but not of those trading exclusively in a State.

Cases which relate to navigable rivers and streams, and obstructions by bridges; Silliman v. Troy etc. Bridge Co., 11 Blatchf. 284, Fed. Cas. 12,853, in general discussion with reference to powers of the State to authorize bridge over navigable stream; Columbus Ins. Co. v. Curtenius, 6 McLean, 218, Fed. Cas. 3045, holding that Congress by its enactments had intended that the Mississippi and its navigable tributaries should remain free from obstructions to navigation; Hatch v. Wallamet Bridge Co., 7 Sawy. 131, 6 Fed. 329, holding power of Congress extended to all navigable waters accessible from a State other than that in which they lie; Wallamet Bridge Co. v. Hatch, 9 Sawy. 649, 19 Fed. 350, holding river for purposes of commerce was part of Columbia River, and navigable water of United States; United States v. New Bedford Bridge Co., 1 Wood. & M. 419, Fed. Cas. 15,867, holding Congress had power to keep open all navigable streams to the highest ports of delivery; The Clinton Bridge, Woolw. 163, 164, Fed. Cas. 2900, holding the definition covered the right to legislate concerning bridges over navigable waters; Depew v. Board of Trustees, 5 Ind. 10, and Neaderhouser v. State, 28 Ind. 266, holding that power to regulate commerce included right to keep open natural channels of commerce, but that State could authorize obstruction of stream not being an interstate navigable stream; Pollock v. Cleveland Ship Building Co., 56 Ohio St. 668, 47 N. E. 584, holding right of riparian proprietor to soil of a river was subordinate to public's paramount right of navigation.

The following cases relate to intercourse with Indians: United States v. Holliday, 3 Wall. 417, 18 L. Ed. 185, applying rule to acts of Congress prohibiting sale of liquor to Indians; United States v. Seveloff, 2 Sawy. 317, Fed. Cas. 16,252, holding that Alaska was not part of the Indian Territory to which the statute of June 30, 1834, applied; United States v. Bridleman, 7 Sawy. 250, 7 Fed. 901, holding that federal courts had jurisdiction to punish larceny from an Indian; and United States v. Martin, 8 Sawy. 476, 14 Fed. 820, had also jurisdiction of a murder of an Indian.

Cases relating to railroads, postal and telegraph lines are: Pensacola Co. v. West. Tel. Co., 96 U. S. 9, **24 L. Ed. 710**, holding that the definition also included the postal service and extends to telegraph lines; Sweatt v. Boston etc. R. R. Co., 3 Cliff. 347, 5 N. B. R. 243, Fed. Cas. 13,684, holding that railroad companies are commercial corporations; Pensacola Tel. Co. v. Western Union Tel. Co., 2 Woods, 646, Fed. Cas. 10,960, holding Congress had power to legislate concerning telegraphs, and the statute of Florida which conflicted with Federal law was void; Western Union Tel. Co. v. Atlantic & Pacific Tel. Co., 5 Nev. 109, holding that telegraphy came within the definition. Cases relating to other subjects of congressional legislation under the commerce clause are: In re Rahrer, 140 U. S. 556, **35 L. Ed. 574**, 11 Sup. Ct. 867, where the definition was applied to congressional legislation as to liquors; United States v. Boyer, 85 Fed. 432, holding act of Congress providing for inspection before slaughter of animals for export was constitutional.

The following cases further define what are subjects of interstate commerce on which State legislation has been held unconstitutional: Covington etc. Bridge Co. v. Kentucky, 154 U. S. 218, **38 L. Ed. 969**, 14 Sup. Ct. 1092, holding bridges were instruments of interstate commerce as well as ferryboats, and that a State law attempting to regulate tolls on a bridge over the Ohio was void; The William Jarvis, 1 Sprague, 487, Fed. Cas. 17,697, holding Louisiana code respecting colored seamen was unconstitutional; State v. Chicago etc. R. R. Co., 40 Minn. 268, **12 Am. St. Rep. 731, 3 L. R. A. 238**, 41 N. W. 1047, holding the State railroad commission had no power to fix rates for transportation in another State; McNaughton v. McGirl, 20 Mont. 129, **63 Am. St. Rep. 613**, 49 Pac. 653, holding that agent of a corporation of another State buying wool consigned to warehouses out of State was engaged in interstate commerce; People v. Brooks, 4 Denio, 476, holding a State hospital tax on officers and crew of vessels engaged in the coasting trade was void; dissenting opinion in Commonwealth v. Gloucester Ferry Co., 98 Pa. St. 120, 123, arguing that State could not tax corporate stock of a foreign corporation doing business in the State. On the other hand, State enactments have been sustained on the subjects to which the following cases relate: Lehigh Valley R. R. Co. v. Pennsylvania, 145 U. S. 200, **36 L. Ed. 675**, 12 Sup. Ct. 807, in which a tax on railroad transportation between points in a State, though passing in transit outside the State, was held not a tax on interstate commerce; Fry v. State, 63 Ind. 563, **30 Am. Rep. 246**, upholding State law regulating issuing and taking up of tickets by common carriers; Fuller v. Chicago & N. W. R. R. Co., 31 Iowa, 207, upholding State law requiring railway companies annually to fix and publish schedule of rates for transportation; Howell v. State, 3 Gill, 18, arguendo, as to right of a State to tax shares of vessels owned by residents of the State; Commonwealth v. Phila. & R. R. Co., 62 Pa. St. 296, **1 Am. Rep. 408**, showing that the State tonnage law on all goods transported was not a regulation of commerce, but a tax for revenue; State v. Morgan, 2

S. D. 51, 48 N. W. 320, holding that the regulation of the business of mercantile commercial agencies was a legitimate subject of State legislation.

The same definition and rule have been also cited generally in Passenger Cases, 7 How. 436, 437, 12 L. Ed. 766, in which rule was approved; dissenting opinion in Dred Scott v. Sandford, 19 How. 622, 15 L. Ed. 790, illustrating interference of national Constitution with State rights; dissenting opinion in United States v. E. C. Knight Co., 156 U. S. 21, 36, 39 L. Ed. 332, 337, 15 Sup. Ct. 257, 262, arguing that the anti-monopoly act of 1890 extended to manufacturers of a necessary of life; Kaeiser v. Illinois Central R. R. Co., 5 McCrary, 499, 18 Fed. 153, laying down seven propositions as to commerce and its regulation, as established by cases, and collecting authorities; United States v. Holtzhauer, 40 Fed. 78, holding that an indictment under Revised Statutes, section 5344, need not allege jurisdictional facts; dissenting opinion in Lin Sing v. Washburn, 20 Cal. 585, regulation of commerce did not extend to taxation of Chinese as class; In re State Lands, 18 Colo. 364, 32 Pac. 988, holding that where a State Constitution provided that power was to be exercised under such regulations as should be prescribed by law, it meant rules to be prescribed by the legislative department; dissenting opinion in New York v. Miln, 11 Pet. 154, 9 L. Ed. 669, majority upholding New York act requiring captain of vessel to make report as to passenger; United States v. Williamson, 28 Fed. Cas. 692, affirming right of owner to travel with slaves through another State.

Distinguished in International Text-Book Co. v. Peterson, 133 Wis. 311, 113 N. W. 732, holding contract to furnish course of instruction from another State through usual transportation agencies was not interstate commerce, but subject to State law relating to foreign corporations; dissenting opinion in Passenger Cases, 7 How. 502, 12 L. Ed. 794, holding that the converse of the proposition, viz., that navigation included commerce, is not true; and in State v. Fullerton, 7 Rob. (La.) 215, as not applicable to a tax levied on persons coming by boat to the city of New Orleans, where neither the captain, officers or crew of the ship were made liable.

Power in Federal government to lay embargo is acknowledged and is included in power to regulate commerce.

Cited in Legal Tender Cases, 12 Wall. 550, 20 L. Ed. 312, holding all powers necessary for executing powers expressly granted were included.

Commerce, as used in national Constitution, comprehends every species of commercial intercourse between United States and foreign nations, between States, and with Indian tribes; in regulating it the power of Congress does not stop at the jurisdictional lines of States, and may be exercised within a State.

Approved in Addyston Pipe & Steel Co. v. United States, 175 U. S. 227, 44 L. Ed. 142, 20 Sup. Ct. 102, holding agreements between corporations engaged in sale and manufacture of iron pipe, by which one makes its own bid and others are required to bid over him, are invalid under act of Con-

gress, July 2, 1900, so far as applicable to sales for delivery beyond State of sale; The Passaic Bridges, 3 Wall. App. 793, holding the right to build bridge over Passaic River rests with people of New Jersey; Shepard v. Northern Pac. Ry. Co., 184 Fed. 770, 795, holding Congress could control discrimination between localities in different States wrought by unreasonable difference between intrastate and interstate rates; Colasurdo v. Central R. R., 180 Fed. 837, holding Employers' Liability Act included person working on switch on track used for interstate commerce; Kansas Natural Gas Co. v. Haskell, 172 Fed. 560, 576, holding void as attempted interference with interstate commerce, State statute limiting right to transport gas from State; United States v. Southern Ry. Co., 164 Fed. 356, upholding safety appliance act; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 7, 17, 84 C. C. A. 167, holding Colorado statute relating to license fees and powers to sue of foreign corporations was inapplicable to interstate commerce in that State; Kelley v. Great Northern Ry. Co., 152 Fed. 217, upholding Employers' Liability Act of 1906; United States v. Wishkah Boom Co., 136 Fed. 47, 48, 68 C. C. A. 592, construing 26 Stat. 454, prohibiting maintenance of obstructions in navigable streams; State v. Missouri Pac. Ry. Co., 96 Kan. 627, 152 Pac. 785, upholding act of Congress prohibiting shipment of liquor into States to be used in violation of State law; United States Fidelity & Guaranty Co. v. Commonwealth, 139 Ky. 34, Ann. Cas. 1912B, 333, 47 L. R. A. (N. S.) 648, 129 S. W. 317, holding credit reporting bureau was not engaged in interstate commerce; D. E. Foote & Co. v. Clagett, 116 Md. 235, 236, 81 Atl. 514, holding carriage of oysters from oyster-beds in one State to another was interstate commerce; State v. Missouri Pac. Ry. Co., 212 Mo. 680, 111 S. W. 505, holding act of Congress of 1907 relating to hours of service of telegraphers controlled State statute on same subject as to operators engaged in interstate service; Gulf etc. Ry. Co. v. State, 32 Tex. Civ. 5, 73 S. W. 432, determining that shipment from Dakota to Texarkana, where it was transshipped to new purchaser within State, was intrastate; dissenting opinion in Northern Securities Co. v. United States, 193 U. S. 379, 48 L. Ed. 717, 24 Sup. Ct. 436, majority upholding enforcement of anti-trust act by Federal decree enjoining corporation organized in pursuance of combination of stockholders in competing interstate railroads from exercising power acquired by corporation through acquisition of stock; dissenting opinion in Gilman v. Philadelphia, 3 Wall. 737, 739, 743, 18 L. Ed. 103, 104, 105, holding that Congress had, by the acts relating to the coasting trade, regulated the navigation of the Schuylkill River; Wabash etc. Ry. v. Illinois, 118 U. S. 573, 30 L. Ed. 249, 7 Sup. Ct. 11, holding State law imposing penalty for discriminating in the matter of long and short haul which might operate on interstate transportation, unconstitutional; Leicy v. Hardin, 135 U. S. 111, 34 L. Ed. 133, 10 Sup. Ct. 685, holding that power of Congress over imports from foreign countries applied to importations from one State to another; Schollenberger v. Pennsylvania, 171 U. S. 21, 43 L. Ed. 56, 18 Sup. Ct. 765, holding a State could not wholly exclude oleomargarine from importation

from State where made, but might regulate its introduction so as to secure purity; dissenting opinion in Lake Shore etc. R. R. Co. v. Ohio, 173 U. S. 316, 43 L. Ed. 713, States cannot legislate to provide for stoppage of trains at certain places, and impose fines; The Daniel Hall, Brown Adm. 197, 198, Fed. Cas. 3564, holding that power of Congress extended to transportation of goods wholly within State, but destined for other States; Hatch v. Wallamet Bridge Co., 7 Sawy. 133, 6 Fed. 332, holding that coasting license was only a license to navigate stream as far as navigable, and that a State could obstruct or destroy the navigation of river within its limits; The Chusan, 2 Story, 464, Fed. Cas. 2717, holding it to have been decided that power of Congress to regulate foreign and interstate navigation was exclusive, applying rule to liens on ships in home and foreign ports; Roberts v. Skolfield, 3 Ware, 191, Fed. Cas. 11,917, holding that no State could have a separate and distinct maritime law of its own; The Clinton Bridge, Woolw. 165 Fed. Cas. 2900, holding congressional authority extended to acts done on land, which prevented exercise of power to regulate commerce; King v. American Transportation Co., 1 Flipp. 7, Fed. Cas. 7787, holding that destruction of warehouse by fire caused by sparks from smokestack of vessel navigating river, was case over which Congress had no power to legislate; Cuban S. S. Co. v. Fitzpatrick, 66 Fed. 67, holding that regulating power extended to persons conducting navigation as well as to instruments used; United States v. Coal Dealers' Assn., 85 Fed. 265, holding the Coal Dealers' Association of California illegal as restraint on interstate commerce, under anti-trust law of 1890; City of South Bend v. Martin, 142 Ind. 42, 29 L. R. A. 535, 41 N. E. 318, ordinance imposing license on peddlers, not interference with interstate commerce, when goods offered had become permanently fixed and mingled with property in State; City of Huntington v. Mahan, 142 Ind. 698, 51 Am. St. Rep. 202, 42 N. E. 463, holding right to deliver goods sold when not within the State could not be taxed; The Wharf Case, 3 Bland, 371, holding Federal government had power to establish and regulate public ports; dissenting opinion in State v. Delaware etc. R. R. Co., 30 N. J. L. 492, State cannot impose tax on transportation of passengers and merchandise passing through State; Flanagan v. Philadelphia, 42 Pa. St. 231, sustaining State act for erection of new bridge over the Schuylkill River at Philadelphia; State v. Freeman, 8 Yerg. 316, holding that State law of 1833, extending criminal law to crimes by Indians within the Indian Territory, was valid. See also Passenger Cases, 7 How. 462, 12 L. Ed. 777, and dissenting opinion in New York v. Miln, 11 Pet. 154, 155, 9 L. Ed. 669, where the power of Congress is discussed.

Distinguished in The James Morrison, Newb. 248, Fed. Cas. 15,465, as not intending to say that power of Congress extended to all commerce and navigation, and holding it did not include a ferry wholly in limits of State.

State taxation of ferry as regulation of interstate commerce. Note, Ann. Cas. 1914B, 685.

The power committed to Congress by Constitution does not extend to commerce wholly within State.

Approved in Cummings v. Chicago, 188 U. S. 430, 47 L. Ed. 531, 23 Sup. Ct. 472, 477, holding suit which involves question of right to construct dock in navigable river under acts of Congress is one arising under the Constitution and acts of Congress (26 Stats. at Large, 827, c. 517, U. S. Comp. Stats. 1901, p. 549); Lottery Case, 188 U. S. 346, 47 L. Ed. 497, 23 Sup. Ct. 323, 325, 328, 333, holding Congress may prohibit carriage of lottery tickets by express company from one State to another; Scranton v. Wheeler, 179 U. S. 159, 45 L. Ed. 136, 21 Sup. Ct. 55, holding in suit by riparian owner to prevent interference with rights in submerged waterfront by officer of United States in possession of pier built by government, State court has jurisdiction; Milnor v. New Jersey R. Co., Fed. Cas. 9620, 24 How. Append. 1, holding Federal court has no jurisdiction to enjoin erection of bridge over navigable stream wholly within State where erection is authorized by legislature; Louisville etc. R. Co. v. Hughes, 201 Fed. 735, holding State act for boiler inspection superseded by Federal act; In re Arkansas Rate Cases, 187 Fed. 301, 302, holding right of State to fix intrastate rates was subject only to Fourteenth Amendment; Louisville etc. R. Co. v. Siler, 186 Fed. 200, holding Federal court could review order of State railroad commission fixing rates only on ground it was beyond authority or confiscatory; The Nassau, 182 Fed. 700, holding Federal statute relating to carriage of combustibles did not apply to New York-Brooklyn ferry; Gibbs v. M'Neeley, 102 Fed. 597, holding act of association of manufacturers in adopting resolution denouncing dealer who bought and shipped to customers of other States, and in mailing said circulars to manufacturers and customers of dealer, constituted conspiracy in restraint of commerce; Compagnie Francaise de Nav. etc. v. State Board of Health, 51 La. Ann. 661, 72 Am. St. 473, 25 South. 598, holding Acts 1898, No. 192 (La.), authorizing State board of health to prohibit introduction from foreign country of any person with infectious disease, does not violate Federal Constitution giving Congress power to regulate commerce; Slingerland v. International Contracting Co., 169 N. Y. 69, 61 N. E. 997, holding owner of land bordering on river, who also owned land under water, but not exclusive right of fishing or taking ice, could not sue dredging contractor operating in channed under authority of Federal government; Western Union Tel. Co. v. Reynolds, 100 Va. 466, 93 Am. St. Rep. 974, 41 S. E. 857, holding telegram is domestic message where initial point and terminal point are both in same State and concerns only citizens of State, although the line passes in part over territory of another State; dissenting opinion in Austin v. Tennessee, 179 U. S. 370, 45 L. Ed. 236, 21 Sup. Ct. 142, 143, majority holding legislature may restrict or prohibit sale of cigarettes when not applicable to original packages and no discrimination is made against other States; Veazie v. Moor, 14 How. 575, 14 L. Ed. 548, affirming Moor v. Veazie, 32 Me. 364, 52 Am. Dec. 666, sustaining statute of Maine granting sole right of navigating river wholly within State; The

Daniel Ball, 10 Wall. 565, 19 L. Ed. 1002, holding that steamship transporting goods on navigable waters of United States entirely within State's limits, but coming from and going to other States, was subject to congressional legislation; Lord v. Steamship Co., 102 U. S. 543, 26 L. Ed. 226, accepting rule as undoubted, and holding Revised Statutes, section 4283, as limited by Revised Statutes, section 4289, not applicable to vessels used on rivers or inland navigation, and therefore unconstitutional; dissenting opinion in Bridge Co. v. United States, 105 U. S. 492, 26 L. Ed. 1151, arguing that Congress could not order removal of bridges over navigable streams which did not obstruct navigation; United States v. New Bedford Bridge, 1 Wood. & M. 417, Fed. Cas. 15,867, holding that penalties for obstruction of navigable stream wholly in State by bridge constructed under State law could not be inflicted in Federal courts; The Bright Star, Woolw. 275, Fed. Cas. 1880, holding that steamboat plying on navigable river, but wholly within State, was not engaged in interstate commerce; The Gretna Green, 20 Fed. 901, holding navigation laws did not apply to vessel trading within State limits; United States v. Burlington etc. Ferry Co., 21 Fed. 335, holding that regulating power of Congress extended to vessels on navigable waters of United States, even when engaged exclusively in domestic commerce of the States; Whitaker v. The F. Lorents, 29 Fed. Cas. 954, holding Federal courts did not have jurisdiction of case of damage to passenger going between ports in same State; The Belfast v. Boon & Co., 41 Ala. 70, holding a State had the right to create a statutory lien on a vessel for goods lost in navigating an interior river above tidewater; Allen v. Newberry, 21 How. 246, 16 L. Ed. 111; Maguire v. Card, 21 How. 250, 16 L. Ed. 111, holding act of Congress of February 23, 1845, regulating Federal jurisdiction in admiralty upon lakes, did not apply to vessels engaged in domestic State commerce; The Seneca, 1 Biss. 372, Fed. Cas. 12,669, and The Tug Oconto, 5 Biss. 463, Fed. Cas. 10,421, holding a steamboat plying wholly between ports of a State not liable to government inspection act; The James Morrison, Newb. 245, Fed. Cas. 15,465, holding Congress had no power over commerce completely internal and confined to one State; Transportation Co. v. Moore, 5 Mich. 393, defining "inland navigation" as not including navigation of the Great American Lakes and their connecting waters; dissenting opinion in Pensacola Tel. Co. v. West. etc. Tel. Co., 96 U. S. 23, 24 L. Ed. 715, act of Congress of July 24, 1866, did not relate to all telegraph lines; Interstate Commerce Commn. v. Brimson, 154 U. S. 470, 38 L. Ed. 1055, 14 Sup. Ct. 1130, in general discussion on the powers of interstate commerce commission to require witnesses to testify; Geer v. Connecticut, 161 U. S. 531, 40 L. Ed. 797, 16 Sup. Ct. 605, holding a State law prohibiting the killing of game birds for export constitutional; State v. Harrub, State v. Melvin, 95 Ala. 184, 186, 36 Am. St. Rep. 199, 202, 15 L. R. A. 764, 10 South. 754, 755, sustaining State law regulating oyster fisheries in State; Dobbs v. State, 39 Ark. 356, 43 Am. Rep. 276, holding State law prohibiting sale of pistols constitutional;

People v. Brady, 40 Cal. 218, **6 Am. Rep. 615**, holding Constitution could not abrogate the right of a State to regulate the production and competency of evidence; Phelps v. Racey, 60 N. Y. 15, **19 Am. Rep. 144**, holding States could pass laws for preservation of game; Railroad Co. v. Harris, 99 Tenn. 710, 712, 43 S. W. 121, 122, holding that tax on railroads for transportation wholly within a State does not affect interstate commerce; Smith v. State, 100 Tenn. 506, **41 L. R. A. 434, 435**, 46 S. W. 569, discussing power of Congress to legislate sustaining State law providing for separate railroad accommodation of white and colored races; dissenting opinion in Brown v. Maryland, 12 Wheat. 452, **6 L. Ed. 690**, majority holding void Maryland act licensing retailers of drygoods.

Power of Congress over commerce is power to regulate or prescribe rules by which commerce is to be governed; it has no limitations except as prescribed by the Constitution.

Approved in Adams Express Co. v. Commonwealth of Kentucky, 238 U. S. 196, **Ann. Cas. 1915D, 1167, L. R. A. 1916C, 273, 59 L. Ed. 1269**, 35 Sup. Ct. 824, holding under Wilson act of 1890 and Webb-Kenyon act of 1913 interstate transportation of liquor remained within sole jurisdiction of Congerss; Brolan v. United States, **236 U. S. 220, 59 L. Ed. 548**, 35 Sup. Ct. 285, holding Congress could prohibit importations and provide punishment for violation of prohibition; Houston etc. R. Co. v. United States, 234 U. S. 351, **58 L. Ed. 1348**, 34 Sup. Ct. 833, upholding order of commerce commission made to avoid local discrimination prohibiting charge of greater rate between certain interstate points than between certain interstate points; Simpson v. Shepard, 230 U. S. 398, **Ann. Cas. 1916A, 18, 57 L. Ed. 1540**, 33 Sup. Ct. 729, holding Congress could, when necessity arose in exercise of power of regulation of interstate commerce, impose regulations affecting interstate commerce; Lewis Publishing Co. v. Morgan, 229 U. S. 314, **57 L. Ed. 1203**, 33 Sup. Ct. 867, upholding act requiring paid matter in newspaper to be marked as advertisements as condition to sending through mails; Interstate Commerce Commn. v. Goodrich Transit Co., 224 U. S. 215, **56 L. Ed. 738**, 32 Sup. Ct. 436, holding Congress could require carrier doing both interstate and intrastate business to render accounts of all its business; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 201, **53 L. Ed. 180**, 31 Sup. Ct. 164, holding Congress could prohibit interstate carrier from limiting by contract its liability beyond its own line; Northern Securities Co. v. United States, 193 U. S. 335, 341, 368, 369, 376, **48 L. Ed. 699, 702, 713, 716**, 24 Sup. Ct. 436, upholding enforcement of anti-trust act by Federal decree enjoining corporation organized in pursuance of combination of stockholders in competing interstate railroad from exercising power acquired by corporation through acquisition of stock; Prairie Oil & Gas Co. v. United States, 204 Fed. 807, 811, upholding amendment to commerce act of 1906 subjecting oil pipe-lines to control of commerce commission; United States v. Hoke, 187 Fed. 994, holding white slave act of 1910 was proper exercise of power of Congress over commerce;

Southern Express Co. v. State, 188 Ala. 468, 474, 477, 478, 481, 66 South. 120, 122, 123, 124, and American Express v. Beer, 107 Miss. 546, **Ann. Cas. 1916D, 127,** 65 South. 581, both upholding act prohibiting shipment of liquor into State to be used in violation of State law; Ex parte Eaglesfield, 180 Fed. 559, 560, holding one trading in interstate commerce under coasting license not subject to State license; Zikos v. Oregon R. & Navigation Co., 179 Fed. 898, holding Congress had power to prescribe rules of liability of interstate carrier for injuries of its employees; Wabash R. Co. v. United States, 168 Fed. 410, 93 C. C. A. 393, holding safety appliance act applied to all cars and trains of interstate carrier, whether operated between points in State or points in different States, or when empty; United States v. Southern Ry. Co., 164 Fed. 353, holding safety appliance act was proper exercise of this power; United States v. Delaware & H. Co., 164 Fed. 227, holding commodities clause of commerce act did not fall within commerce clause of Constitution, and was void; United States v. Adair, 152 Fed. 744, upholding act of 1898 forbidding carrier from discharging employee because member of labor union; United States v. Wells-Fargo Express Co., 161 Fed. 614, upholding provisions of commerce act prohibiting issuance of franks by express companies; United States v. Interstate Commerce Commission, 37 App. D. C. 270, holding interstate commerce commission had power to establish through and joint rail and steamship rates from United States to Alaska; McNamara v. Washington Terminal Co., 37 App. D. C. 392, **36 L. R. A. (N. S.) 446,** holding Employers' Liability Act applied to Washington Terminal Company of District of Columbia; Fry v. Southern Pac. Co., 247 Ill. 574, 93 N. E. 908, holding Congress could make initial carrier liable for damages to goods on connecting line; State v. Illinois Cent. R. Co., 246 Ill. 211, 92 N. E. 826, holding tax of seven per cent on gross receipts of railroad from all business, in lieu of property tax was not void as attempt to impose tax on interstate commerce; Southern Ry. Co. v. Railroad Commission, 179 Ind. 32, 41, 100 N. E. 340, 343, holding safety appliance act applied to cars commonly used on interstate railroads even when loaded and delivered at points in same State; Corcoran v. Louisville etc. R. Co., 125 Ky. 640, 101 S. W. 1186, holding carrier publishing rate for interstate traffic and filing it with commerce commission was not subject to local rates fixed by State railroad commission; Fleming v. City of Mexico, 262 Mo. 435, 171 S. W. 321, holding shipment to agent in another State to fill solicited orders was interstate commerce not subject to city license tax; Chicago etc. R. Co. v. Gildersleeve, 219 Mo. 181, **16 Ann. Cas. 749,** 118 S. W. 89, holding void statute limiting power of Circuit Court to punish for contempt; Davis v. Southern Ry. Co., 170 N. C. 591, 87 S. E. 749, holding statute prohibiting Sunday trains did not render railroad liable for injury caused by train operated on Sunday, in absence of negligence; Missouri etc. Ry. Co. v. Lenahan, 39 Okl. 287, 289, 135 Pac. 385, 386, holding Employers' Liability Act superseded State law so far as regulating liability of carriers for death of employees while engaged in

interstate commerce; Betts v. Commrs. of Land Office, 27 Okl. 76, 110 Pac. 770, defining word "regulation" as used in Constitution in relation to leasing of State lands by authority of legislature; State v. Chicago etc. Ry. Co., 136 Wis. (407), 414, 417, 19 L. R. A. (N. S.) 329, 117 N. W. 689, 690, holding act of Congress of 1907 limiting hours for telegraphers superseded State statute on same subject; dissenting opinion in Howard v. Illinois Central R. Co., 207 U. S. 506, 526, 52 L. Ed. 312, 320, 28 Sup. Ct. 141, majority holding Employers' Liability Act exceeded powers of Congress over commerce; Interstate Commerce Commn. v. Brimson, 154 U. S. 471, 38 L. Ed. 1055, 14 Sup. Ct. 1131, holding that Interstate Commerce Act was legitimate exercise of congressional power; Scranton v. Wheeler, 57 Fed. 812, 16 U. S. App. 152, holding that the States' title to land under rivers was subject to regulating power of Congress; Sweatt v. Boston, H. & E. R. R. Co., 3 Cliff. 352, 5 N. B. R. 247, Fed. Cas. 13,684, holding railroad companies are subject to bankruptcy act; Sang Lung v. Jackson, 85 Fed. 505, the act prohibiting importation of impure tea; United States v. Mackenzie, 30 Fed. Cas. 1164, in charge to grand jury holding Congress had power to limit trial of crimes by members of army or navy to courts-martial; Mitchell v. Steelman, 8 Cal. 372, holding Congress could require registration of mortgages of ships; s. c., p. 373, citing opinion of Johnson that regulating power extended to shipbuilding, carrying trade, etc.; Bullard v. N. P. R. R. Co., 10 Mont. 179, 11 L. R. A. 250, 25 Pac. 122, holding interstate commerce law of 1887 derived its authority from the regulating power in the Constitution; Kneedler v. Lane, 45 Pa. St. 278, sustaining validity of conscription act of Congress of 1863; Schollenberger v. Brinton (the Legal Tender Cases), 52 Pa. St. 61, holding Congress had power to issue treasury notes and make them legal tender; Pollard v. Hagan, 3 How. 229, 11 L. Ed. 574, holding the regulating power did not confer on the United States any rights over the shores of navigable waters; Kentucky etc. Br. Co. v. Louisville & N. R. R., 37 Fed. 624, 2 L. R. A. 327, holding the commerce act of 1886 was not intended to interfere with private contracts between common carriers not in conflict with the law; dissenting opinion in Lee Bowman v. Chicago R. R. Co., 125 U. S. 530, 31 L. Ed. 719, 8 Sup. Ct. 712, majority holding that a State law prohibiting importation of liquor without a certificate was void; The Chusan, 2 Story, 466, Fed. Cas. 2717, holding a State could not legislate so as to supply what was not actually occupied by congressional legislation; Lin Sing v. Washburn, 20 Cal. 566, holding State law of 1862 against importation of Chinese labor unconstitutional; C. R. L. Co. v. Patterson, 33 Cal. 340, holding law granting county supervisors right to collect toll for floating lumber down the Carson river unconstitutional; Council Bluffs v. K. C. etc. R. R. Co., 45 Iowa, 349, 24 Am. Rep. 779, holding statute of 1872 imposing certain duties on railroad companies terminating at Council Bluffs void as an interference with regulations enacted by Congress; Carton & Co. v. Illinois Cent. R. R. Co., 59 Iowa, 151, 44 Am. Rep. 674, 13 N. W. 68, holding

if State law of 1874 contemplated the fixing of rates on shipments to other States, it was void; Wood v. Stockwell, 55 Me. 82, holding State had no power to interfere with act of Congress requiring registration of conveyances of ships; The Wharf Case, 3 Bland, 374, 375, holding State law authorizing wharfage dues on articles other than productions of State void; People v. Brooks, 4 Denio, 479, holding that when subject of legislation had been acted on by Congress it is placed beyond State control; State v. Scott, 98 Tenn. 259, **36 L. R. A.** 432, 39 S. W. 2, soliciting orders for pictures to be enlarged outside the State is interstate commerce and State law imposing a tax on persons other than photographers of the State, engaged in such business, void. But State power of legislation has been affirmed in Crow v. State, 14 Mo. 305, as to internal taxation. By analogy the principle has been further applied to municipal ordinances in the following cases: Osborne v. Mobile, 44 Ala. 498, holding a municipal tax on an express company was not a tax to regulate commerce; State v. Thomas, 102 Mo. 90, 14 S. W. 109, a municipal ordinance authorizing the ordering of a special election to fill vacancies in an elective office before the end of the official term; State v. Schweickardt, 109 Mo. 509, 19 S. W. 51, to the power given to the city of St. Louis to regulate its parks. See also Passenger Cases, 7 How. 394, **12 L. Ed.** 749, where the rule is cited approvingly in general discussion.

Distinguished in dissenting opinion in Chicago etc. Ry. Co. v. Gildersleeve, 219 Mo. 198, 199, **16 Ann. Cas.** 749, 118 S. W. 95, majority holding void statute limiting power of Circuit Court to punish for contempt.

Power of Congress comprehends navigation within limits of every State so far as it is connected with commerce with foreign nations, or among the States or with Indian tribes.

Approved in Monongahela Bridge Co. v. United States, 216 U. S. 192, **54 L. Ed.** 441, 30 Sup. Ct. 368, upholding act of 1899, empowering Secretary of War to require changes in bridges over navigable streams; United States v. Louisville Bridge Co., 233 Fed. 277, 280, holding Congress could require removal of bridge which impeded navigation of river; Greenleaf Johnson Lumber Co. v. United States, 204 Fed. 492, 496, holding Secretary of War in widening river channel could destroy piers built by authority of State; International Transit Co. v. Sault Ste. Marie, 194 Fed. 525, holding city could not impose license tax on ferry crossing international boundary.

Approved in United States v. Union Bridge Co., 143 Fed. 386, 391, upholding 30 Stat. 1153, requiring alteration of bridges over navigable waters on determination of Secretary of War; dissenting opinion in Howard v. Illinois Central R. Co., 207 U. S. 531, **52 L. Ed.** 323, 28 Sup. Ct. 141, majority holding Employers' Liability Act exceeded powers of Congress over commerce; In re Debs, 158 U. S. 590, **39 L. Ed.** 1104, 15 Sup. Ct. 908, as asserting the control of Congress over inland waters and applying the rule to right to remove obstructions to commerce on railways; The Daniel

Ball, Brown Adm., 199, Fed. Cas. 3564, holding power of Congress controlled the commodity and means of its transportation from point of shipment to destination; The General Cass, Brown Adm. 339, Fed. Cas. 5307, holding that admiralty jurisdiction extended to vessels of all classes, whether licensed or not, if engaged in business of commerce; The Martha Washington, 3 Ware, 249, Fed. Cas. 9148, holding regulating power extended to instruments of commerce, but doubting if it could regulate the mode of transfer of ships; United States v. Debs, 64 Fed. 749, holding that "commerce" in anti-trust statute of 1890 is not synonymous with "trade," but has same signification as in Constitution.

State inspection laws are not passed by virtue of power to regulate commerce, though they may have an influence on commerce.

Approved in Sligh v. Kirkwood, 237 U. S. 60, **59 L. Ed. 838**, 35 Sup. Ct. 501, holding State could prohibit shipment of fruits unfit for consumption; Simpson v. Shepard, 230 U. S. 408, **Ann. Cas. 1916A, 18, 57 L. Ed. 1545**, 33 Sup. Ct. 729, holding State could adopt protective measures relating to commerce affecting safety, health, morals and welfare of people; Asbell v. State of Kansas, 209 U. S. 255, **14 Ann. Cas. 1101, 52 L. Ed. 780**, 28 Sup. Ct. 485, holding State could prohibit bringing in of diseased cattle; St. Clair Co. v. Interstate Transfer Co., 192 U. S. 460, 462, 463, **48 L. Ed. 522**, 24 Sup. Ct. 301, 302, 303, holding county cannot recover penalty for carrying on, without ferry license, transportation of cars across Mississippi River between Illinois and Missouri; Reid v. Colorado, 187 U. S. 147, **47 L. Ed. 114**, 23 Sup. Ct. 96, 97, holding Colo. Sess. Laws 1885, p. 335, prohibiting importation of cattle from south of thirty-sixth parallel of latitude between certain dates, unless kept for nineteen days in some place north, is not unconstitutional; Pabst Brewing Co. v. Crenshaw, 120 Fed. 154, holding Sess. Laws 1899, p. 228 (Mo.), relating to inspection of beer and other malt liquors, has no application where the beer is shipped through the State, or where it is placed in warehouse until it may be distributed beyond limits of State; Southern Express Co. v. State, 188 Ala. 467, 66 South. 120, holding prohibition acts of 1909 covered all liquors which no person can have in possession; Corporation of Georgetown v. Davidson, 6 D. C. 287, holding city ordinance for inspection of flour did not apply to flour in transit through city; Armour & Co. v. City Council, 134 Ga. 181, **27 L. R. A. (N. S.) 676**, 67 S. E. 418, holding city ordinance prescribing duties of packing-house inspector void as unlawful interference with interstate commerce; State v. Butterfield Livestock Co., 17 Idaho, 446, **134 Am. St. Rep. 263, 26 L. R. A. (N. S.) 1224**, 106 Pac. 457, holding void statute imposing grazing license fee on sheep entering State; State v. Bixman, 162 Mo. 27, 62 S. W. 833, holding act of May 4, 1899 (Laws 1899, p. 228), Mo., relating to inspection of beer is valid; Ames v. Kirby, 71 N. J. L. 445, 59 Atl. 559, anti-poolselling act of 1898 is violated by making wagers by telegraph with persons outside State, though latter be not violating own local laws in accepting bets; Territory v. Denver etc. R. R. Co., 12 N. M. 433, **78 Pac. 76**,

upholding hide inspection act of 1901; St. Louis Southwestern Ry. Co. v. Arkansas etc. Grain Co., 42 Tex. Civ. 129, 95 S. W. 658, upholding State law requiring carriers to dispose of unclaimed freight, though from outside State; St. Louis S. Ry. Co. v. Smith, 20 Tex. Civ. 459, 49 S. W. 631, holding Rev. Stats. 1895, tit. 102, c. 7 (Tex.), giving sanitary commission authority to prohibit importation of cattle on the ground of infectious disease, is not unconstitutional on the ground that it is interference with interstate commerce; Hagan v. City of Richmond, 104 Va. 732, 3 L. R. A. (N. S.) 1120, 52 S. E. 389, construing 30 Stats. 1154, § 19, relating to removal of obstructions in navigable waters by Secretary of War; McDermott v. State, 143 Wis. 37, 21 Ann. Cas. 1315, 126 N. W. 893, holding statute of 1907, relating to mixture of syrups without branding, was proper exercise of powers of State; Turner v. Maryland, 107 U. S. 50, 51, 27 L. Ed. 375, 2 Sup. Ct. 54, 55, holding that statute of Maryland relating to inspection of tobacco before exportation was constitutional; s. c., p. 54, 27 L. Ed. 376, 2 Sup. Ct. 57, holding all such laws are subject to the revision and control of Congress; Bowman v. Chicago R. R. Co., 125 U. S. 488, 31 L. Ed. 708, 8 Sup. Ct. 700, holding that a State law prohibiting importation of liquor without a certificate that consignee was a licensed dealer was not an inspection law, but a regulation of commerce and unlawful; Leisy v. Hardin, 135 U. S. 113, 34 L. Ed. 134, 10 Sup. Ct. 685, holding a State law prohibiting sale of imported liquors by the importer except in unbroken packages void; Voight v. Wright, 141 U. S. 65, 35 L. Ed. 639, 11 Sup. Ct. 856, holding State law of Virginia requiring inspection of imported flour void as discriminating in favor of home-made flour; Patapsco Guano Co. v. North Carolina, 171 U. S. 356, 43 L. Ed. 195, 18 Sup. Ct. 866, sustaining State law for the inspection of fertilizers imposing a charge per ton to defray costs of inspection; New York v. Compagnie Gen. Transatlantique, 20 Blatchf. 303, 10 Fed. 362, holding State laws for inspection of alien immigrants not inspection laws in sense of the Constitution; United States v. Bain, 3 Hughes, 604, Fed. Cas. 14,496, classing inspection laws among the subjects of legislation left to State control; In re Wong Yung Quy, 6 Sawy. 447, 2 Fed. 629, holding statute of California relating to disinterment and removal of Chinese corpses not in conflict with national Constitution; Corfield v. Coryell, 4 Wash. C. C. 380, Fed. Cas. 3230, holding, by analogy, that New Jersey oyster law of 1820 was constitutional; Neilson v. Garza, 2 Woods, 290, Fed. Cas. 10,091, holding inspection laws of Texas of 1871-74 constitutional; Swift v. Sutphin, 39 Fed. 637, holding Minnesota statute, effect of which was to prohibit importation of any fresh meat, violative of the Constitution; In re Barber, 39 Fed. 650, holding Indian statute, in effect prohibiting import of dressed meat, unconstitutional; United States v. Boyer, 85 Fed. 435, holding that congressional law for inspection, before slaughter, of animals intended for export not within constitutional power to regulate commerce; State v. Coal Co., 41 La. Ann. 471, 6 South. 223, holding that as regards inspection laws, quantity was as legitimate subject as quality; Turner v. State, 55 Md. 264,

holding State could regulate dimensions of packages, require their delivery at State warehouses for inspection and impose charges to cover the cost of inspection; Moore v. State, 48 Miss. 170, commenting on quarantine and police powers of State, court holding the State could legislate to prohibit lotteries; Scott v. Wilson, 3 N. H. 327, State law to prevent damage from floating timber loose down Connecticut River did not affect to regulate commerce; Smith v. State, 100 Tenn. 499, **41 L. R. A. 434**, 46 S. W. 568, sustaining State law for separate railroad accommodation for white and colored races as valid police regulation; St. Louis etc. Ry. Co. v. Smith, 49 S. W. 631, upholding State inspection was respecting importation of diseased cattle.

Distinguished in United States v. Shauver, 214 Fed. 161, holding act of 1913 protecting migratory birds not sustainable as exercise of power to regulate commerce; Railroad etc. Co. v. Board of Health, 36 La. Ann. 668, showing that State law imposing fees for quarantine inspection do not come within the definition of inspection laws in the principal case.

Power to regulate weights and measures. Note, **70 Am. Dec. 154.**

Quarantine and health laws and regulations. Note, **47 Am. St. Rep. 534, 537.**

Quarantine regulations. Note, **26 L. R. A. 484.**

States may enact pilotage laws within own limits, subject to power of Congress to legislate; but Congress cannot delegate its legislative powers to State.

Approved in St. Clair County v. Interstate Car-Transfer Co., 109 Fed. 743, holding State has no power to exact a license for operating a ferry between two States, when corporation ferry is resident and taxpayer of another State, and the only property of the corporation in the State attempting to impose the license is the ferry slip and facilities; State v. United States Express Co., 164 Iowa, 133, 145 N. W. 459, holding Webb-Kenyon act was permissive in character and adoptive of laws of State and not invalid as delegation of power of Congress to State; State v. Leech, 119 La. 526, **129 Am. St. Rep. 336**, 44 South. 287, holding State could not, under pilot licensing act of 1837, license pilots for vessels plying on waters of river within another State; Wilson v. McNamee, 102 U. S. 574, **26 L. Ed. 235**, as to the pilot laws of New York; The Wave v. Hyer, 2 Paine, 144, Fed. Cas. 17,300, as to act of Congress adopting New York State law relating to pilots, holding Congress had still power to legislate on the entire subject; The Glencarne, 7 Sawy. 202, 7 Fed. 607, Oregon pilot laws valid until superseded by Congress; The Clymene, 9 Fed. 167, act of Congress of March, 1837, to prevent conflicts under the pilotage laws of Delaware and Pennsylvania; The Chase, 14 Fed. 855, law conferring on local boards power to fix pilotage rates, valid as exercise of original State power; Commissioners of Pilotage v. Steamboat Cuba, 28 Ala. 198, law requiring steamboat owners to file statement of name and

owners of boats; Low v. Commissioners of Pilotage, Charlt. (Ga.) 314, act authorizing city of Savannah to elect commissioners of pilotage; Thompson v. Spraigue, 69 Ga. 421, pilotage clauses in Georgia code valid except as to one clause repugnant to act of Congress; Hobart v. Drogan, 10 Pet. 120, 9 L. Ed. 368, holding rule did not apply to legislation as to salvage; dissenting opinion in Cooley v. Wardens of Philadelphia, 12 How. 321, 13 L. Ed. 1006, majority holding State pilotage law constitutional.

Liability of vessel or owner for compulsory pilotage fees. Note, 39 L. R. A. 180.

Power to regulate implies full power over thing to be regulated, and excludes action of all others that would perform same operation on same thing.

Approved in State v. Shepherd, 177 Mo. 236, 76 S. W. 88, holding Rev. Stats. 1899, § 1616, authorizing courts of record to punish, as for criminal contempt, persons guilty of specified acts and no other is void; Southern Express Co. v. Goldberg, 101 Va. 621, 44 S. E. 894, holding Code 1887, § 1215, in so far as it undertakes to fix charges to be received within State by interstate carriers, is void; dissenting opinion in The Queen, 186 Fed. 736, 108 C. C. A. 595, majority holding State could not levy pilotage charges on vessels to or from Puget Sound ports in charge of pilots licensed by United States; Cherokee Nation v. Georgia, 5 Pet. 44, 8 L. Ed. 40, applying principle to power of Congress to make regulations and rules respecting United States territory; dissenting opinion in Passenger Cases, 7 How. 555, 12 L. Ed. 816, discussing and reviewing authorities; United States v. New Bedford Bridge, 1 Wood. & M. 430, Fed. Cas. 15,867, collecting cases on question of exclusive power of Congress, doubting that silence of Congress was equivalent to a prohibition.

Distinguished in Scott v. Wilson, 3 N. H. 325, as inapplicable to a State law respecting the floating of timber loose down the Connecticut River.

Validity of legislative grant of exclusive control over navigable stream. Note, Ann. Cas. 1915D, 70.

Right of intercourse between States derives its source from those laws whose authority is acknowledged by civilized man throughout world. The Constitution gave to Congress the power to regulate it.

Approved in Dooley v. United States, 183 U. S. 170, 46 L. Ed. 136, 22 Sup. Ct. 70, holding tax imposed upon goods imported into Porto Rico from New York, under 31 Stats. at Large, 77, c. 191, is not an export duty under United States Const., art. I, § 9; United States v. Cruikshank, 92 U. S. 551, 23 L. Ed. 591, to right of public meeting for lawful purpose; dissenting opinion in Bowman v. Chicago Ry. Co., 125 U. S. 519, 520, 31 L. Ed. 719, 8 Sup. Ct. 711, 712, holding that free interstate commercial intercourse existed by virtue of Constitution, but Congress could not so regulate it as to prevent the reasonable exercise of the powers reserved to the States.

Regulation of commerce includes vessels engaged in carrying passengers as well as those carrying merchandise.

Approved in New York Cent. etc. R. Co. v. Board of Chosen Freeholders, 74 N. J. L. 368, 65 Atl. 861, holding passenger ferry between States was engaged in interstate commerce; dissenting opinion in City of New York v. Miln, 11 Pet. 154, 155, **9 L. Ed. 669**, majority upholding New York law requiring master of vessel to make report as to passengers; Passenger Cases, 7 How. 401, 479, **12 L. Ed. 751, 784**, as now not an open question; s. c., p. 566, **12 L. Ed. 821**, as instance of use of legitimate authority by Congress; Hall v. De Cuir, 95 U. S. 491, **24 L. Ed. 549**, in case of Louisiana statute; United States v. Burlington etc. Ferry Co., 21 Fed. 335, holding a ferry-boat on navigable water plying between ports of same State was within admiralty jurisdiction and subject to navigation laws of Congress; United States v. The Ohio, 27 Fed. Cas. 226, holding that a boat having no motive power of its own is not a vessel within the law for enrolling and licensing ships engaged in the coasting trade; Hanson v. Eichstaedt, 69 Wis. 546, 35 N. W. 33, applying principle to use of State office of register of deeds by all persons.

State jurisdiction in regard to vessels. Note, **62 Am. Dec. 238, 239.**

Enrollment confers national character on vessels designed for coasting trade; registration like as to vessels designed for foreign trade.

Cited in The Mohawk, 3 Wall. 571, **18 L. Ed. 68**, holding that under the act of March 2, 1831, it was equivalent to both enrollment and registration and subjected enrolled vessels to the penalties attaching to registered ones; Morgan v. Parham, 16 Wall. 475, **21 L. Ed. 304**, that it did not subject a vessel to State taxation when registered and owned in another State; Howell v. State, 3 Gill, 19, holding it did not prevent State taxing share of a vessel licensed for coasting trade owned by resident of a State; Steamboat Co. v. Livingston, 3 Cow. 727, 738, in general discussion of points decided in principal case as to the extent of the license, holding that it gave full power to navigate the waters of the United States for the purpose of the coasting trade; Bradshaw v. The Sylph, 3 Fed. Cas. 1178, holding that vessels enjoyed common character in all American ports regardless of owner's domicile; Lawrence v. Hodges, 92 N. C. 677, **53 Am. Rep. 440**, that it and license conferred national character wherever the ship might go and however engaged; Hall v. De Cuir, 95 U. S. 498, 513, **24 L. Ed. 551, 556**, holding that vessels carrying passengers are equally under the control of Congress; and in Belden v. Chase, 150 U. S. 697, **37 L. Ed. 1226**, 14 Sup. Ct. 271, holding that steam pleasure yacht was an ocean-going steamer, not a coaster.

License under act of Congress for regulating coasting trade gives a permission to carry on that trade.

Approved in Ryman Steamboat Line Co. v. Commonwealth, 125 Ky. 258, **10 L. R. A. (N. S.) 1187**, 101 S. W. 403, holding steamboat company licensed

to ply on navigable stream was not subject to State statute requiring filing with Secretary of State designation of agent and place of business; New York etc. R. Co. v. Board of Chosen Freeholders, 76 N. J. L. 673, 16 Ann. Cas. 858, 74 Atl. 957, holding right of State to fix ferry rates across boundary stream not denied by later decisions of United States Supreme Court.

Applied in following cases, in which effect of the license in exempting the vessel from attempted control and taxation by States and municipalities has been affirmed: Sinnot v. Davenport, 22 How. 239, 241, 16 L. Ed. 246, 247, as to State law requiring registration of vessels holding coasting licenses; State Tonnage Cases, 12 Wall. 215, 20 L. Ed. 374, as to law to impose tonnage duty on steam and sailing boats; Hall v. De Cuir, 95 U. S. 495, 24 L. Ed. 550, as to a passenger vessel licensed for coasting trade; Moran v. New Orleans, 112 U. S. 72, 28 L. Ed. 654, 5 Sup. Ct. 39, as to municipal ordinance imposing license tax on tow boats running between Gulf of Mexico and New Orleans; Harman v. Chicago, 147 U. S. 405, 37 L. Ed. 220, 13 Sup. Ct. 309, as to municipal ordinance imposing license tax on vessels licensed under Revised Statutes, section 4311; Philadelphia etc. Tow Boat Co. v. Philadelphia, W. & B. R. R. Co., 19 Fed. Cas. 475, as to Maryland Sunday law unless engaged in towing between ports of the State; dissenting opinion in Chilvers v. People, 11 Mich. 53, arguing that licensed vessel could not be subjected to municipal tax as a ferry-boat from Detroit to Canada. But in the following cases the license was held not to confer exemption: Transportation Co. v. Parkersburg, 107 U. S. 705, 27 L. Ed. 589, 2 Sup. Ct. 743, as to State law imposing a wharfage tax; San Francisco v. Cal. S. N. Co., 10 Cal. 507, holding that vessels plying on rivers were engaged in coasting trade and were subject to statutory harbor dues under State law.

The same ruling has also been cited and applied in the following cases: The James Morrison, Newb. 251, 252, 254, 255, Fed. Cas. 15,465, and The William Pope, Newb. 259, 260, Fed. Cas. 16,703, holding that ferry-boat wholly in State was not engaged in coasting trade and did not require Federal license; United States v. New Bedford Bridge, 1 Wood. & M. 498, Fed. Cas. 15,867, holding that bridge constructed under State law was not crime against the Federal licensing acts without a constitutional provision or law of Congress; City of New York v. Independent Steamboat Co., 22 Fed. 802, holding question of extent of license was not involved in alleged infringement of exclusive ferry rights under a State franchise; Ravesies v. United States, 37 Fed. 447, holding a vessel engaged in the carrying trade on a navigable river was engaged in the coastwise trade and subject to act of June 19, 1886; dissenting opinion in Steamboat Co. v. Livingston, 3 Cow. 750, holding that principal case had decided that the commerce subject to control of Congress was the coasting trade which included the transportation of passengers.

Taxes may be levied both by Congress and States upon same subject so long as object of tax is within power of taxing authority.

Approved in Day v. Buffington, 3 Cliff. 386, Fed. Cas. 3675, holding salary of a judge paid by State could not be taxed as income under national internal revenue law; State v. Garton, 32 Ind. 7, 9, **2 Am. Rep.** 319, 321, holding official bonds given to State by its officers could not be taxed by Congress; Kunzler v. Kohaus, 5 Hill, 324, holding Congress could authorize voluntary bankruptcy in laws of 1841. State taxation has been dealt with in following, in which power to tax has been denied: Ward v. Maryland, 12 Wall. 428, **20 L. Ed. 452**, as to discriminating tax on non-resident traders; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 211, 29 **L. Ed.** 164, 5 Sup. Ct. 832, on transportation of passengers and freight by steam ferry between New Jersey and Philadelphia; Crow v. State, 14 Mo. 306, 334, on merchants. In following cases, State power of taxation has been affirmed: Louisville Bridge Co. v. City of Louisville, 81 Ky. 196, as to so much of bridge over Ohio River as lay within State boundary line; Stetson v. City of Bangor, 56 Me. 286, as to shares in national banks; Ragnet v. Wade, 4 Ohio, 110, on merchants; Perry v. Torrence, 8 Ohio, 524, **32 Am. Dec. 727**, and Transportation Co. v. City of Wheeling, 9 W. Va. 181, **27 Am. Rep. 556**, as to State and municipal taxes on steamboats as property.

Corporate taxation and the commerce clause. Note, **60 L. R. A. 642, 647, 648.**

Power to levy duties on imports and exports is a branch of taxing power not of commerce power, and States cannot levy tonnage duties without consent of Congress.

Approved in Ex parte Eaglesfield, 180 Fed. 561, 563, holding cargo in interstate commerce not subject to State tax; Commonwealth v. Lee Line Co., 159 Ky. 480, 167 S. W. 411, holding foreign corporation engaged in commerce on navigable water not subject to State franchise tax; Passenger Cases, 7 How. 501, 502, 549, 554, **12 L. Ed. 794, 814, 816**, holding that passenger tax on the master of a ship is not an import duty unless passengers are imports; State Tonnage Cases, 12 Wall. 214, **20 L. Ed. 373**, holding ships may be taxed as property; Transportation Co. v. Wheeling, 99 U. S. 282, 285, **25 L. Ed. 416**, holding steamboats plying on navigable river are liable to taxation by city which is their home port; Wiggins Ferry v. East St. Louis, 107 U. S. 374, **27 L. Ed. 423**, 2 Sup. Ct. 264, sustaining license tax on ferry-boats; The North Cape, 6 Biss. 510, Fed. Cas. 10,316, sustaining municipal tax on vessel owned in city, not being tonnage tax; Peete v. Morgan, 19 Wall. 583, **22 L. Ed. 202**, holding void State tax by way of tonnage to provide cost of carrying out valid State quarantine law; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 211, **29 L. Ed. 164**, 5 Sup. Ct. 832, holding void tax imposed on transportation on ferry between States; United States v. New Bedford Bridge, 1

Wood. & M. 502, Fed. Cas. 15,867, holding void imposition of tonnage duties by State; Lott v. Morgan, 41 Ala. 250, as to tonnage tax on vessels plying in navigable waters of the State (law of 1866); Sipe v. Murphy, 49 Ohio St. 546, 17 L. R. A. 187, 31 N. E. 887, holding void license tax on auction sale of goods imported for such sale; Johnson v. Drummond, 20 Gratt. 422, holding void duty on oysters under law of 1866, because it was in fact a tonnage duty; People v. Walling, 53 Mich. 269, 18 N. W. 810, holding the terms "imports" and "exports" apply only coming from or going to foreign countries.

Distinguished in Commonwealth v. Philadelphia etc. R. R. Co., 62 Pa. St. 298, 1 Am. Rep. 409, holding that act of 1864, imposing a tonnage tax on freight carried by the railroad was in no way a levy of duties on imports, but a tax for revenue.

First clause of section 9 of Constitution enables Congress to impose poll tax on all immigrants; Congress may prohibit where States permit, but cannot permit where States prohibit.

Denied in Passenger Cases, 7 How. 540, 12 L. Ed. 810, pointing out that section was one of limitation of power rather than of grant and seemed to refer only to slaves.

Licensing acts are universally restraining acts.

Cited in dissenting opinion in Munn v. People, 69 Ill. 99, act of 1871, to regulate public warehouses, was in violation of the Bill of Rights.

In construing Constitution, words taken in natural sense, and objects for which power is conferred taken into consideration.

Approved in Weems v. United States, 217 U. S. 374, 19 Ann. Cas. 705, 54 L. Ed. 801, 30 Sup. Ct. 544, holding under eighth amendment punishment for crime should be graduated to offense; Hodges v. United States, 203 U. S. 16, 51 L. Ed. 68, 27 Sup. Ct. 6, holding under language of thirteenth, fourteenth and fifteenth amendments, no jurisdiction was given to Federal courts over charge of conspiracy, made in a State against citizens of African descent; South Carolina v. United States, 199 U. S. 449, 50 L. Ed. 265, 26 Sup. Ct. 110, United States may exact internal revenue tax from dispensing agents of State which has taken charge of liquor business; In re Aldridge, 168 Fed. 99, construing provisions of bankruptcy act relating to discharge; Pollitz v. Wabash R. Co., 167 Fed. 159, construing provision in State Constitution for increasing capital stock of corporation; State v. McGough, 118 Ala. 166, 24 South. 397, holding act February 16, 1897 (Acts 1896–97, Ala., p. 1133), authorizing appointment of district oil inspector by State auditor is repugnant to Const., art. IV, § 38; Gemmer v. State, 163 Ind. 160, 66 L. R. A. 82, 71 N. E. 482, holding void, under Const., art. VI, § 2, Acts of 1903, p. 24, c. 13, postponing election of successors to enumerated officers; Pingree v. Auditor General, 120 Mich. 99, 78 N. W. 1026, holding Pub. Acts 1881, No. 168 (Mich.), pro-

viding for the assessment of telegraph and telephone lines, is void under Const., art. XIV, § 11; State v. Western Union Telegraph Co., 111 Minn. 26, 124 N. W. 381, construing statute taxing gross earnings of telephone companies and repealing conflicting statutes; Mutual Life Ins. Co. v. Martien, 27 Mont. 440, 71 Pac. 470, holding Pol. Code, § 3940 (Mont.), providing that assessor must collect taxes is unconstitutional under article XVI, section 5, declaring duties of treasurer; State v. Cole, 38 Nev. 232, 148 Pac. 556, construing "office" as used in Constitution, article IV, section 8; State v. Harris, 74 Or. 584, 144 Pac. 112, construing provision of Constitution for recall; Kemper v. State, 63 Tex. Cr. 28, 138 S. W. 1039, construing "confrontation" and "criminal prosecution" as used in Bill of Rights; Ex parte Anderson, 46 Tex. Cr. 380, 81 S. W. 976, city court has no jurisdiction to try accused for alleged violation of State penal statute; Ex parte Heyman, 45 Tex. Cr. 540, 78 S. W. 352, construing meaning of "designate" as employed in constitutional provision for local option districts; Ex parte Coombs, alias Shirley, 38 Tex. Cr. 651, 44 S. W. 855, holding under Const. 1876, art. V, § 1, relating to judicial power of State, the legislature has no power to invest municipal courts with power concurrent with State courts; May v. Topping, 65 W. Va. 660, 64 S. E. 850, construing provision requiring Governor to communicate dissent and reasons therefor on disapproval of bill of legislature; Rasmussen v. Baker, 7 Wyo. 130, 50 Pac. 822, holding under Const. Wyo., art. VI, § 9, no person shall have to vote who shall not be able to read Constitution; dissenting opinion in State v. Smiley, 65 Kan. 287, 69 Pac. 214, majority holding "anti-trust law" (Kan.), chapter 265, Laws 1897, does not conflict with Federal Constitution; dissenting opinion in Moulton v. Scully, 111 Me. 466, 89 Atl. 961, construing referendum statute; dissenting opinion in State v. Chicago etc. R. Co., 239 Mo. 335, 143 S. W. 828, majority upholding statute requiring railroads to run one train each way per day; Rhode Island v. Massachusetts, 12 Pet. 723, 9 L. Ed. 1260, where it was held that interpretation of supreme law was confined to its obvious or necessarily implied sense; Greencastle Township v. Black, 5 Ind. 570, where court held discretion of courts in construing State Constitution was more limited than in construing statutes; Beebe v. State, 6 Ind. 528, holding that all that courts could do with statutes, noxious, but constitutional, was to chasten their harshness of construction; Smith v. Half-acre, 6 How. (Miss.) 600, that Constitution ought not to be so construed as to cripple government, and applying principle to election of State officials; Bloomer v. Todd, 3 Wash. Ter. 617, 1 L. R. A. 115, 19 Pac. 140, in denying women suffrage in territory, it was held that any power not given to Congress in Constitution, specifically or by necessary implication, did not exist at all.

The following cases apply rule with reference to State Constitutions: People v. Lynch, 51 Cal. 28, 21 Am. Rep. 687, as to separation of legislative and judicial powers in California Constitution; Thomason v. Ruggles,

69 Cal. 474, 11 Pac. 25, and Oakland Paving Co. v. Hilton, 69 Cal. 492, 11 Pac. 9, as to provision requiring entry on journals of proposed constitutional amendment; Alexander v. People, 7 Colo. 165, 2 Pac. 899, where it was held that when Constitution fixed lowest limit, legislature might act without restriction in ascending scale; People v. Hatch, 33 Ill. 137, holding that Governor must be allowed whole time given by the Constitution for signing bills; Hills v. Chicago, 60 Ill. 90, as to persons to make sales for delinquent taxes under Illinois Constitution; Lafayette, M. & B. R. R. Co. v. Geiger, 34 Ind. 203, as to power of municipal corporations to subscribe for railroad stock; Cory v. Carter, 48 Ind. 338, 17 Am. Rep. 745, sustaining a provision for the separate education of colored children; Robertson v. State, 109 Ind. 129, 10 N. E. 606, holding that under State Constitution jurisdiction of contest for lieutenant-governor vested wholly in general assembly; dissenting opinion in Opinions of Justices, 62 Me. 606, that State Constitution contained no inhibition against females holding office; Murphy and Glover Test Oath Cases, 41 Mo. 373, to oath of loyalty prescribed by the Constitution of Missouri, holding it contrary to the national Constitution; dissenting opinion in State v. County Court, 50 Mo. 329, interpreting provision for establishment of inferior courts of law; Hale v. Everett, 53 N. H. 125, 16 Am. Rep. 182, interpreting the Constitution on the question of support of religious societies; Attorney General v. Taggart, 66 N. H. 365, 366, 25 L. R. A. 614, 615, 29 Atl. 1029, respecting question of vacancy in office of Governor; People v. New York Cent. R. R. Co., 24 N. Y. 487, in discussing bearing of Constitution on the law dealing with the State canal revenues; Metropolitan Bank v. Van Dyck, 27 N. Y. 412, 413, in general discussion as to powers of Congress under Constitution; Wenzler v. People, 58 N. Y. 520, construing clause in State Constitution on election of justices of peace; People v. Carr, 100 N. Y. 242, 53 Am. Rep. 165, 3 N. E. 84, and People v. Wemple, 115 N. Y. 308, 22 N. E. 273, as to limit of age for holding judicial office; dissenting opinion in Home Ins. Co. v. Taxing District, 4 Lea, 654, that implied repeals were forbidden in Tennessee; Farinholt v. Luckhard, 90 Va. 937, 44 Am. St. Rep. 954, 21 S. E. 817, as to homestead exemption, and holding that mail carrier was laboring man; Cincinnati & O. R. R. Co. v. Miller, 19 W. Va. 419, arguing in interpreting inhibition against exempting property from taxation; State v. Cottrill, 31 W. Va. 191, 6 S. E. 443, as to trial of crimes and misdemeanors by jury; State v. McGough, 24 South. 397, refusing to follow any refined rules of interpretation where language was plain; Coombs v. State, 44 S. W. 855, construing provision as to establishment of courts by the legislature.

The rule has been cited and applied in construing and considering validity of acts of Congress and State enactments, as follows: Kidd v. Pearson, 128 U. S. 20, 32 L. Ed. 350, 9 Sup. Ct. 10, the Kansas prohibition law; dissenting opinion in United States v. E. C. Knight & Co., 156 U. S. 19, 39 L. Ed. 332, 15 Sup. Ct. 256, arguing that anti-monopoly act of 1890

extended to manufacturers of necessary of life; Pollock v. Farmers' L. & T. Co., 158 U. S. 618, 39 L. Ed. 1119, 15 Sup. Ct. 913, as to meaning of "direct taxes," and holding the income tax act of 1894 void; Ex rel. Hobbs, 1 Woods, 542, Fed. Cas. 6550, the provisions of Georgia code as to intermixed marriages; In re Irwine, 13 Fed. Cas. 130, as to bankruptcy law of 1841; Clayton v. Berry, 27 Ark. 132, act appropriating money to pay militia claims; People v. Weller, 11 Cal. 86, law concerning election of district judges; Frieszleben v. Shallcross, 9 Houst. 107, 8 L. R. A. 356, 19 Atl. 595, sustaining act making right to vote dependent on payment of taxes; Wellborn v. Estes, 70 Ga. 397, code provisions as to election of judges; Indiana Central R. R. Co. v. Bradley, 7 Ind. 49, statute on the jurisdiction of common-law courts when title to land was directly called in question; Waldo v. Wallace, 12 Ind. 587, on question whether statute conferring judicial powers on mayor of city was constitutional; dissenting opinion in State v. Young, 47 Ind. 157, discussing constitutionality of liquor law of 1873, as affected by its title; Sibley v. Smith, 2 Mich. 492, as to the statute relating to sale of lands for taxes; George v. Concord, 45 N. H. 439, and Metropolitan Bank v. Van Dyck, 27 N. Y. 449, holding that act of Congress of 1862, making United States notes legal tender, was constitutional; Shollenberger v. Brinton (the Legal Tender Cases), 52 Pa. St. 89, on same act of 1862, that it did not apply to contracts to pay coin; Kunzler v. Kohans, 5 Hill, 324, and Sackett v. Andross, 5 Hill, 354, in considering voluntary provisions of the bankruptcy act of 1841; Newell v. People, 7 N. Y. 98, 109, 118, 119, construing Erie canal act of 1851, and holding same unconstitutional; Kneedler v. Lane, 45 Pa. St. 312, in favor of conscription act of Congress of 1863; Stockton v. Montgomery, Dall. (Tex.) 475, as to act of 1841, constituting territory of Ward; Ex parte Rodriguez, 39 Tex. 776, deciding section 12 of the election law of 1873 was unconstitutional; dissenting opinion in Henderson v. Beaton, 52 Tex. 42, arguing against constitutionality of act of 1879, creating a commission of arbitration and award; State v. Duket, 90 Wis. 280, 48 Am. St. Rep. 933, 31 L. R. A. 521, 63 N. W. 86, statute making a sentence of imprisonment for life an absolute dissolution of marriage constitutional; Russie v. Brazzell, 128 Mo. 109, 49 Am. St. Rep. 551, 30 S. W. 530, construing provision in Constitution of religious society as to method of changing the Constitution.

A limitation of a power argues the existence of that power, and an exception from a power marks its extent.

Approved in United States v. Board of Commissioners, 216 Fed. 885, 133 C. C. A. 87, holding provision of act of June 28, 1906, exempting surplus Indian lands from taxation for three years implied they were taxable thereafter; United States v. First Nat. Bank, 190 Fed. 341, applying rule to section 239, Criminal Code; Deitch v. Staub, 115 Fed. 314, holding where a void Tennessee corporation charter is made valid by act March 23, 1883, with all powers prescribed by Acts 1875, c. 142, by making application

for amended charter, provided action had not been commenced for revocation thereof, the fact that the application for amendment referred to section of act of 1875, without specifying powers, was but an irregularity, and did not affect amendment; Tognazzini v. Jordan, 165 Cal. 23, Ann. Cas. 1914C, 665, 130 Pac. 881, construing statute relating to amendment of articles of incorporation; Tulsa St. Ry. Co. v. Oklahoma Union Traction Co., 27 Okl. 350, 113 Pac. 184, construing grant of franchise to operate street railway; Ex parte Young, 36 Or. 249, 78 Am. St. Rep. 773, 59 Pac. 708, holding Hill's Ann. Laws, § 1952 (Or.), forbidding any person to persuade seaman to desert vessel, is valid, and not in conflict with Const. U. S., art. I, § 8, subd. 3; J. W. Kelly v. State, 123 Tenn. 542, 132 S. W. 200, construing statute prohibiting sale of liquors near schools. The recent cases apply the above doctrine as follows: Simpson v. Shepard, 230 U. S. 411, Ann. Cas. 1916A, 18, 57 L. Ed. 1547, 33 Sup. Ct. 729, holding State could fix rates for intrastate commerce; New York Central etc. R. Co. v. Board of Chosen Freeholders, 227 U. S. 261, 57 L. Ed. 504, 33 Sup. Ct. 129, as asserted authority for concurrent jurisdiction, but court holding Congress had exclusive power to regulate ferries over boundary streams; Keller v. United States, 213 U. S. 144, 53 L. Ed. 739, 29 Sup. Ct. 470, holding Congress could not make it felony to harbor alien prostitutes; New York v. Hesterberg, 211 U. S. 41, 53 L. Ed. 80, 29 Sup. Ct. 10, holding State could prohibit possession of game during closed season even if game were brought from outside State; Phillips v. Mobile, 208 U. S. 479, 52 L. Ed. 581, 28 Sup. Ct. 370, holding State statute imposing license on sale of beer by barrel was valid exercise of police power, though such liquors were introduced in State in original packages; Chicago etc. Ry. Co. v. Illinois, 200 U. S. 584, 50 L. Ed. 606, 26 Sup. Ct. 341, upholding Illinois farm drainage act of 1885; Jacobson v. Massachusetts, 197 U. S. 25, 49 L. Ed. 649, 25 Sup. Ct. 358, upholding Massachusetts compulsory vaccination act; Connolly v. Union Sewer Pipe Co., 184 U. S. 558, 46 L. Ed. 689, 22 Sup. Ct. 439, holding discrimination in favor of agricultural products or livestock in hands of producer, made by Illinois act of June 20, 1893, exempting them from provisions which prohibit recovery of the price of articles sold by any trust formed in restraint of trade, is void under United States Const., Fourteenth Amendment; Texas etc. Ry. Co. v. United States, 205 Fed. 382, holding State could not enforce intrastate rate for carriers so as to create unjust discrimination against competitive shippers from other States; Southern Ry. Co. v. King, 160 Fed. 337, 87 C. C. A. 284, holding State statute relating to speed of trains at crossings not void as applied to trains engaged in interstate commerce; Crescent Liquor Co. v. Platt, 148 Fed. 898, holding void, as to interstate shipments, W. Va. Act 1903, p. 130, regulating shipment and sale of liquor and providing that agent of carrier delivering liquor to one not having license or who has not ordered it for own use, deemed to be seller contrary to law; R. M. Rose Co. v. State, 133 Ga. 357, 36 L. R. A. (N. S.) 443, 65 S. E. 772, holding Penal Code, section 428, did not make it crime for citizen of

another State to solicit by mail sale of liquors in Georgia; State v. Durein, 70 Kan. 24, 80 Pac. 990, upholding statute regulating liquor traffic; State v. Chicago etc. R. Co., 239 Mo. 300, 301, 307, 143 S. W. 817, 819, holding statute requiring railroad to run at least one passenger train daily each way not void as regulating interstate commerce; State v. Martyn, 82 Neb. (225) 233, 17 Ann. Cas. 659, 23 L. R. A. (N. S.) 217, 222, 117 N. W. 722, upholding anti-pass law as proper exercise of power of State; State v. Kofines, 33 R. I. 234, 238, Ann. Cas. 1913C, 1120, 80 Atl. 441, 442, upholding statute prohibiting taking of lobsters from waters of State without license; Jewett Bros. & Jewett v. Smail, 20 S. D. 241, 105 N. W. 740, holding statute of 1905 creating food and dairy department was within power of State; Morrison v. State, 116 Tenn. 542, 95 S. W. 495, upholding as valid exercise of police power of State statute requiring separation of white and colored passengers on street-cars; Independent Tug Line v. Lake Superior Lumber & Box Co., 146 Wis. 126, 131 N. W. 410, holding contract of foreign corporation for carriage of logs from one point in State to another was subject to State laws regulating foreign corporations, though carriage was over international body of water; Hopkins v. City of Richmond, 117 Va. 714, 86 S. E. 145, holding State not forbidden to abridge privileges of its own citizens by Fourteenth Amendment; dissenting opinion in Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 625, 53 L. Ed. 362, 29 Sup. Ct. 214, majority holding State court could mandamus carrier doing interstate business to equalize switching service, though cars to be used were eventually to be engaged in interstate commerce; dissenting opinion in Lochner v. New York, 198 U. S. 73, 49 L. Ed. 948, 25 Sup. Ct. 539, majority holding void N. Y. Laws 1897, c. 415, art. VIII, § 110, limiting hours of employment in bakeries; dissenting opinion in Ex parte Blardone, 55 Tex. Cr. 198, 21 L. R. A. (N. S.) 607, 116 S. W. 1200, majority holding statute prohibiting killing and offering for sale of certain wild game was valid exercise of police power of State; dissenting opinion in Dred Scott v. Sandford, 19 How. 594, 15 L. Ed. 779, in the interpretation of State law of Missouri, conferring citizenship on negroes; Tinkham v. Tapscott, 17 N. Y. 152, applying rule to construction of act to reorganize the warden's office of port of New York; Morton v. Gordon, Dall. (Tex.) 398, holding Congress cannot limit the right of appeal; State v. Cunningham, 83 Wis. 155, 35 Am. St. Rep. 59, 17 L. R. A. 171, 53 N. W. 53, applying rule in deciding validity of apportionment act of 1892.

State legislative powers extend to everything within State not surrendered to national government, which can be best exercised by State itself.

Of the earlier cases arranged as to the subject matter, the following relate to exercise of the police power: New York v. Miln, 11 Pet. 133, 139, 141, 145, 146, 147, 9 L. Ed. 660, 662, 663, 665, 666, affirming Milne v. New York, 2 Paine, 431 Fed. Cas. 9618, as to New York statute requiring master of a vessel arriving from foreign port to report as to passengers; Holmes

v. Jennison, 14 Pet. 616, 617, 10 L. Ed. 619, 620, extradition of criminals of foreign States; s. c., p. 619, 10 L. Ed. 621, holding that no power over the internal police of a State had been surrendered to the Federal government; License Cases, 5 How. 628, 12 L. Ed. 312, holding it was conceded that States could exclude articles detrimental to public morals, safety or prosperity; Slaughter-House Cases, 16 Wall. 63, 21 L. Ed. 404, regulation of place and manner of conducting slaughter-houses; Peete v. Morgan, 19 Wall. 582, 22 L. Ed. 202, holding that quarantine powers had not been surrendered to the national government; United States v. Cruikshank, 92 U. S. 551, 23 L. Ed. 591, regulation of public meetings; Patterson v. Kentucky, 97 U. S. 503, 24 L. Ed. 1116, collecting authorities as to continued existence of police power in States, and holding that they could prevent the use of a patented article; dissenting opinion in Leisy v. Hardin, 135 U. S. 131, 132, 133, 34 L. Ed. 140, 10 Sup. Ct. 692, holding that principal case had not considered the grant of power to Congress as per se impairing the police power of a State; Plumley v. Massachusetts, 155 U. S. 479, 39 L. Ed. 229, 15 Sup. Ct. 161, a law forbidding sale of imitation articles of foods; Geer v. Connecticut, 161 U. S. 534, 40 L. Ed. 799, 16 Sup. Ct. 606, law prohibiting export of game birds; Hennington v. Georgia, 163 U. S. 308, 309, 41 L. Ed. 170, 171, 16 Sup. Ct. 1089, 1090, Georgia Sunday law forbidding running of freight trains on Sunday; Reeves v. Corning, 51 Fed. 784, Indiana law requiring vendor of patent to file copy of patent to exhibit source of title; Caldwell v. State, 1 Stew. & P. 376, 377, Alabama law extending State civil and criminal jurisdiction over the Creek nation within its limits; Magner v. People, 97 Ill. 334, law prohibiting killing of game during certain seasons; Jamieson v. Indiana etc. Gas Co., 128 Ind. 578, 12 L. R. A. 659, 28 N. E. 83, law regulating use of natural gas; State v. Fagan, 22 La. Ann. 556, statute giving company sole right to keep slaughter-house and requiring all slaughtering to be done there; Morgan's L. L. T. R. & S. Co. v. Board of Health, 36 La. Ann. 669, law as to quarantine, and imposing fees; State v. Coal Co., 41 La. Ann. 471, 6 South. 223, inspection law requiring weighing of coal where the measures of weight varied in different States; The Wharf Case, 3 Bland, 372, law enacting a system of police for a public port; Craig v. Kline, 65 Pa. St. 408, 3 Am. Rep. 642, law regulating the floating of logs on the Susquehanna River; Nixon v. Reid, 8 S. D. 514, 515, 32 L. R. A. 319, 67 N. W. 59, 60, ferry licenses; Smith v. State, 100 Tenn. 505, 41 L. R. A. 434, 435, 46 S. W. 569, law providing for separate accommodation of the white and colored races in railroad traveling; Baker v. Wise, 16 Gratt. 196, 199, 205, law providing additional protection of the slave property of citizens; Norfolk & W. R. R. Co. v. Commonwealth, 93 Va. 755, 757, 57 Am. St. Rep. 831, 832, 34 L. R. A. 107, 108, 24 S. E. 839, law prohibiting certain railway traffic on Sunday.

Cases in which legislation on the subject of the liquor traffic has also been sustained, as part of police power, are: Mugler v. Kansas, 123 U. S. 659, 31 L. Ed. 210, 8 Sup. Ct. 296, Bowman v. Chicago R. R. Co., 125 U. S.

510, **31 L. Ed. 716**, 8 Sup. Ct. 707, and In re Rahrer, 140 U. S. 556, **35 L. Ed. 574**, 11 Sup. Ct. 867, as to the Kansas prohibition law; dissenting opinion in Bowman v. Chicago R. R. Co., 125 U. S. 512, **31 L. Ed. 716**, 8 Sup. Ct. 708, State might legislate against introduction of intoxicating liquor; s. c., p. 519, **31 L. Ed. 719**, 8 Sup. Ct. 211, distinguishing the rule laid down in Brown v. Maryland, 12 Wheat. 419, **6 L. Ed. 678**, from that of the principal case; Dorman v. State, 34 Ala. 247, 248, State prohibition law of 1855–56; Hinson v. Lott, 40 Ala. 132, holding State could impose tax on foreign imported liquor after bulk was broken, and on liquor imported from another State; State v. Falker, 43 Kan. 242, **7 L. R. A. 186**, 22 Pac. 1022, law against importation and sale of liquors, whether in original packages or not; s. c., p. 247, 22 Pac. 1024, holding ruling in Bowman v. Chicago R. R. Co., 125 U. S. 482, **31 L. Ed. 706**, 8 Sup. Ct. 697, did not extend to liquor imported from another State; Tragesser v. Gray, 73 Md. 254, **25 Am. St. Rep. 590**, 9 L. R. A. 784, 20 Atl. 906, liquor law of city of Baltimore, confining licenses to citizens of United States; Commonwealth v. Kimball, 24 Pick. 363, **35 Am. Dec. 329**, law prohibiting sale of intoxicating liquor without a license; People v. Walling, 53 Mich. 269, 18 N. W. 810, law imposing tax on the wholesale importation of liquor from another State.

The following cases relate to the subjects of navigation, ferries and bridges: Passenger Cases, 7 How. 548, 556, **12 L. Ed. 813, 817**, applying rule as to State powers to regulate matters in harbors and ports; Conway v. Taylor, 1 Black, 633, **17 L. Ed. 202**, holding the authority to establish and regulate ferries belonged to the State; Gilman v. Philadelphia, 3 Wall. 725, 726, 729, **18 L. Ed. 99, 100**, holding State had power to provide for the erection of a bridge over the Schuylkill River; The Passaic Bridges, 3 Wall. 793, **16 L. Ed. 499**, showing that the decision in Willson v. Blackbird Creek, 2 Pet. 245, **7 L. Ed. 412**, did not conflict with principal case; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 377, **27 L. Ed. 424**, 2 Sup. Ct. 266, holding that ferry-boats enrolled and licensed under laws of United States were liable to State license fee; Transportation Co. v. Parkersburg, 107 U. S. 706, **27 L. Ed. 590**, 2 Sup. Ct. 744, as to validity of State laws imposing a wharfage tax; Woodman v. Kilbourn Mfg. Co., 1 Abb. (U. S.) 164, 1 Biss. 552, Fed. Cas. 17,978, holding that a partial obstruction of navigable stream, unless in conflict with Constitution or Federal enactment, was within power of State legislature; Silliman v. Hudson R. Bridge, 4 Blatchf. 403, 412, Fed. Cas. 12,852, holding New York statute authorizing construction of bridge valid, unless repugnant to Constitution or Federal law; Elizabethport etc. Ferry Co. v. United States, 5 Blatchf. 199, Fed. Cas. 4362, holding the grant of a ferry franchise belongs exclusively to the State; Silliman v. Troy etc. Bridge Co., 11 Blatchf. 286, 287, Fed. Cas. 12,853, reviewing cases and holding the State could authorize a bridge across a navigable river not interfering with interstate commerce; The James Morrison, Newb. 250, Fed. Cas. 15,465, and The William Pope, Newb. 258, 259, Fed. Cas. 16,703, holding a ferry wholly in

a State was engaged in internal commerce and not under the control of Congress; New Bedford Bridge, 1 Wood. & M. 424, Fed. Cas. 15,867, holding only States had power to legislate concerning roads and bridges used for internal commerce; City of Norwalk, 55 Fed. 107, as an instance of creation of new legal right by State authority in maritime affairs; Atkinson v. Philadelphia & T. R. R. Co., 2 Fed. Cas. 109, as to act for construction of railway bridges over a stream; Easton v. New York & L. B. R. R. Co., 8 Fed. Cas. 273, holding construction of a bridge with draws over a navigable stream within power of State legislature, when not in conflict with law of Congress; United States v. Jackson, 26 Fed. Cas. 561, holding that act of Congress of 1838, requiring licensing and inspection of steamboats, applied to all steamboats, whether engaged solely in State traffic or not; Kellogg v. Union Co., 12 Conn. 24, 25, and Thames Bank v. Lovell, 18 Conn. 510, 46 Am. Dec. 333, holding State could tax vessels passing thereon for the cost of improving navigable river; City of Savannah v. State, 4 Ga. 40, holding State can authorize construction of wharves on navigable rivers within its territorial limits; Chicago v. McGinn, 51 Ill. 273, 2 Am. Rep. 300, sustaining city ordinance regulating the time and manner of vessels passing through bridges over the Chicago River; Wiggins Ferry v. East St. Louis, 102 Ill. 572, 574, holding that municipal authorities could impose a license on the business of conducting a ferry; Keokuk v. Keokuk Northern & P. Co., 45 Iowa, 208, holding city could charge reasonable compensation for use of wharves; Newport v. Taylor, 16 B. Mon. 795, 798, holding power of Congress did not interfere with right of State to regulate ferries over the Ohio River; State v. Fullerton, 7 Rob. (La.) 217, holding the State could impose tax on persons coming by boat to New Orleans, when neither the captain, officers nor crew of the ship were charged; Master etc. of New Orleans v. The Martha J. Ward, 14 La. Ann. 289, 291, holding that State act providing for payment of fees for services of the master and warden, constitutional; Chilvers v. People, 11 Mich. 50, sustaining a municipal ordinance imposing a license for keeping a ferry over the Detroit River, although the vessel had a coasting license; Marshall v. Grimes, 41 Miss. 34, 36, holding that States had retained the power of establishing and regulating ferries; Carroll v. Campbell, 108 Mo. 564, 17 S. W. 887, holding the grant of a ferry privilege by city council, within city limits, was valid though the ferry is across a river to another State; Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 63, holding State has power to grant exclusive right to build a bridge within certain limits and to take tolls; Dover v. Portsmouth Bridge, 17 N. H. 229, holding grant of power to Congress did not operate to restrain States from erecting bridges and dams if no actual legislation of Congress was contravened; State v. Freeholders of Hudson, 23 N. J. L. 209, and Freeholders v. State, 24 N. J. L. 728, as distinctly conceding to State power to regulate ferries on its own waters; Steamboat Co. v. Livingstone, 3 Cow. 734, as to effect of decision in principal case;

People v. Babcock, 11 Wend. 591, holding right of States to license ferries within their limits was not surrendered to national government; People v. Rensselaer etc. R. R. Co., 15 Wend. 133, 30 Am. Dec. 41, and Thompson v. People, 23 Wend. 553, holding State could authorize bridge across a navigable stream with a draw to allow passage of vessels engaged in coasting trade; Langdon v. Mayor etc. of New York, 93 N. Y. 156, sustaining a grant by the city of part of its waterfront.

State power to lay taxes for internal revenue has been affirmed in the following citations: Passenger Cases, 7 How. 550, 551, 12 L. Ed. 814, as to a tax for the support of paupers; People v. Naglee, 1 Cal. 236, 52 Am. Dec. 316, holding that except as to imports, exports and tonnage, power of taxation existed in States as sovereign nations, collecting authorities; Norris v. City of Boston, 4 Met. 288, as to a law prohibiting the landing of aliens without payment of a capitation fee for the support of foreign paupers; Candler v. Mayor etc. of New York, 1 Wend. 500, sustaining a bond to indemnify the mayor, etc., of New York against cost of maintenance of foreign immigrants; Commonwealth v. Philadelphia & R. Ry. Co., 62 Pa. St. 292, 1 Am. Rep. 403, holding law of 1864, imposing a tonnage tax on transportation, valid as solely a revenue law; Ex parte Asher, 23 Tex. App. 672, 5 S. W. 96, as to a law imposing a tax on commercial travelers.

Legislation concerning railroads has been sustained in the following: Railroad Co. v. Fuller, 17 Wall. 568, 21 L. Ed. 714, Fuller v. Chicago etc. R. R. Co., 31 Iowa, 210, sustaining statute of Iowa requiring railroad companies annually to fix rates of its fares for passengers and freight as not being a regulation of interstate commerce; dissenting opinion in Wabash etc. R. R. Co. v. Illinois, 118 U. S. 584, 30 L. Ed. 252, 7 Sup. Ct. 17, States may legislate on regulation of railroads in the matter of long and short haul until Congress acted.

Other matters in which the competency of State legislation has been affirmed or discussed are dealt with in the following cases: Passenger Cases, 7 How. 546, 558, 565, 12 L. Ed. 812, 817, 820, in general discussion as to State powers relating to local taxation, quarantine, police, importation of criminals or paupers, immoral prints and books, poisons and liquors; Smith v. Maryland, 18 How. 74, 15 L. Ed. 271, State law regulating oyster dredging; dissenting opinion in Tennessee v. Davis, 100 U. S. 301, 25 L. Ed. 663, Federal courts have no jurisdiction on the removal from a State court of a trial of a revenue officer for murder committed in the course of his employment; Presser v. Illinois, 116 U. S. 268, 29 L. Ed. 620, 6 Sup. Ct. 586, State law making all citizens between eighteen and forty-five subject to military duty; Kidd v. Pearson, 128 U. S. 23, 52 L. Ed. 351, 9 Sup. Ct. 11, holding that State legislation may affect commerce without regulating it, and to that extent is lawful; Covington etc. Bridge Co. v. Kentucky, 154 U. S. 211, 38 L. Ed. 966, 14 Sup. Ct. 1089, collecting authorities on concurrent jurisdiction; Sweatt v. Boston, H. & E. R. R. Co., 3 Cliff. 352, 5 N. B. R. 248, Fed. Cas. 13,684, showing that

the States and the United States are independent sovereignties, and holding that railroad corporations are subject to control of Congress; Corfield v. Coryell, 4 Wash. C. C. 379, Fed. Cas. 3230, law of New Jersey of 1820, as to oyster fisheries; Louisville R. R. Co. v. Railroad Commission of Tennessee, 19 Fed. 713, in general discussion of powers of State to legislate as to commerce; Preston v. Finley, 72 Fed. 858, holding that newspapers were subjects of commerce; United States v. Boyer, 85 Fed. 433, holding that legislation as to completely internal commerce of a State is reserved for the State; State v. Harrub, 95 Ala. 188, **36 Am. St. Rep. 203**, **15 L. R. A. 764**, 10 South. 754, discussing limits of State power, holding that an oyster, until shelled, was not an article of interstate commerce; Green v. City of Savannah, 6 Ga. 13, holding the city could, under the State laws, regulate the planting of rice within its corporate limits; State v. Morris, 77 N. C. 516, statute of 1875, restraining disposition of property of corporation by lottery; Frasher v. State, 3 Tex. App. 274, **30 Am. Rep. 138**, holding marriage laws were the subject of State, not Federal legislation.

Applied in the following cases in which incompetency of State to legislate has been affirmed; Passenger Cases, 7 How. 396, 398, 405, 480, 503, 504, 533, 534, **12 L. Ed. 749, 750, 753, 784, 794, 795, 807**, holding States had no power to impose duties on imports or exports; s. c., p. 463, **12 L. Ed. 778**, applying the rule to attempted tax on passengers; Foster v. New Orleans, 94 U. S. 247, **24 L. Ed. 123**, holding Louisiana statute providing for survey by master and wardens of New Orleans, exclusively of ships and cargo arriving at that city, void as a regulation of commerce; Hall v. De Cuir, 95 U. S. 488, **24 L. Ed. 548**, holding act of Louisiana, requiring transportation companies to give equal rights to travelers without distinction of race or color, void, as a regulation of interstate commerce; Walling v. Michigan, 116 U. S. 455, **29 L. Ed. 694**, 6 Sup. Ct. 457, law imposing license tax on nonresident importers of liquors; dissenting opinion in United States v. Petersburg Election Judges, 1 Hughes, 507, Fed. Cas. **16,036**, saying Federal courts had only jurisdiction to protect rights accruing from citizenship of United States; Ex parte Kinney, 3 Hughes, 13, Fed. Cas. 7825, holding that privileges of citizens as of States and as of United States were separate; People v. Raymond, 34 Cal. 498, State law imposing stamp duty on passenger contracts void as a regulation of commerce; Higgins v. Lime, 130 Mass. 3, State law relating to inspection and sale of lime from State of Maine only, held unconstitutional; State v. Cutshall, 110 N. C. 549, **16 L. R. A. 133**, 15 S. E. 264, State act as to bigamous marriages held invalid; In re Booth, 3 Wis. 125, holding that Congress had no power to pass the fugitive slave act of 1850.

Distinguished in New York v. Miln, 11 Pet. 133 (134), 135 **9 L. Ed. 660, 661**, showing that State act requiring report from master of ship as to passengers, did not conflict with any act of United States and did not concerning navigation; s. c., pp. 156, 161, **9 L. Ed. 669, 671**, dissenting opinion, New York statute was, in fact, a regulation of commerce; dis-

senting opinion in Pennsylvania v. Bridge Co., 13 How. 584, 585, 586, 587, 14 L. Ed. 277, 278, majority holding that bridge constructed under State law over the Ohio River was a public nuisance; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 215, 29 L. Ed. 166, 5 Sup. Ct. 834, holding that ruling of principal case as to State right to regulate ferries was confined to ferries entirely within the State; Council Bluffs v. K. C. etc. & C. B. R. R. Co., 45 Iowa, 354, 24 Am. Rep. 783, admitting principle but holding not applicable to State law attempting to regulate interchange of traffic at Council Bluffs.

Congress, in exercising its granted powers, may use same means as State in exercising one of its reserved powers; but State act does not derive its authority from particular power granted to Congress, but from some other power remaining in State; in conflict with congressional legislation it yields to latter.

Approved in Port Richmond etc. Ferry Co. v. Board of Chosen Freeholders, 234 U. S. 327, 58 L. Ed. 1334, 34 Sup. Ct. 821, holding State could fix rates for boundary ferry, subject to power of Congress over interstate commerce; Philadelphia Co. v. Stimson, 223 U. S. 634, 56 L. Ed. 582, 32 Sup. Ct. 340, holding Secretary of War could fix harbor lines superseding those fixed by States; Chicago etc. Ry. Co. v. United States, 219 U. S. 497, 54 L. Ed. 310, 31 Sup. Ct. 272, holding under act of June 29, 1906, carriers could not accept compensation other than cash for interstate transportation; Louisville etc. R. Co. v. Mottley, 219 U. S. 480, 34 L. R. A. (N. S.) 671, 55 L. Ed. 302, 31 Sup. Ct. 265, holding after act of June 29, 1906, carrier could not issue interstate transportation pursuant to prior existing contract in compensation for injuries; Chicago etc. Ry. Co. v. State of Arkansas, 219 U. S. 463, 55 L. Ed. 295, 31 Sup. Ct. 275, holding State could make police regulations governing equipment of interstate trains in absence of legislation of Congress; Jacobson v. Massachusetts, 197 U. S. 25, 49 L. Ed. 649, 25 Sup. Ct. 358, upholding Massachusetts compulsory vaccination act; Dobbins v. Los Angeles, 195 U. S. 237, 49 L. Ed. 175, 25 Sup. Ct. 18, holding void municipal ordinance narrowing limits within which gas-works may be maintained, so as to include property purchased for that purpose; Northern Securities Co. v. United States, 193 U. S. 348, 48 L. Ed. 704, 24 Sup. Ct. 436, upholding enforcement of anti-trust act by Federal decree enjoining corporation organized in pursuance of combination of stockholders in competing interstate railroads from exercising power acquired by corporation through acquisition of stock; Montgomery v. Portland, 190 U. S. 105, 47 L. Ed. 970, 23 Sup. Ct. 737, holding extension of wharves under act of Congress beyond lines established by local law, within limits of a State ceding (75 Stats. at Large, 400, c. 860), cannot be justified; Compagnie Francaise etc. v. Board of Health. 186 U. S. 388, 46 L. Ed. 1214, 22 Sup. Ct. 815, holding La. Acts 1898, No. 192, § 8, providing State board of health may exclude healthy person from entering locality infected with contagious disease, is constitutional; Marienelli v. United

Booking Offices, 227 Fed. 169, holding right of State to tax business monopoly not dependent on whether it was subject to Sherman act; The Margaret J. Sanford, 203 Fed. 339, holding Federal statute regulating anchorage of vessels in navigable channels did not supersede State statute on same subject; Union Co. Nat. Bank v. Ozan Lumber Co., 127 Fed. 211, holding void Ark. Sess. Acts 1891, p. 296, requiring negotiable instruments taken in payment of patented article or patent right to be on printed form, and to state for what they were given, and providing that it shall apply only to dealers in patented things; Southern Express Co. v. State, 188 Ala. 471, 66 South. 121, holding State prohibition laws not in conflict with Webb-Kenyon act; People v. California Fish Co., 166 Cal. 600, 138 Pac. 89, holding right of United States to fix harbor lines did not affect power of State to regulate tide-lands and waters for navigation so long as regulations did not conflict; Western Union Tel. Co. v. Superior Court, 15 Cal. App. 687, 115 Pac. 1094, holding State statute could not affect power of foreign telegraph corporation which had complied with United States law to exercise right of eminent domain; Hoxie v. New York etc. R. Co., 82 Conn. 364, 17 Ann. Cas. 324, 73 Atl. 759, holding void act of Congress of 1908, giving remedy for death of employee of interstate railroad as attempt to change rules established by States for descent of property; Van Winkle v. State, 4 Boyce (Del.), Ann. Cas. 1916D, 104, 604, 91 Atl. 396, holding State statute prohibiting shipment of liquor to prohibition district void so far as in conflict with Webb-Kenyon act; Postal Telegraph-Cable Co. v. Mayor etc., 139 Ga. 132, Ann. Cas. 1914A, 984, 76 S. E. 747, holding city ordinance taxing telegraph companies void as unlawful interference with interstate commerce; Southern Ry. Co. v. Railroad Commission, 179 Ind. 43, 100 N. E. 344, upholding State statute relating to equipment of cars as regulation additional to and not in conflict with safety appliance act; Louisville etc. R. Co. v. Central Stockyards Co., 133 Ky. 184, 97 S. W. 791, holding statute of 1903 prohibiting discrimination by carriers was valid exercise of police power of State; Cincinnati etc. R. Co. v. Commonwealth, 126 Ky. 566, 104 S. W. 394, holding act of 1906 controlled as to shipment of liquor to point outside State, and thence to another point within State to evade State law; Allen v. Reed, 10 Okl. 123, 60 Pac. 788, holding void act of 1893, relating to change of county seats as conflicting with act of Congress; dissenting opinion in Howard v. Illinois Central R. Co., 207 U. S. 535, 52 L. Ed. 324, 28 Sup. Ct. 141, majority holding Employers' Liability Act exceeded power of Congress over commerce; dissenting opinion in Pabst Brewing Co. v. Crenshaw, 198 U. S. 39, 49 L. Ed. 934, 25 Sup. Ct. 552, majority upholding State statute imposing inspection fee on malt liquors imported into State, as being enacted within powers granted by 26 Stats. 313; New York v. Miln, 11 Pet. 137, 9 L. Ed. 662, holding, as resulting from the rule, that a State may adopt the same legislative means as Congress but must not conflict with its laws; License Cases, 5 How. 581, 582, 583, 12 L. Ed. 291, 292, holding that the principal case had ruled that States might make regulations affecting commerce subject to the control

of Congress; s. c., p. 600, **12 L. Ed. 299**, defining the limits of State and Federal powers as depending on the condition of the subject matter of the regulation; Passenger Cases, 7 How. 553, **12 L. Ed. 815**, holding that in case of conflicting legislation the State, being the granting power, must give way; Railroad Co. v. Husen, 95 U. S. 472, **24 L. Ed. 530**, holding that police power of State cannot be exercised over subject confided to Congress exclusively by the Constitution; Wisconsin v. Duluth, 96 U. S. 387, **24 L. Ed. 672**, holding that when Congress has occupied the field its action is conclusive of any right to the contrary asserted under State authority, collecting cases; Brown v. Houston, 114 U. S. 631, **29 L. Ed. 260**, 5 Sup. Ct. 1096, and Robbins v. Shelby District, 120 U. S. 493, **30 L. Ed. 696**, 7 Sup. Ct. 594, holding principle was well established that failure of Congress to legislate indicated the subject should be left free except as to matters of local concern by the States; Sawrie v. Tennessee, 82 Fed. 619, as to supremacy of congressional when in conflict with State legislation; Edwards v. Pope, 3 Scam. 470, affirming powers of State to enact general or special laws; State v. Wiley, 4 Or. 188, holding that when only part of a statute is unconstitutional that part only is void; Lake Shore etc. R. R. Co. v. Ohio, 173 U. S. 298, 299, **43 L. Ed. 707**, holding State law requiring stoppage of trains at certain places for a time sufficient to receive and let off passengers, not repugnant to Constitution in the absence of legislation by Congress. See also for general discussion of concurrent subjects of State and Federal legislation, Prigg v. Pennsylvania, 16 Pet. 655, **10 L. Ed. 1104**, License Cases, 5 How. 625, **12 L. Ed. 311**, Passenger Cases, 7 How. 552, **12 L. Ed. 815**, United States v. E. C. Knight Co., 156 U. S. 12, **39 L. Ed. 329**, 15 Sup. Ct. 253, defining limits of State and Federal jurisdiction; In re Rahrer, 140 U. S. 556, 557, **35 L. Ed. 574, 575**, 11 Sup. Ct. 867, 868, sustaining act making liquors imported into any State subject to local legislation under the police power; United States v. Addyston Pipe etc. Co., 78 Fed. 722, holding the anti-trust act could not affect any monopoly unless it directly interfered with interstate foreign commerce; Mitchell v. Steelman, 8 Cal. 372, holding act requiring recording of ships' mortgages overrode the State statute of frauds; Briggs v. Light Boats, 11 Allen, 160, holding that the establishment and regulation of lighthouses and vessels belonging exclusively to the national government; Steamboat Co. v. Livingstone, 3 Cow. 734, showing what Congress could not legislate as to vessels sailing only between ports in same State; Sinnot v. Davenport, 22 How. 242, **16 L. Ed. 247**, registration of steamboats void, being also required by act of Congress; Henderson v. Mayor of N. Y., 92 U. S. 272, **23 L. Ed. 549**, statutes of New York and Louisiana imposing a passenger tax payable by master of vessel, void; Morgan v. Louisiana, 118 U. S. 464, **30 L. Ed. 241**, 6 Sup. Ct. 1119 (see also s. c., 36 La. Ann. 668), quarantine laws valid until Congress acted; Hennington v. Georgia, 163 U. S. 314, **41 L. Ed. 173**, 16 Sup. Ct. 1092, Sunday law valid until superseded by Congress; Railroad Co. v. New York, 165 U. S. 631, **41 L. Ed. 854**, 17 Sup. Ct. 420, law regulating the heating of steam passenger cars, valid; Missouri, K. & T. R. R.

Co. v. Haber, 169 U. S. 626, 42 L. Ed. 882, 18 Sup. Ct. 493, law prohibiting importation of diseased cattle valid and not overridden by the animal industry act of 1844; In re Brown, 4 Fed. Cas. 335, 3 N. B. R. 255, holding bankrupt entitled to homestead out of land mortgaged by him to secure loan made before claim; Parrott's Chinese Case, 6 Sawy. 362, 1 Fed. 494, any provisions in Constitution or laws of California in conflict with treaty with China void, the treaty-making power having been vested in the national government; United States v. New Bedford Bridge, 1 Wood. & M. 418, Fed. Cas. 15,867, as to erection of bridge over navigable stream wholly in State, over which Congress had not legislated; Pensacola Tel. Co. v. Western U. Tel. Co., 2 Woods, 646, Fed. Cas. 10,960, Florida statute, as to exclusive power to erect telegraph lines, void as conflicting with congressional legislation; Sawrie v. Tennessee, 82 Fed. 618, law prohibiting importation for sale of cigarettes, void as regarded original packages; Williams v. The Lizzie Henderson, 29 Fed. Cas. 1374, law of Florida exempting State owned ships from half pilotage, void as in conflict with Revised Statutes, section 4237; Howell v. State, 3 Gill, 28, 30, arguendo, that there was no conflict between State law taxing share of coasting vessel owned by resident in State and act of Congress under which the vessel was licensed; Norris v. City of Boston, 4 Met. 292, law imposing capitation tax on foreign immigrants valid; Rothermel v. Meyerle, 136 Pa. St. 265, 9 L. R. A. 368, 20 Atl. 588, if law of State, imposing a discriminating license tax on residents and nonresidents of a county buying produce for export, was void as to exports from State, it remained good as to remainder.

Constitutional restraint on congressional legislation is exception from power to regulate commerce and classes migration or voluntary arrival with importation or involuntary arrivals.

Cited in Groves v. Slaughter, 15 Pet. 514, 10 L. Ed. 824, holding that Congress could prohibit importation of slaves after cesser of the term of restraint; Passenger Cases, 7 How. 490, 12 L. Ed. 789, holding that States could pass laws restricting pauper immigration (see Norris v. City of Boston, 4 Met. 288).

Object of commerce clause in Constitution was to keep commercial intercourse among States free from all invidious and partial restraints.

Cited in Mitchell v. Steelman, 8 Cal. 374, applying principle to sustain act of Congress requiring registry of ships' mortgages.

State and Federal legislation may bear upon same subject matter; if purposes are different and lead to no conflict, both may subsist concurrently.

Approved in Southern Express Co. v. State, 188 Ala. 473, 66 South. 122, holding State prohibition acts and Webb-Kenyon bill were not in conflict; Detroit etc. Ry. Co. v. State, 82 Ohio St. 72, 91 N. E. 871, holding State statute providing for automatic couplers was valid and applied to train engaged in interstate traffic; Passenger Cases, 7 How. 540, 553, 561, 12 L. Ed. 810, 815, 819, to a poll tax on passengers under New York statute;

Missouri, K. & T. Ry. Co. v. Haber, 169 U. S. 627, **42 L. Ed. 883**, 18 Sup. Ct. 494, holding Kansas law prohibiting importation of diseased cattle not in conflict with any regulation of Congress; The Wave v. Hyer, 2 Paine, 148, Fed. Cas. 17,300, holding tribunal for enforcement of a law accompanied the power to make the law; Worsley v. New Orleans, 9 Rob. (La.) 333, **41 Am. Dec. 335**, sustaining city wharfage dues for use of city wharves both on imports and exports; Cannon v. New Orleans, 27 La. Ann. 18, sustaining city ordinance imposing levy and wharfage due on all steamboats mooring or landing in port of New Orleans; Morgan etc. S. S. Co. v. Board of Health, 36 La. Ann. 669, holding State could enact quarantine laws and impose fees for carrying them into execution; but in Sawrie v. Tennessee, 82 Fed. 622, it was held that State law prohibiting importation for sale of cigarettes in original packages could not be upheld as a quarantine or inspection law.

Where cause has been remanded and State court declines to carry into effect mandate of Supreme Court, latter will proceed to final decision.

Cited as instance of final decree entered in Supreme Court in Tyler v. Magwire, 17 Wall. 291, **21 L. Ed. 586**.

Ownership of riparian owner to thread of stream. Note, **23 E. R. C. 185**.

Miscellaneous. Cited in Port Richmond etc. Ferry Co. v. Board of Chosen Freeholders, 234 U. S. 322, **58 L. Ed. 1332**, 34 Sup. Ct. 821, referring to cases cited by counsel in principal case; Hill v. City of St. Louis, 159 Mo. 171, 60 S. W. 119, holding under St. Louis city charter relating to payment for construction of sewers, the city had power to enact ordinance prohibiting connection with sewers by owners until sewer assessments were paid; Coyle v. Smith, 28 Okl. 219, 113 Pac. 983, to point that Congress alone was vested with power to admit new States, while people have only power to accept or reject proposals; dissenting opinion in Gibbs v. Gibbs, 26 Utah, 408, 73 Pac. 650, majority holding District Court of county in which plaintiff resided had jurisdiction of suit for divorce on ground of adultery committed in another county, and defendent's failure to object to venue was waiver of objection to jurisdiction; Passenger Cases, 7 How. 488, 558, **12 L. Ed. 788, 817**, showing that difference between the States on questions of import duties had mainly led to the Constitution; State Freight Tax Case, 15 Wall. 279, **21 L. Ed. 163**, apparently as authority for saying that power to regulate commerce lay exclusively with Congress; United States v. Reese, 92 U. S. 253, **23 L. Ed. 577**, as having held that it belongs to Congress to determine whether the necessity has arisen which calls for its action, collecting authorities; Hall v. De Cuir, 95 U. S. 514, **24 L. Ed. 557**, doctrines in principal case, and in Willson v. Blackbird Co., 2 Pet. 245, **7 L. Ed. 412**, entirely distinct; United States v. Harris, 106 U. S. 636, **27 L. Ed. 292**, 1 Sup. Ct. 606, saying that the United States government was one of delegated, limited and enumerated powers, and every valid act

of Congress must be warranted by the Constitution; People v. Compagnie Gen. Trans-Atlantique, 107 U. S. 61, **27 L. Ed. 384**, 2 Sup. Ct. 89, and Lake Shore etc. Ry. Co. v. Ohio, 173 U. S. 334, **43 L. Ed. 720**, referring to argument of counsel; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 661, **29 L. Ed. 520**, 6 Sup. Ct. 258, as to extent of police power; Bowman v. Chicago Ry. Co., 125 U. S. 490, **31 L. Ed. 708**, 8 Sup. Ct. 701 and Kidd v. Pearson, 128 U. S. 16, **32 L. Ed. 349**, 9 Sup. Ct. 8, in general discussion defining limit between State and Federal legislative powers, and saying the general principles were laid down in principal case; Leisy v. Hardin, 135 U. S. 125, **34 L. Ed. 138**, 10 Sup. Ct. 690, saying that when the line between State and Federal powers was defined accommodation to it could readily be found in candid co-operation for general good; United States v. E. C. Knight Co., 156 U. S. 15, **39 L. Ed. 330**, 15 Sup. Ct. 255, referred to as giving instance where State law interfered with interstate or international commerce; United States v. E. C. Knight Co., 156 U. S. 45, **39 L. Ed. 341**, 15 Sup. Ct. 266, in general discussion as to difficulties suggested in construing the Constitution; The Sloop Merchant, Abb. Adm. 8, Fed. Cas. 9434, holding an authorized regulation of the Supreme Court was complete and exclusive, inhibiting what it did not allow as well as governing what was fixed; United States v. New Bedford Bridge, 1 Wood. & M. 500, Fed. Cas. 15,867, holding that for stoppage of a navigable stream below a port of entry redress seemed obtainable both in State and Federal courts; State Lottery Co. v. Fitzpatrick, 3 Woods, 264; Fed. Cas. 8541, saying that the authority of Federal Constitution was the supreme law; Schandler Bottling Co. v. Welch, 42 Fed. 565, saying laws under the United States Constitution were supreme; United States v. Boyer, 85 Fed. 434, in general discussion; Haslett v. The Enterprise, 11 Fed. Cas. 787, holding that barge being engaged in maritime service was subject to maritime law; Van Santwood v. The J. B. Cole, 28 Fed. Cas. 1077, holding contract of affreightment subject to Federal jurisdiction whether vessel propelled by its own power or by tow; Steamboat etc. v. Richards, 9 Ind. 528, holding that State had power to create domestic lien on vessels, but that it did not extend to contracts made and broken outside the State; Kershaw v. Kelsey, 100 Mass. 577, 97 Am. Dec. 139, **1 Am. Rep. 156**, showing that commercial clause of Constitution did not affect private contract between citizen of State in rebellion and citizen of loyal State relating to matters wholly within State of former; Fifield v. Close, 15 Mich. 508, holding act of Congress imposing stamp duty on process in State courts unconstitutional; Seawell v. K. C. etc. Ry. Co., 119 Mo. 235, 24 S. W. 1004, in general discussion, as to extent of congressional powers over traffic between points in same State, but in course of transit passing out; State v. St. Louis, 145 Mo. 584, **42 L. R. A. 125**, 46 S. W. 991, separate opinion, arguendo, that city having power to regulate the use of its streets by the National Subway Company could pass ordinances providing for laying wires underground; Jack v. Martin, 14 Wend. 532, as to general laws of Congress on fugitive slaves; dissenting opinion in Boston etc. R. R. Co. v. New York etc. R. R. Co., 13 R. I. 284,

as instance of grant of exclusive privileges by State without giving power of eminent domain; Ex parte Rodriguez, 39 Tex. 767, holding that State and Federal courts had always exercised the power to determine the validity and constitutionality of laws; Ex parte Romanes, 1 Utah, 24, in considering the power of State to arrest and remove criminals; Arbenz v. Wheeling & H. R. R., 33 W. Va. 7, 5 L. R. A. 375, 10 S. E. 16, to point that every grant of power carried with it such incidental powers as were requisite to its exercise, applying rule to power of a railroad company to construct its line along a public street in a cutting. Distinguished in Morgan v. Parham, 16 Wall. 475, 21 L. Ed. 304, as not in point on a question of right of State to tax as personal property, a vessel, owned and taxed in another State, but enrolled in taxing State; Camden & A. Ry. Co. v. Briggs, 22 N. J. L. 651, as having no applicability to case of a State chartering a company to navigate its own waters; Tyack v. Bromley, 4 Edw. Ch. 273, s. c., 1 Barb. Ch. 534, holding decision did not reach the point of chancery jurisdiction to sustain by injunction a supposed valid right.

9 Wheat. 241–325, 6 L. Ed. 81, KIRK v. SMITH.

To maintain the title the possession must be adverse.

Cited in Armstrong v. Morrill, 14 Wall. 146, 20 L. Ed. 772, holding that a statute forfeiting the lands of original holder for nonpayment of taxes broke the continuity of an adverse possession; Nelson v. City of Madison, 3 Biss. 254, Fed. Cas. 10,110, applied to dedication of land for a public street, collecting and reviewing authorities; Roberts v. Pillow, 1 Hempst. 634, Fed. Cas. 11,909, and Gilmer v. Billings, 55 Fed. 778, where same principle applied to holding of corporate stock; Farmer v. Eslava, 11 Ala. 1043, holding further that such title also gives a right of entry in ejectment; Ringo v. Woodruff, 43 Ark. 485, in support of ruling that a mortgagee's right of recovery of mortgaged premises is barred by adverse possession for statutory period; Hart v. Bostwick, 14 Fla. 178, holding adverse possession good defense to ejectment; Coogler v. Rogers, 25 Fla. 877, 7 South. 395, holding that in Florida the doctrine was to be taken strictly and required clear and positive proof; Mettler v. Miller, 129 Ill. 641, 22 N. E. 532, and Dewey v. McLain, 7 Kan. 131, 12 Am. Rep. 420, holding the possession of land by a tenant for life or his vendee cannot be adverse to that of remainderman or reversioner; Maple v. Stevenson, 122 Ind. 370, 23 N. E. 854, further defining elements of adverse possession; Story v. Saunders, 8 Humph. 670, holding that possession of a tenant in common is ordinarily not adverse; Sydnor v. Palmer, 29 Wis. 252, applying rule; Pease v. Lawson, 33 Mo. 42, to effect that claim to be adverse must be under claim of title hostile to right of true owner.

A possession permissive and entirely consistent with title of another cannot bar that title.

Approved in District of Columbia v. Robinson, 180 U. S. 100, 45 L. Ed. 445, 21 Sup. Ct. 286, holding mere use of land for public highway is not

sufficient to constitute the road a highway unless the use is adverse to owner and not permissive; Southern Cal. R. Co. v. Slauson, 6 Cal. Unrep. 876, 68 Pac. 108, holding railroad going into possession of land for right of way under agreement to build stations did not hold land adversely, stations not having been built; McClenahan v. Stevenson, 118 Iowa, 110, 91 N. W. 927, holding where defendant entered into possession by permission, and correspondence showed that possession was permissive, and in order to settle their rights accepted a lease without claiming ownership, the possession was not adverse; Atchison, T. & S. F. Ry. Co. v. Conlon, 62 Kan. 421, 63 Pac. 433, holding where railroad constructed crossing over its tracks and put gates in its fences for benefit of land owner so situated, who used the same for fifteen years, the land owner was mere licensee; Jasper Tp. v. Martin, 161 Mich. 341, **137 Am. St. Rep. 508**, 126 N. W. 439, holding township entering under lease with covenant to pay rent of one dollar for time it should be used for township purposes did not hold adversely; Gates v. Sebald, 180 Mich. 583, 147 N. W. 482, holding agreement by partners on division of property to use stairway in common created easement, and neither party could gain title by adverse possession; Jennings v. Brown, 20 Okl. 302, 94 Pac. 560, holding possession under parol agreement to purchase was not adverse; Yeager v. Woodruff, 17 Utah, 369, 53 Pac. 1046, holding where lands adjoined and one owner permitted the other owner to extend a ditch over his land and take water therefrom, the right was permissive and might be revoked at any time; Crosier v. Brown, 66 W. Va. 277, **25 L. R. A. (N. S.) 174**, 66 S. E. 328, holding permissive use of easement not adverse; Meyer v. Hope, 101 Wis. 127, 77 N. W. 721, holding in ejectment, where evidence showed defendant went into possession with consent of claimant's intestate, but later mortgaged premises, and intestate witnessed same, the defendant held by hostile title; N. O. etc. R. R. Co. v. Jones, 68 Ala. 55, holding that mere permissive enjoyment of land or easement thereon did not confer any adverse right; Alexander v. Wheeler, 69 Ala. 341, holding that possession, permissive in inception, could only become adverse by clear, open and continuous assertion of hostile title; Toy v. Wellborn, 112 Ala. 167, 20 South. 605, holding that registration of tax deed, vaguely describing the property, could not convert permissive into adverse possession; Coogler v. Rogers, 25 Fla. 880, 7 South. 396, applying rule to case of cotenancy holding there must be an ouster by one or the other before ejectment would lie; Spalding v. Grigg, 4 Ga. 87, collecting authorities and applying principle; Allen v. Smith, 6 Blackf. 528, holding that instruments not purporting to convey title cannot be foundation for adverse possession; Brooks v. Riding, 46 Ind. 22, holding unintentional inclosure of land part of public street, but not actually in public use, equivalent to permissive possession; Union Pac. Ry. Co. v. Kindred, 43 Kan. 136, 23 Pac. 112, holding cultivation and inclosure of part of railway right of way only permissive; Armstrong v. Risteau, 5 Md. 279, **59 Am. Dec. 128**, holding acts of ownership committed with consent of real owner, not sufficient to found title by possession; Walsh v. McIntire, 68 Md. 418, 13 Atl. 351, holding

acts of agent in charge were always referable to the permission under which he originally entered; Benson v. Stewart, 30 Miss. 55, that entry by purchaser before payment was not adverse; Lane v. Kennedy, 13 Ohio St. 48, holding occupation of part of street with recognition of ultimate right of public not adverse; Clarke v. McClure, 10 Gratt. 310, holding possession originally permissive, cannot become adverse except by a disclaimer, the assertion of an adverse title and notice; Yeager v. Woodruff, 53 Pac. 1046, holding construction and use of water ditch for eight years on another's land, permissive; Brown v. Huey, 103 Ga. 450, holding vendee's possession under bond for a title, permissive merely; Pitzer v. Burns, 7 W. Va. 74, applying rule to grantor of a trust deed remaining in possession; Hudson v. Putney, 14 W. Va. 576, holding a patent procured by a tenant in common could not make his possession adverse; Potts v. Coleman, 67 Ala. 228, holding distinct recognition of another title an estoppel.

Distinguished in Fountain v. Lewiston Nat. Bank. 11 Idaho, 467, 83 Pac. 509, where person owing bank principal and interest on overdue mortgage gave deed of premises to bank and took option contract to repurchase, possession of bank was adverse; Fain v. Garthwright, 5 Ga. 17, holding that ruling was limited to executory contracts for proprietary lands of the State; Meyer v. Hope, 77 N. W. 721, holding permissive entry on land raises no conclusive presumption of permissive occupation and that holding had become adverse by execution of mortgage witnessed by ousted party.

Necessity for color of title, not expressly made a condition by statute, in adverse possession. Note, **15 L. R. A. (N. S.) 1195.**

Original charter of Pennsylvania empowered William Penn to create manors without restriction to lands which were vacant at time.

Cited as an instance of a grant conferring power to grant lands to be held of himself as mesne lord in People v. Van Rensselaer, 9 N. Y. 336.

The Pennsylvania statute of 1705 is not retrospective, and did not have the effect of an act of limitations.

Cited approvingly in Eakin v. Raub, 12 Serg. & R. 369.

Power of State to confiscate property of subjects of enemy is absolute and includes power to do it partially or conditionally.

Cited in Beirne v. Brown, 4 W. Va. 79, as one of rights of war; and to same point in Ex parte Quarrier and Fitzhugh, 4 W. Va. 218.

Abandonment of highway by nonuser, or otherwise than by act of authorities. Note, **26 L. R. A. 453.**

Miscellaneous. Cited, but not in point, Hackett v. Maxey, 134 Ind. 190, **19 L. R. A. 381,** 33 N. E. 360.

9 Wheat. 325–353, 6 L. Ed. 101, TAYLOR v. MASON.

Devise to parties in succession, upon condition that devisee change his name, etc., creates immediate estate on condition subsequent, liable to be divested on nonperformance of condition.

Approved in Green v. Gordon, 38 App. D. C. 455, 456, applying rule in construing terms of similar will; Crumphà v. Barfield & Wilson Co., 114 Ga. 573, 40 S. E. 810, holding where property was devised to a daughter to hold as long as she desired, and when dissatisfied the property should revert, a holding for thirteen years was election to accept the fee; Smith v. Smith, 64 Neb. 568, 90 N. W. 562, holding that devise upon condition that devisee should be baptized under and maintain certain name was not complied with by being baptized and not maintaining the name; Webster v. Cooper, 14 How. 501, 14 L. Ed. 516, condition being that devisee, on coming into possession, should take testator's name; Jenkins v. Merritt, 17 Fla. 322, as to a pecuniary legacy the income to be paid to two beneficiaries while they resided together; Rogan v. Walker, 1 Wis. 562, holding that condition for cesser of an estate for failure to perform obligations of bond was subsequent.

Conditions precedent and subsequent—Impossibility of performance. Note, **70 Am. St. Rep. 834.**

Nature of condition must be determined by intention of testator and sought in will.

Cited in Jackson v. Berry, 8 N. J. L. 242, holding there are no technical words to distinguish the two classes of conditions.

Where condition depends on will of devisee, failure to perform is equivalent to a refusal.

Cited in Den v. Hance, 11 N. J. L. 251, to a devise to become void on refusal of devisee to convey part of property as directed.

Where condition is to be performed before devisee has possession, but is coupled with condition subsequent, both conditions are subsequent.

Cited as an instance of condition precedent in Den v. Messenger, 33 N. J. L. 505.

Condition that devisee in fee shall not make any change, relative to property, in his life is void.

Cited in Hardy v. Galloway, 111 N. C. 523, **32 Am. St. Rep. 829**, 15 S. E. 890, as instance of a condition void as a restraint on alienation.

Restraints on alienation. Note, **57 Am. Dec. 489.**

Miscellaneous. Cited in Virginia etc. Wheel Co. v. Harris, 103 Va. 714, 49 S. E. 993, construing averment that master promised to repair machinery but failed and "refused" to do so; not in point in Georgia T. & T. Co. v. Oliver, 1 Ga. 40, Lampley v. Scott, 24 Miss. 534, Tompkins v. Saltmarsh,

14 Serg & R. 281, and Green v. Dyersburg, 2 Flipp. 497, Fed. Cas. 5756, as to dependent and independent covenants of a contract.

9 Wheat. 354–361, 6 L. Ed. 109, McGEERY v. SOMERVILLE.

Under acts 11 and 12 William III, chapter 6, title cannot be acquired by heirship through alien ancestor, if living, as, at common law, that ancestor would, but for his alienage, be heir.

Cited and applying the common-law rule in Levy v. McCartee, 6 Pet. 115, 8 L. Ed. 339, to descent in New York, where statute of William III was not in force; McKinney v. Saviego, 18 How. 239, 15 L. Ed. 367, showing that rule of descent in Texas followed statute of William III; United States v. Wong Kim Ark, 169 U. S. 661, 662, 42 L. Ed. 895, 18 Sup. Ct. 462, and Lynch v. Clarke, 1 Sand. Ch. 670, as having assumed that children of alien parentage, but born in the United States, were citizens; Dixon v. Walker, 30 Fed. Cas. 1077, case of descent in District of Columbia, where statute of William III is in force; Bartlett v. Morris, 9 Port. 271, holding that same rules of interpretation applied to private as to public statutes; Furenes v. Mickelson, 86 Iowa, 512, 53 N. W. 418, as governing law of inheritance in Iowa; as not in conflict with Orr v. Hodgson, 4 Wheat. 453, 4 L. Ed. 613, in Jackson v. Green, 7 Wend. 340; People v. Irvin, 21 Wend. 130, in interpreting New York statute which agreed with 11 and 12 William III; Wright v. Methodist Episcopal Church, 1 Hoff. Ch. 266, as having settled the law decisively; McLean v. Swanton, 13 N. Y. 539, as that there was no material difference between statute of New York and 11 and 12 William III.

Doubted and distinguished in Sullivan v. Burnett, 105 U. S. 340, 341, 26 L. Ed. 1126, suggesting that the English statute had not been correctly quoted and that the ruling did not apply to Missouri.

Effect of State statutes and Constitutions upon inheritance through alien. Note, 31 L. R. A. 150.

Alien's right to inherit. Note, 31 L. R. A. 177.

Miscellaneous. Cited, but not in point, in Campbell's Case, 2 Bland Ch. 237, 20 Am. Dec. 378.

9 Wheat. 362–380, 6 L. Ed. 111, THE APOLLON.

Probable cause is not matter of defense in municipal seizure in admiralty, except where so made by statute.

Cited in Averill v. Smith, 17 Wall. 93, 94, 21 L. Ed. 617, intimating that court in principal case referred to section 89 of collection act as in point; Stacey v. Emery, 97 U. S. 643, 24 L. Ed. 1035, holding that certificate given under section 89 extended to party directing the seizure; Smith v. Averill, 7 Blatchf. 31, Fed. Cas. 13,007, where certificate had been given under statute; United States v. Reindeer, 27 Fed. Cas. 768, holding that if certificate is refused, the party seizing is liable in damages; Williams v. Delano,

155 Mass. 14, 28 N. E. 1123, holding that where seizure is made as provided by statute, the party seizing is not liable to an action at law.

Distinguished in The Palmyra, 12 Wheat. 17, 6 L. Ed. 536, holding it not decided that in maritime torts generally, probable cause might not be a defense.

Probable cause is defense in case of capture jure belli, exempts captors from damages and, if strong enough, gives them costs and expenses.

Approved in The Olinde Rodrigues, 174 U. S. 536, 43 L. Ed. 1076, 19 Sup. Ct. 862, holding in prize cause spoliation of papers is probable cause for capture; The Thompson, 3 Wall. 162, 18 L. Ed. 57, case of seizure of ship during Rebellion; The Ship La Manche, 2 Sprague, 216, Fed. Cas. 8004, holding that if case be one of further proof there is probable cause.

One nation cannot seize vessels for offenses against its own laws in ports of another.

Approved in Rundell v. La Compagnie Generale Transatlantique, 100 Fed. 660, holding United States Court of Admiralty can entertain suit for damages and apply French law when libelant's intestate was drowned on the high seas by collision, while sailing under French flag; dissenting opinion in Crapo v. Kelly, 16 Wall. 633, 21 L. Ed. 439, arguendo; dissenting opinion in United States v. Erie Ry. Co., 106 U. S. 335, 27 L. Ed. 155, 1 Sup. Ct. 232, on question whether United States could tax bonds of nonresident aliens; Brown v. Duchesne, 2 Curt. 373, Fed. Cas. 2004, as instance of unlawful seizure; People v. McLeod, 25 Wend. 590, 1 Hill, 424, 37 Am. Dec. 353, applying ruling to arrest of a foreign subject for offense committed in territorial waters.

Jurisdiction of prosecution for homicide where act occurs in one state or country and death in another. Note, Ann. Cas. 1913E, 469.

Jurisdiction over sea. Note, 46 L. R. A. 267.

Phrases in municipal laws must always be restricted in construction to places and persons upon whom legislature has authority and jurisdiction.

Distinguished in Green v. State, 66 Ala. 44, 41 Am. Rep. 745, holding reasoning not applicable where crime is perpetrated partly in one State and partly in another; Ex parte McNeeley, 36 W. Va. 92, 32 Am. St. Rep. 838, 14 S. E. 438, holding crime committed in one country cannot, by legislative fiction, be considered an offense in another.

When boundary between two nations runs along middle of river, whole river is common to both for purposes of navigation.

Approved in United States v. Rio Grande Irr. Co., 174 U. S. 697, 43 L. Ed. 1139, 19 Sup. Ct. 773, holding District Court of New Mexico cannot take judicial notice that Rio Grande River is non-navigable in New Mexico; State v. Muncie Pulp, 119 Tenn. 94, 104 S. W. 449, applying rule to river forming boundary between States; dissenting opinion in United States v.

Rodgers, 150 U. S. 272, 37 L. Ed. 1079, 14 Sup. Ct. 118, open waters of Great Lakes not "high seas"; The Atlantic, 1 Ware, 122, Fed. Cas. 621, applying rule to waters separating the United States from British provinces; The Pilot, 48 Fed. 320, applying rule to the waters of the strait of Juan de Fuca.

Distinguished in The Pilot, 50 Fed. 439, 7 U. S. App. 188, as not authority for contention that no part of Strait of Juan de Fuca was foreign water.

Jurisdiction over boundary rivers. Note, 65 L. R. A. 959.

Arrest of offending vessel must be restrained to places were jurisdiction of arresting country is complete to its own waters or to ocean.

Cited in Cucullu v. Louisiana Ins. Co., 5 Mart. (N. S.) 482, 16 Am. Dec. 208, limiting warranty under policy warranted free from loss from illicit trading to rightful seizures.

Under act of 1799, vessel entering American waters is not compelled to make entry at custom-house of district unless bound to American port.

Cited in The Javirena, 67 Fed. 155, 30 U. S. App. 219, holding Revised Statutes, section 2773, corresponds substantially with the provision construed in principal case.

Measure of damages in admiralty tort does not depend on probable profits of voyage either on ship or cargo; rules of damage laid down.

Cited in Pacific Ins. Co. v. Conard, 1 Bald. 144, Fed. Cas. 10,647, applying rule in action against marshal; The Rhode Island, Abb. Adm. 104, Fed. Cas. 10,740a, following rule; The Alice, 12 Fed. 502, holding that measure of damages for nondelivery of cargo is value at place of shipment, not destination; The Sam Brown, 29 Fed. 651, limiting damages in action of tort to actual damages sustained at time and place of injury; Danolds v. State, 89 N. Y. 50, 42 Am. Rep. 284, holding that same rule applied against government as against individuals; Steam Nav. Co. v. Merchants' Bank, 6 How. 435, 12 L. Ed. 504, respecting liability of owner for tort of master.

Lost profits from tort as damages. Note, 52 L. R. A. 61.

Interest on unliquidated damages. Note, 28 L. R. A. (N. S.) 9.

In cases of tort as well as ex contractu, damages for delay or detention of vessel may be awarded.

Approved in Southern Ry. Co. v. Lewis, 165 Ala. 455, 51 South. 864, holding carrier liable for demurrage charges incurred by delay in delivering lumber to vessel; Southern Ry. Co. v. Melton, 133 Ga. 294, 65 S. E. 672, upholding rule of railroad commission imposing penalty on carrier for delay in furnishing cars; The Nuestra Senora de Regla, 108 U. S. 103, 27 L. Ed. 666, 2 Sup. Ct. 293, case of unlawful seizure as prize; The Conquerre, 166 U. S. 125, 126, 41 L. Ed. 945, 17 Sup. Ct. 516, limiting rule to actual proved loss by detention; The Narragansett, Olc. 395, Fed. Cas.

10,020, applying rule to demurrage while ship under repairs from collision; The Rhode Island, Abb. Adm. 104, Fed. Cas. 11,740a, and Sprague v. West, Abb. Adm. 554, Fed. Cas. 13,255, both following rule; Hawgood v. One Thousand Three Hundred and Ten Tons of Coal, 21 Fed. 685, 686, ship owner has lien on cargo for demurrage though bill of lading has no demurrage clause; Falkenburg v. Clark, 11 R. I. 283, as correctly defining demurrage and adopting it.

Counsel's fees may be allowed both in prize and instance cases.

Cited in United States v. Waters, 133 U. S. 212, 33 L. Ed. 595, 10 Sup. Ct. 250, attorney general cannot re-examine and reverse action of court in allowing district attorney counsel fee for securing conviction in criminal case; Pacific Ins. Co. v. Conard, 1 Bald. 145, Fed. Cas. 10,647, applying rule in action against marshal; Jay v. Almy, 1 Wood. & M. 271, Fed. Cas. 7236, as instance of proper allowance, but improper when not allowed in previous action resulting in nonsuit; Allen v. Blunt, 2 Wood. & M. 147, Fed. Cas. 217, where rule extended to damage suits for infringement of patents; The Wreath, 30 Fed. Cas. 653, where costs were allowed, the court saying, the allowance, when made, is on exceptional and extraordinary reasons.

Overruled in The Margaret v. The Connestoga, 2 Wall. Jr. 123, Fed. Cas. 9070, where court pointedly refused to follow ruling. Referred to in general discussion in Sturgis v. The Joseph Johnson, 23 Fed. Cas. 327, saying that statute of February 26, 1853, had taken away the discretion of the court to award counsel's fees; The City of Augusta, 80 Fed. 303, remarking that rule was changed by act of 1853.

The court is bound to take judicial notice of public facts and geographical positions.

Approved in Ex parte Lair, 177 Fed. 794, holding court took judicial notice that sea-going vessel carrying immigrants from France to United States did not find port of entry in northern district of Illinois; Peyroux v. Howard, 7 Pet. 342, 8 L. Ed. 707, position and flow of tide at New Orleans; The Minna, Blatchf. Pr. 335, Fed. Cas. 9634, and The Annie, Blatchf. Pr. 337, Fed. Cas. 417, notorious practice of blockade running by ship owners; Lands v. Cargo of Coal, 4 Fed. 480, applying ruling to navigable waters; Ex parte Lane, 6 Fed. 37, fact that Ontario is British province; Brumagim v. Bradshaw, 39 Cal. 40, judicial notice taken of geographical divisions of counties and incorporated cities; Hipes v. Cochran, 13 Ind. 177, on question of sufficiency of notice dependent upon increased facilities of transport; State v. Wagner, 61 Me. 186, holding court could take judicial notice of position of island in county of York.

Judicial notice of geographical facts. Note, 12 Ann. Cas. 927.

Operation of municipal laws of nation do not extend beyond its own territory.

Approved in Avenarius v. Kornely, 139 Wis. 270, 121 N. W. 343, holding courts not bound by rules of foreign country as to essentials of trademark.

An unappealed decree of acquittal is conclusive evidence in every inquiry before another tribunal that there was no case.

Cited in Cushing v. Laird, 107 U. S. 80, **27 L. Ed. 395**, 2 Sup. Ct. 204, as to a prize of war, but saying it was no determination as to title; The Rhode Island, Abb. Adm. 108, Fed. Cas. 11,743, applying rule to report of commissioner; Hall v. Warren, 2 McLean, 334, Fed. Cas. 5952, holding that certificates of condemnation and acquittal were alike conclusive; Fuller v. Colby, 3 Wood. & M. 11, Fed. Cas. 5149, following rule; Bailey v. Sundberg, 43 Fed. 82, applying rule to prior adjudication that there had been no collision.

Remedy in personam may be pursued in admiralty.

Cited in Manro v. Almeida, 10 Wheat. 487, **6 L. Ed. 372**, following rule; Waring v. Clarke, 5 How. 486, 487, **12 L. Ed. 248**, holding that admiralty jurisdiction in tort is given by locality; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 436, **12 L. Ed. 505**, following rule; Price v. Thornton, 10 Mo. 138, rule applied to case of slave permitted to ship on boat and subsequently lost.

Conclusiveness of bills of lading. Note, **30 Am. St. Rep. 635, 639.**

Miscellaneous. Cited in Osborn v. United States Bank, 9 Wheat. 870, **6 L. Ed. 235**, as instance where interests of central government committed to subordinate agents; Steele v. Thacher, 1 Ware, 97, Fed. Cas. 13,348, as instance of exercise of admiralty jurisdiction in case of tort partly on land and partly on water.

9 Wheat. 381–390, 6 L. Ed. 116, THE EMILY AND THE CAROLINE.

Seizure of vessel may be made as soon as preparations have advanced so far as to show real purpose.

Cited in The St. Iago de Cuba, 9 Wheat. 413, **6 L. Ed. 123**, holding that object of particular fitting out being apparent, right of seizure follows; The Plattsburgh, 10 Wheat. 141, **6 L. Ed. 286**, and United States v. Gooding, 12 Wheat. 473, **6 L. Ed. 697**, holding it is sufficient if any preparations are made for unlawful purpose; The Slavers (Sarah), 2 Wall. 371, **17 L. Ed. 907**, and The Slavers Weathergage, 2 Wall. 380, **17 L. Ed. 910**, following rule; United States v. Simmons, 96 U. S. 365, **24 L. Ed. 821**, applying principle to a seizure of distilling apparatus; The Yacht Wanderer, Sprague, 519, Fed. Cas. 17,139, holding it not necessary that fittings are adapted to unlawful purpose, where intent otherwise proved; Commonwealth v. King, 1 Whart. 458, applying rule to an attempt to export flour from New Jersey without branding.

Alternative charges in same libel when each constitutes offense is no objection in admiralty.

Cited in The Confiscation Cases, 20 Wall. 105, 22 L. Ed. 322, applying ruling to confiscation of property of rebels; United States v. Three Hundred and Ninety-six Barrels Distilled Spirits, 28 Fed. Cas. 122, ruling as to what allegations in information are sufficient; United States v. Fifteen Barrels of Spirits, 51 Fed. 421, applied to charges for illegally importing spirits.

Errors in pleadings must be objected to in trial court where amendments can be made; objections cannot be first made in Court of Appeals.

Cited in Aiken v. Bemis, 3 Wood. & M. 348, Fed. Cas. 109, holding amendments in informations allowable after writ of error; United States v. Three Hundred and Ninety-six Barrels Distilled Spirits, 28 Fed. Cas. 122, illustrating extent of permissible amendments.

Object of statute must be sought and no interpretation adopted which will defeat its own purpose if it will admit of any other reasonable construction.

Approved in E. R. Darlington Lumber Co. v. Missouri Pac. Ry. Co., 216 Mo. 672, 116 S. W. 534, and Grand Trunk Ry. Co. v. United States, 229 Fed. 119, both construing statute limiting time of confinement of animals during interstate shipment; Burt v. State, 39 Ala. 649, saying rule requiring strict construction of penal statutes applies to offense, not punishment; Ex parte Joice, 88 Ala. 133, 7 South. 4, applying principle to conviction for carrying on lottery; Daniel v. Guy, 19 Ark. 133, applying ruling to interpretation of the term "mulatto" in suit for freedom; State v. Williams, 35 Mo. App. 546, construing Sunday law; Ex parte Deidesheimer, 14 Nev. 318, construing act of 1877, to protect rights of stockholders in mines.

9 Wheat. 391–408, 6 L. Ed. 118, THE MERINO.

When charge is so clearly set forth as to bring it within statute, addition of the words "contra formam statuti" is unnecessary.

Cited in The Confiscation Cases, 20 Wall. 111, 22 L. Ed. 324, holding the omission not available in court of error, and rule confined to civil cases; American Ins. Co. v. Johnson, Blatchf. & H. 15, Fed. Cas. 303, arguendo; Walsh v. United States, 3 Wood. & M. 348, Fed. Cas. 17,116, holding courts are liberal in allowing amendments, even in informations; United States v. Parynthia Davis, 1 Cliff. 535, Fed. Cas. 16,003, approving rule where there are no technical words employed in statute; The Idaho, 12 Sawy. 159, 29 Fed. 189, approving rule and distinguishing between pleading in action at law for a statutory penalty and libel in admiralty; The Cherokee, 5 Fed. Cas. 549, holding libels for forfeiture must set forth distinctly ground and cause of demand.

Seizure, if made within waters of foreign nation, belongs to court of district into which property is brought, and in which proceedings are instituted. Illegality of seizure does not affect jurisdiction.

Approved in The Tenyu Maru, 4 Alaska, 135, holding schooner standing outside three-mile limit but sending boats within to kill seals was within limit and subject to forfeiture; Re Johnson, 167 U. S. 126, 42 L. Ed. 105, 17 Sup. Ct. 737, as having approved the ruling in The Richmond, 9 Cr. 102, 3 L. Ed. 670, and distinguishing between arrests in civil and criminal cases; The Washington, 4 Blatchf. 103, Fed. Cas. 17,221, in general discussion as to jurisdiction in a seizure for violation of revenue laws; The Peterhoff, Blatchf. Pr. 505, Fed. Cas. 11,024, applying ruling to prize taken on high seas, carried to Key West, then to New York, where proceedings instituted.

Intention of act of 1800 was to prevent citizens of United States affording any facilities to trade and the offense consisted in the employment of vessel belonging to United States citizen in carrying slaves, regardless of purpose.

Cited in United States v. Battiste, 2 Sumn. 245, Fed. Cas. 14,545, adopting the construction of the statute; 30 Fed. Cas. 1027, charge to grand jury on alleged violation of statute prohibiting carrying slaves from one port to another in foreign country.

Irregularities in pleadings are waived by appearance of parties interested, and their pleading to the merits.

Cited in Stewart George v. Skeates, 19 Ala. 743, where technical objection as to seizure not allowed after issue joined on merits.

9 Wheat. 409–420, 6 L. Ed. 122, THE ST. JAGO DE CUBA.

Courts will not enforce contracts for wages or materials, if connected, however remotely, with unlawful purpose which claimant might, upon inquiry, have ascertained.

Cited in Tufts v. Tufts, 3 Wood. & M. 505, Fed. Cas. 14,233, where it was sought to enforce contract against public policy; The Ann, 5 Hughes, 298, 8 Fed. 928, applying rule in case of unlawful oyster dredging; The Jennie Hayes, 37 Fed. 374, holding in such case services rendered would be illegal.

Object of giving admiralty process and priority of payment to privileged creditors of a vessel.

Approved in In re Alaska Fishing & Development Co., 167 Fed. 878, holding tug owner engaged by master to take loaded barge to port of destination entitled to maritime lien on both barge and cargo; The Alcalde, 132 Fed. 578, refusing lien to bank which cashed master's drafts to pay crew, where master drew drafts after receiver appointed for vessel, though bank ignorant of receivership; The Robert Dollar, 115 Fed. 221, holding statute of Washington (1 Hill's Code, § 1678), which makes certain persons having charge of the repair or construction of a vessel, agent of owner, for purpose of contracting debts on credit of vessel, is applicable to foreign vessels; The Iris, 100 Fed. 106, holding contract to furnish labor or materials for repair of vessel is maritime, whether made on credit of vessel

or person contracting therefor; The Del Norte, 90 Fed. 509, construing Washington statute governing maritime liens; North Am. Com. Co. v. United States, 81 Fed. 749, s. c., sub nom. The Louis Olsen, 48 U. S. App. 367, holding lien for supplies innocently furnished, not defeated by subsequent forfeiture for subsequent illegal acts; In re Hydraulic etc. Dredge, 80 Fed. 555, 53 U. S. App. 230, holding a contract for furnishing coal to a dredge used for making a fill for railroad purposes not an admiralty contract.

As to liens for materials and supplies, last supersedes preceding; last bottomry bond overrides all that precede, and abandonment to a salvor supersedes every prior claim.

Cited in The Glide, 167 U. S. 610, **42 L. Ed. 297**, 17 Sup. Ct. 931, holding that lien for damages occasioned by negligent towage must be preferred to previous lien for supplies; The J. G. Stevens, 170 U. S. 120, **42 L. Ed. 972**, 18 Sup. Ct. 547, holding rule did not apply to making of claims for damages by collision and for supplies; The Hendrik Hudson, 11 Fed. Cas. 1096, applying rule to contract made by master to contract for transport of merchandise to collect prior charges for which ship would be liable; Marsh v. The Minnie, 16 Fed. Cas. 814, holding lien of materialmen for repairs preferred to that of mortgagee for unpaid purchase money.

Forfeiture of vessel overrides rights of subsequent purchaser, whether with or without notice.

Cited as having established this principle in "The Distilled Spirits," 11 Wall. 368, **20 L. Ed. 171**, but in the principal case the principle is assumed as law and acted upon.

Approved in The John T. Williams, 107 Fed. 751, holding where materialman entitled to lien for repairs on vessel permits her to depart when he might have libeled her, he thereby allows priority to subsequent supply claimants.

Forfeiture does not override rights derived under maritime contracts, fairly and honestly acquired, whether called liens or privileges.

Approved in The Siren, 7 Wall. 159, **19 L. Ed. 132**, holding as settled law that all maritime claims in the vessel extend to proceeds of sale; The Patapsco, 13 Wall. 335, **20 L. Ed. 698**, applying the principle and saying it had also been extended to seamen's wages; The Rumbell, 148 U. S. 9, **37 L. Ed. 346**, 13 Sup. Ct. 499, holding liens for repairs and supplies overrode claims, except for wages and salvage; Moran v. Sturges, 154 U. S. 282, **38 L. Ed. 990**, 14 Sup. Ct. 1027, where state court receiver did not take possession of vessel until after seizure by marshal, State court order enjoining libelant from prosecuting libel is void; The Rodney, Blatchf. & H. 232, Fed. Cas. 11,993, applying principle of priority of claim for wages to that for port dues; The Laurel, Newb. 273, Fed. Cas. 15,569, holding that United States claim for violation of statute did not override that of materialmen;

The Mary Ann, Abb. Adm. 272, Fed. Cas. 9194, and The Jennie Hayes, 37 Fed. 374, as directly in point on the subject of seamen's wages; The Elexena, 53 Fed. 365, holding that these rights might be confiscated in due course of proceeding by the common-law courts of State as well as of the United States; North Am. Com. Co. v. United States, 81 Fed. 751, 752, s. c., sub nom. The Louis Olsen, 48 U. S. App. 367, 368, 369, 371, holding lien for supplies innocently furnished is not defeated by subsequent illegal acts and forfeiture therefor; Briggs v. A Light Boat, 7 Allen, 297, holding that title acquired by forfeiture was subject to same liens as if acquired by private sale; Union Pac. R. R. Co. v. United States, 2 Wyo. 186, 192, applying principle to lien of common carrier of goods carried for government contractor; McKenzie v. The Oglethorpe, 16 Fed. Cas. 206, applying rule to wages of foreign seamen who unknowingly contracted for voyage on American ship; The Velocity, 28 Fed. Cas. 1141, holding rule not applicable to claims under local laws.

Distinguished in The Haytian Republic, 65 Fed. 122, and The Louis Olsen, 74 Fed. 246, holding that forfeiture cuts off liens for supplies furnished prior to cause of forfeiture; Briggs v. A Light Boat, 11 Allen, 182, 183, holding that State courts could not enforce a materialman's lien against ship built for the government.

Power of hypothecation of vessel to materialmen belongs to master alone; when owner is present contract is presumed to be with him on his ordinary responsibility, and no lien attaches to vessel.

Approved in The Clinton, 160 Fed. 424, 87 C. C. A. 373, holding one making repairs on vessel in foreign port under contract with owner then present not entitled to maritime lien on vessel, in absence of contract to that effect; Cuddy v. Clement, 113 Fed. 462, following rule; The Underwriter, 119 Fed. 743–762, holding where charter-party provided that charterer shall pay for all coal used by vessel, and that master shall be under orders of charterer, no lien attaches to vessel for coal supplied on order of master; Prince v. Ogdensburg Transit Co., 107 Fed. 981, holding credit was given to owners of vessels personally, where it appeared that owners contracted with petitioners to supply coal for their steamers during the season. Coal was charged against each steamer, but at end of the season defendant's note was taken; The C. W. Moore, 107 Fed. 958, holding lien will not attach to vessel for wharfage in port where charterer resides, when he is not master and is required by charterer to pay all expenses and keep vessel free from liens; The Roanoke, 101 Fed. 301, holding where charterers of steamer instructed libelant to make necessary repairs and told him it was the owner, after she had been put on drydock and certain removals made and contracts for materials let and the owner was notified, libelants not to make repairs on credit of ship, the libelant had a lien; The Saratoga, 100 Fed. 481, holding where a tug had been employed to render general tonnage services for a partnership at agreed amount per month, was sent by one of the firm on a special service to bring a general tow, the services were

rendered on personal credit of contractors; The Havana, 92 Fed. 1008, holding repairs made at request of managing owner create no lien; Post Steamboat Co. v. Loughran, 12 App. D. C. 442, holding one funneling coal to steamer, enrolled in another port, operated under charter which made charterer liable for supplies had no lien on vessel when he might by reasonable diligence have acquired notice of charter-party; Thomas v. Osborn, 19 How. 29, 15 L. Ed. 537, refusing to extend rule to case of an owner pro hac vice in command of the vessel; s. c., p. 38, 15 L. Ed. 541, holding that shipmaster who contracts for a voyage upon "a lay" can bind ship; The Kate, 164 U. S. 466, 41 L. Ed. 516, 17 Sup. Ct. 138, and The Valencia, 165 U. S. 268, 41 L. Ed. 713, 17 Sup. Ct. 824, holding that no lien attached when supplies were furnished on the order of a charterer; The Valencia, 165 U. S. 271, 41 L. Ed. 713, 17 Sup. Ct. 325, holding that suppliers were put upon inquiry and mere belief was insufficient to create lien; The Glide, 167 U. S. 610, 42 L. Ed. 297, 17 Sup. Ct. 931, reaffirming rule; Phelps v. The Camilla, Taney, 410, Fed. Cas. 11,073, holding same rule applied when owner's resident agent purchased in his own name; Hill v. The Golden Gate, Newb. 313, Fed. Cas. 6492, holding maritime liens confined to foreign vessels and ports in different States are foreign to each other; Sarchet v. The Davis, Crabbe, 200, Fed. Cas. 12,357, applying rule where chain loaned to master for limited period; The Regulator, 1 Hask. 20, Fed. Cas. 11,665, applying rule where in a foreign port supplies were ordered by the managing owner; The Norman, 6 Fed. 407, applying rule where supplies ordered by the charterer; Stephenson v. The Francis, 21 Fed. 721, holding materialmen furnishing supplies to known charterer had no lien on vessel; The Kingston, 23 Fed. 202, holding that lien on vessel could not be enforced in District Court unless of maritime nature; The Mary Morgan, 28 Fed. 198, holding that doctrine of implied lien had not been extended to debts contracted by the owner, except in exceptional circumstances; The Norman, 28 Fed. 384, applying rule where coal was supplied by order of charterers in foreign port; The Willamette Valley, 66 Fed. 570, 29 U. S. App. 447, applying rule where vessel was sent by receiver out of his court's jurisdiction in charge of master; Marsh v. The Minnie, 16 Fed. Cas. 813, saying it had been doubted if owner could make valid hypothecation by bottomry bond in home port; Spedden v. Koenig, 78 Fed. 507, 42 U. S. App. 67, holding that in home port, where owners easily accessible, master could not create lien without authority; The Burton, 84 Fed. 1000, holding that burden was on libelants to show that lien was intended and authorized by owners; Boylan v. The Victory, 40 Mo. 253, holding contract for stores and supplies furnished at owner's special request, for which local law gave a lien, enforceable in rem in State court.

Distinguished in New York Trust Co. v. Bermuda-Atlantic S. S. Co., 211 Fed. 996, 999, holding under act of June 23, 1910, persons furnishing repairs and supplies on order of owner were entitled to liens which took precedence over mortgage; Great Lakes Towing Co. v. Mill Transp. Co., 155 Fed. 15, 22 L. R. A. (N. S.) 769, 83 C. C. A. 607, holding where con-

tract for wrecking service was made by agent of owner with towing company, such company, after making unsuccessful attempt to save stranded vessel, was not limited in its recovery to value of salvage; The Geo. T. Kemp, 2 Low. 480, Fed. Cas. 5341, holding rule did not apply when lien given by local law; nor when owner present in foreign port.

Questioned in The Iris, 88 Fed. 909, holding presumption that individual liability was relied upon is less strong than it was when principal case was decided.

Hypothecation of vessel for supplies only arises when vessel is in foreign port, or, being in her home port, is falsely held out as foreign vessel.

Approved in Pickell v. The Loper, Taney, 501, Fed. Cas. 11,119, applying principle holding that when voyage was wholly in home State it was immaterial that she connected with another vessel; Re Surplus of Ship Edith, 11 Blatchf. 460, Fed. Cas. 4283, discussing rule of lien; Francis v. The Harrison, 1 Sawy. 370, 2 Abb. (U. S.) 91, Fed. Cas. 5038, holding that lien of domestic materialman was enforceable against proceeds in court; s. c., p. 371, explaining principles on which determination of the master's agency depended; Hill v. The Golden Gate, Newb. 312, Fed. Cas. 6492, holding lien depends on real or supposed residence of owner and not on place of enrollment; Macy v. De Wolf, 3 Wood. & M. 203, Fed. Cas. 8933, holding that payment by one of several part owners created no lien on shares of the others in vessel; Davis v. Child, 2 Ware (Dav.), 81 (74), Fed. Cas. 3628, and Fox v. Holt, 4 Ben. 296, 36 Conn. 572, Fed. Cas. 5012, following rule; The Nestor, 1 Sumn. 74, Fed. Cas. 10,126, holding that every port was foreign port which was not in State to which vessel belonged; Leland v. The Medora, 2 Wood. & M. 97, Fed. Cas. 8237, holding that lien for repairs in foreign port exists without express hypothecation; The Island City, 1 Low. 377, Fed. Cas. 7109, applying rule where ship was held out as foreign; Hill v. The Golden Gate, 12 Fed. Cas. 164, confining maritime liens to foreign vessels and holding that ports in different States are foreign to each other; Marsh v. The Minnie, 16 Fed. Cas. 810, holding claims of materialmen postponed to mortgagee when owner resident; The Rapid Transit, 11 Fed. 329, arguendo; The Cumberland, 30 Fed. 450, holding that such lien attached by implication; The Gilbert Knapp, 37 Fed. 214, holding that stevedore might have lien for services in foreign port, not in home port; The R. S. Garrett, 44 Fed. 380, where materialman had no knowledge of residence in district of a part owner and dealt with ship as foreign; The Westover, 76 Fed. 383, holding that to charge the vessel in home port there must be mutual contract, express or implied; Case v. Woolley, 6 Dana, 27, 28, 32 Am. Dec. 63, 64, discussing question of home port as between England and United States, and that in the latter any place where vessel and its owner were not together should be considered foreign port.

Distinguished in The Susan G. Owens, 23 Fed. Cas. 449, holding materialmen furnishing supplies by order of nonresident owners to vessel in home port entitled to lien.

Claims of seamen and of materialmen without hypothecation of vessel are not overriden by previous forfeiture, even in home port, if vessel is held out as foreign.

Approved in The Fredericka Schepp, 195 Fed. 625, following rule; The Rumbell, 148 U. S. 12, 37 L. Ed. 347, 13 Sup. Ct. 500, holding general maritime law gave lien for necessary repairs in a foreign port, enforceable in admiralty; s. c., p. 12, 37 L. Ed. 347, 13 Sup. Ct. 500, holding that independently of local statute there was no lien for repairs in home port; The Celestine, 1 Biss. 5, Fed. Cas. 2541, holding liens were also preferred to a bona fide purchaser without notice; The America, 1 Fed. Cas. 613, holding that seamen's wages are generally preferred to claims of materialmen; The Pathfinder, 18 Fed. Cas. 1295, holding as between materialmen first seizure has priority.

Distinguished in Ramsay v. Allegre, 12 Wheat. 632, 6 L. Ed. 753, holding point not settled because ruling related to distribution of money in court.

Hypothecation of vessel in home port may be made by master by implication, by vessel being falsely held up as foreign by her owners.

Approved in The Surprise, 129 Fed. 875, 876, 64 C. C. A. 309, where food supplies ordered by master while in foreign port, owner need not be consulted; The New Brunswick, 129 Fed. 896, 64 C. C. A. 325, lien for supplies furnished sea-going vessel owned in another State cannot be maintained, though enrolled at port where supplies furnished, where person furnishing supplies not misled into believing she was domestic vessel; The A. D. Patchin, 1 Blatchf. 418, 419, Fed. Cas. 87, holding that master who was also owner, but did not disclose his ownership, pledged ship; The Alice Tainter, 14 Blatchf. 42, Fed. Cas. 195, where merchant was not misled as to real port of ship; Blowers v. One Wire Rope Cable, 19 Fed. 448, holding that materialmen were estopped by knowledge of facts without regard to actual title, so that goods placed on vessel became subject to vessel's liens; Stephenson v. The Francis, 21 Fed. 717, holding that mere fact of residence in State of a part owner unknown to materialman will not bar lien when vessel appears to belong to foreign port; The Cumberland, 30 Fed. 451, holding where charterer was part of time master and no knowledge of charter shown lien attached while mastership lasted; Gager v. The A. D. Patchin, 9 Fed. Cas. 1028, holding that contract of salvage made with owner as master, ownership being unknown, was enforceable in rem.

What contracts will support maritime lien. Note, 70 L. R. A. 378, 394, 399, 400.

Claim for wharfage is good against all world, whether object of voyage is lawful or not.

Cited in The Kate Tremaine, 5 Ben. 65, 68, Fed. Cas. 7622, holding that wharfage is maritime demand different from that of materialman and an implied lien on vessel; Delaware River Storage Co. v. The Thomas, 7 Fed. Cas. 413, holding claim for wharfage not enforceable in admiralty; Brook-

man v. Hamill, 43 N. Y. 563, **3 Am. Rep. 738**, holding claim for wharfage was maritime claim not enforceable in State courts.

Preferred liens by parties debtors to the vessel. Payment should be applied to items entitled to precedence.

Cited in The J. F. Spencer, 5 Ben. 153, Fed. Cas. 7316, applying rule to freight moneys received by consignee of a ship.

Actions in State courts against vessels. Note, **62 Am. Dec. 241.**

Waiver of mechanics' liens by taking notes, or other securities. Note, **41 Am. St. Rep. 762.**

Miscellaneous. Cited in The Lassell, 193 Fed. 541, arguendo; general discussion in Waring v. Clarke, 5 How. 459, **12 L. Ed. 235**, saying that decisions rested on principle that the subject matter in cases of contract determined jurisdiction; New Jersey S. N. Co. v. Merchants' Bank, 6 How. 390, **12 L. Ed. 485**, as instance of jurisdiction of admiralty over suits by materialmen; The Kalarama, 10 Wall. 212, **19 L. Ed. 943**, showing that maritime law of the United States recognized distinction between repairs furnished in home and foreign port; The Hilarity, Blatchf. & H. 92, Fed. Cas. 6480, as authority for rule that in respect to domestic ships in their own ports Court of Admiralty must be governed by lex loci; The Stephen Allen, Blatchf. & H. 178, Fed. Cas. 13,361, to point that question of lien or no lien on domestic vessels depends on local law; The Infanta, Abb. Adm. 267, Fed. Cas. 7030, holding that maritime lien was regarded as being element in original contract and inherent therein; The Young Mechanic, 2 Curt. 410, Fed. Cas. 18,180, in general discussion as to nature of maritime lien and how it was not forfeited by breach of municipal law; Drinkwater v. The Spartan, 1 Ware, 153, Fed. Cas. 4085, and The Richard Busteed, 1 Sprague, 447, Fed. Cas. 11,764, holding that jurisdiction of Court of Admiralty had been distinctly asserted over maritime contracts by materialmen in principal case; The Calisto, 2 Ware (Dav.), 39 (31), Fed. Cas. 2316, to point that whenever law gave lien on vessel it would be enforceable in rem; The Hendrik Hudson, 11 Fed. Cas. 1095, general discussion as to various terms used to express idea of a privileged debt secured by maritime lien; Ludington v. The Nucleus, 15 Fed. Cas. 1095, holding that when lien was given by local law for contract for materials it could be enforced in admiralty; The Alvira, 63 Fed. 149, in general discussion distinguishing between principles applicable to maritime liens and those created by State law.

9 Wheat. 421–430, 6 L. Ed. 125, THE MARGARET.

Sale or transfer under ship registry act, 1792, even for fraudulent purpose, is binding between parties and changes legal ownership.

Cited in The Maria, Deady, 94, Fed. Cas. 9075, holding that sale to foreign corporation comes under act without reference to nationality of shareholders.

Forfeiture for failure to make known transfer of ship to subject of foreign State, only avoided by compliance with terms of ship registry act of 1792.

Cited in The Maria, Deady, 100, Fed. Cas. 9075, holding that time should be given for party in charge to return and register the transfer before declaring the forfeiture.

In proceeding under statute for forfeiture, proviso by way of exception from enacting clause is properly matter of defense.

Distinguished in Mathews v. Pascal, 13 La. 53, holding that one claiming forfeiture of a slave for removal by tenant without consent of reversioner, must allege and prove absence of consent.

The proviso of exception in ship registry act of 1792 applies only in case of part owner, not to sole owner.

Cited in The Florenzo, Blatchf. & H. 58, Fed. Cas. 4886, holding purchase of the entire ship subsequent to act of forfeiture under the act will not prevent the forfeiture.

9 Wheat. 430–444, 6 L. Ed. 128, TWO HUNDRED CHESTS OF TEA.

Terms used in classification of subjects of taxation are understood in known commercial sense, according to general usage and known denominations of trade.

Approved in Goat & Sheepskin Import Co. v. United States, 206 U. S. 203, 51 L. Ed. 1025, 27 Sup. Ct. 634, holding "wool" did not include substance known as Mocha hair; United States v. Oregon etc. R. Co., 122 Fed. 540, holding tungsten ore is free from duty under section 614 of tariff act of 1897 (act July 24, 1897, c. 11, 30 Stat. 151, U. S. Comp. Stats. 1901, p. 1685), and not dutiable under section 183, covering metallic mineral substances in crude state; Nodlinger v. United States, 115 Fed. 833, Leghorn citron, known and imported since prior to tariff act of 1883, as dried fruit, is dutiable as such, but not under paragraph 302, where it is classified as a comfit, sweetmeat or fruit preserved in sugar; Wieland v. Collector of Port of San Francisco, 104 Fed. 543, holding fish known as "sardines in oil" are dutiable under paragraph 208, tariff act of 1894, but not under paragraph 211, where they are designated as "fish in cans" though known to importers as "sprats in oil"; In re John Hope & Sons Engraving etc. Co., 100 Fed. 287, holding steel rods tipped with diamond chips, used in engraving machines, are dutiable as articles not specially provided for, composed in whole or in part of steel, and not as jewelry and precious stones; In re Puget Sound Reduction Co., 96 Fed. 94, holding under 2 Supp. Rev. Stats., p. 430, relating to sampling and assaying imported lead ores, the fire process must be used; Armour & Co. v. Bird, 159 Mich. 9, 25 L. R. A. (N. S.) 616, 123 N. W. 583, holding "sausage" within meaning of statute prohibiting false branding did not include addition of cereals to meat; Barlow v. United States, 7 Pet. 410, 8 L. Ed. 731, construing section of act of 1799 relating to drawback on "refined sugars"; Elliott v. Swartout,

10 Pet. 151, 9 L. Ed. 379, as to duties on "worsted" goods; Curtis v. Martin, 3 How. 109, 11 L. Ed. 517, as to gunny cloth charged with duty as cotton bagging; Lawrence v. Allen, 7 How. 797, 12 L. Ed. 918, as to "india rubber shoes" imported in a condition for wearing; Arthur v. Cumming, 91 U. S. 363, 23 L. Ed. 439, as to "burlaps" distinguished from oilcloth foundations or floorcloth canvas; Tyng v. Grinnell, 92 U. S. 470, 23 L. Ed. 734, as to wrought-iron tubes, and holding the question as to commercial name of import was one of fact for the jury; Arthur v. Morrison, 96 U. S. 111, 24 L. Ed. 765, as to "crape veils"; Arthur v. Butterfield, 125 U. S. 75, 31 L. Ed. 645, 8 Sup. Ct. 717, as to goat's hair goods, under act of 1870; American Net & Twine Co. v. Worthington, 141 U. S. 471, 35 L. Ed. 823, 12 Sup. Ct. 56, as to "gilling twine" under act of 1883; Earnshaw v. Cadwalader, 145 U. S. 256, 258, 36 L. Ed. 697, 12 Sup. Ct. 854, as to "iron ore," holding it did not mean dry ore; Cadwalader v. Zeh, 151 U. S. 176, 38 L. Ed. 117, 14 Sup. Ct. 290, as to "toys" under act of 1883; Lutzen v. Magone, 153 U. S. 107, 38 L. Ed. 652, 14 Sup. Ct. 290, as to "saccharine," under act of 1883; United States v. Buffalo Gas Co., 172 U. S. 341, 43 L. Ed. 470, as to natural gas; United States v. Breed, 1 Sumn. 164, Fed. Cas. 14,638, as to "loaf sugar"; Morrison v. Arthur, 13 Blatchf. 199, Fed. Cas. 9842, as to "crape veils" and "silk veils," under act of 1864; Lane v. Russel, 4 Cliff. 125, Fed. Cas. 8053, as to "ribbons," under act of 1864; United States v. Kimball, 26 Fed. Cas. 785, holding passenger on railroad carrying letter without knowledge of company does not subject company to penalty; United States v. Reindeer, 27 Fed. Cas. 763, arguendo, that in cases of penalties, a word must be taken in its commercial sense to draw the penalty; Nichols v. Beard, 15 Fed. 437, as to "wine gallon" or "beer gallon" with reference to imports of ale and porter; Appeal of Field, 50 Fed. 909, as to "silk veils," under act of 1890; "Zante Currants," 73 Fed. 188, 189, as to "Zante currants," under act of 1894; United States v. Buffalo Natural Gas Fuel Co., 78 Fed. 111, as to natural gas, holding it was exempt from duty as a "crude mineral."

A libel is sufficient which follows the language of the enacting clause of the act which inflicts the forfeiture.

Cited in Two Hundred and Fifty Barrels of Molasses v. United States, Chase, 509, Fed. Cas. 14,293, applying rule to admiralty libel for forfeiture, although goods partly landed.

Miscellaneous. Cited incidentally in Commonwealth v. Giltinan, 64 Pa. St. 105, illustrating ruling that the question in proof was not what the statute meant, but what the article seized was; Evans v. The Commercial M. I. Co., 6 R. I. 54, holding the rule was, all dealers in the article were admitted to testify as to the trade name.

9 Wheat. 445–469, 6 L. Ed. 131, MASON v. MUNCASTER.

Covenant of general warranty in a deed may operate to create a title in fee by estoppel.

Cited in Magill v. Brown, 16 Fed. Cas. 413, in general discussion as to rules governing transmission of property of Society of Friends; Dudley v. Cadwell, 19 Conn. 227, applying the rule, holding a title could be acquired by estoppel through a mortgagee, good as against a mortgagor; Fairbanks v. Williamson, 7 Me. 100, holding the effect of a warranty deed was to extinguish all rights of the warrantor, present and future; Pike v. Galvin, 29 Me. 185, stating effect of decisions as to effect of warranty covenant in deed and collecting authorities; Showman v. Miller, 6 Md. 487, holding that a deed containing a warranty, and a covenant for further assurance constituted an estoppel and entitled grantor to specific performance; Somes v. Skinner, 3 Pick. 61, holding that if a vendor conveys by deed with warranty, and afterward acquires title, the title inures for benefit of grantee; Vanderheyden v. Crandall, 2 Denio, 25, holding that an estate in fee, acquired by descent by a tenant for life, who had previously mortgaged his life estate, and had been foreclosed, inured by estoppel, to the title derived under the mortgage; Williams v. First Presbyterian Society of Cincinnati, 1 Ohio St. 503, holding a grant to trustees upon trusts of perpetual duration imported a grant in fee.

Rights of pewholders in Episcopal parish church are limited and subject to general right of parish in freehold of church, of which it cannot be deprived except by its own consent.

Cited in Price v. Methodist Church, 4 Ohio, 541, holding acquisition of right of burial in cemetery of M. E. church gave no right to control church in the appropriate use of its grounds.

Distinguished in Hill Estate Co. v. Whittlesey, 21 Wash. 146, 57 Pac. 346, holding church parish has no authority to mortgage lands held in trust by bishop for vestrymen, wardens and congregation.

Miscellaneous. Referred to in The Wardens etc. v. Mayor of Savannah, 82 Ga. 666, 9 S. E. 540, as a supplement to Terrett v. Taylor, 9 Cr. 43, 3 L. Ed. 650, holding title to cemetery connected with Episcopal parish church in Savannah, vested in rector as a corporation.

9 Wheat. 469–483, 6 L. Ed. 137, DODDRIDGE v. THOMPSON.

The territory lying between two rivers is whole country from their sources to their mouths, and if no fork of either has solely acquired river name, main branch to its source is true river.

Cited in Reynolds v. McArthur, 2 Pet. 436, 7 L. Ed. 477, in deciding validity of patent to land between same rivers mentioned in principal case.

A law of Congress, not intended to retrospect, ought not to have that effect given to it by construction.

Cited in Ladiga v. Roland, 2 How. 589, 11 L. Ed. 390, in interpreting treaty of 1832 with the Creek Indians.

Miscellaneous. Cited in Osborn v. United States Bank, 9 Wheat. 870, 6 L. Ed. 235, as illustration of fact that national interests were sometimes

committed to subordinate agents; Lessee of Wallace v. Saunders, 7 Ohio, 176, with reference to title to land between Scioto and Little Miami rivers reserved for military locations.

9 Wheat. 483–488, 6 L. Ed. 140, RIGGS v. TAYLOE.

Secondary evidence to prove lost or destroyed writing may be given after proof of cause of absence of original.

Approved in Brown v. Harkins, 131 Fed. 66, 65 C. C. A. 301, in action by distiller to recover revenue taxes illegally imposed, evidence of loss of record-book held insufficient to justify admission of oral evidence of contents; Burton v. Driggs, 20 Wall. 134, 22 L. Ed. 302, admitting copy of deposition which had been duly filed; Stebbins v. Duncan, 108 U. S. 43, 27 L. Ed. 646, 2 Sup. Ct. 320, admitting copy and parol evidence of deed destroyed in Chicago fire; Halderman v. Halderman, Hempst. 560, Fed. Cas 5909, as to copy of account of a partner with firm, question of admissibility not decided as it was not a final settlement of account; Mariner v. Saunders, 5 Gilm. 122, where husband not admitted to prove execution of deed by wife, when one of the witnesses was within court's jurisdiction; Hobbs v. Beard, 43 S. C. 379, 21 S. E. 309, in case of a recorded deed, where both deed and record had been destroyed by fire; Tayloe v. Riggs, 1 Pet. 597, 7 L. Ed. 278, as having substantially decided that deposition of a missing witness may be read after proof that he had been sought for, but could not be found.

Proof of destruction of particular writing need not be absolute; impression of and belief in destruction is sufficient.

Cited in Williams v. United States, 1 How. 299, 11 L. Ed. 138, applying principle to proof of official papers destroyed by burning of the Treasury Building, Washington; United States v. Doebler, 1 Bald. 521, Fed. Cas. 14,977, applying ruling to lost letters relating to counterfeit notes; Hopper v. Ashley, 15 Ala. 463, admitting parol evidence of impression of belief of handwriting; Hoitt v. Moulton, 21 N. H. 589, holding absolute assurance by no means necessary to make evidence admissible to prove handwriting.

Admissibility of evidence of loss of writing is addressed to court, not to jury.

Cited in Bagley v. McMickle, 9 Cal. 449, holding the preliminary proof was addressed to court, which was sole judge of its sufficiency; Mason v. Libbey, 90 N. Y. 684, applying rule to offer of parol proof of contents of a destroyed letter.

When secondary evidence of lost or destroyed instrument admissible.

Approved in Main v. Aukam, 4 App. D. C. 54, holding where lost writing was last known in possession of opposite party, secondary evidence could not be offered as to its contents without notice to opposite party to

produce it; Gibbs v. Potter, 166 Ind. 478, 9 Ann. Cas. 481, 77 N. E. 944, holding subsequent alteration of deed afterward lost did not prevent grantor from proving contents before alteration by secondary evidence; The Ariel, 1 Hask. 72, Fed. Cas. 527, holding that party who, under no pretense of mistake or accident, voluntarily destroys primary evidence excludes himself from benefit of secondary evidence; Bagley v. McMickle, 9 Cal. 447, applying rule where secondary evidence admitted to prove destroyed notes; Bagley v. Eaton, 10 Cal. 147, 148, admitting secondary evidence where notes had been destroyed to prevent their negotiation to third parties, but not to cancel indebtedness; Rudolph v. Lane, 57 Ind. 118, admitting secondary evidence where destruction was voluntary, but without fraudulent intent; Old National Bank v. Findley, 131 Ind. 230, 31 N. E. 64, applying rule to voluntary destruction of deed unaccompanied by fraud; Schlemmer v. Schendorf, 20 Ind. App. 452, admitting parol proof of note destroyed by the holder in consequence of cruel and coercive acts of debtor; Joannes v. Bennett, 5 Allen, 173, 81 Am. Dec. 741, holding inference of fraud arising from voluntary destruction must be first rebutted before secondary evidence can be received; Skinner v. Henderson, 10 Mo. 207, admitting secondary evidence of contents of deed destroyed by mutual consent to rescind an unexecuted contract; Bank v. Eastman, 44 N. H. 438, to prove contents of deed not recorded and canceled with intention to revest title; Broadwell v. Stiles, 8 N. J. L. 60, refusing to admit secondary evidence of genuineness of signature willfully erased from indorsement on note; Wyckoff v. Wyckoff, 16 N. J. Eq. 403, applying rule where a will was destroyed under mistaken belief that it was inoperative.

Destruction of note by holder. Note, 13 Am. Dec. 483.

Admissibility of secondary evidence to prove contents of instrument altered or destroyed by person offering such evidence. Note, 9 Ann. Cas. 484.

Presumption against spoliator of evidence. Note, 34 L. R. A. 583.

Miscellaneous. Cited in Merrill v. Dawson, Hempst. 624, Fed. Cas. 9469, saying it was settled by principal case that affidavit of party to suit was competent to prove loss of paper; Longworth v. Close, 1 McLean, 285, Fed. Cas. 8489, with other authorities to show that in courts of United States a copy of a recorded deed was not received as evidence without accounting for nonproduction of original; Woods v. Gassett, 11 N. H. 445, holding evidence of party to cause competent to prove loss introductory of secondary evidence of contents.

9 Wheat. 489–501, 6 L. Ed. 142, HUGHES v. EDWARDS.

In deed upon condition subsequent, if condition is impossible of performance when deed made, only condition is void, and estate vests.

Approved in Ward v. Hood, 124 Ala. 572, 27 South. 246, holding the condition upon which replevin bond should be void, being impossible of

performance, renders the condition and not bond void; Decrow v. Moody, 73 Me. 103, applying principle to legacy contingent on legatee remaining with testator for a term rendered impossible by testator's death, holding legatee entitled to legacy; Byrne v. State, 12 Wis. 518, holding subscription for stock not invalid, though made on condition which could not be performed.

Mortgagee may pursue legal remedy by ejectment and at same time file bill to foreclose.

Approved in Eastern Trust & Banking Co. v. American Ice Co., 14 App. D. C. 329, holding where mortgage reserved right to trustee to take possession on default, mortgagee could not have receiver appointed for property pending foreclosure; Sparks v. Pico, 1 McCall, 500, 503, Fed. Cas. 13,211, holding that though action on note barred by statute, mortgagee can prosecute lien on mortgaged premises in equity, bar of remedy does not extinguish debt; Duval v. McLockey, 1 Ala. 728, holding mortgagee has three remedies—action at law to recover debt, ejectment and foreclosure; s. c., p. 746, holding validity of a mortgage is not impaired by failure to present the notes within time limited by statute; Harris v. Mills, 28 Ill. 48, **81 Am. Dec. 263**, holding that when note barred, right to foreclose was also barred unless mortgage contained covenant for payment on which action of ejectment could be based; Moreton v. Harrison, 1 Bland. 500, holding remedies at law and in equity may be proceeded on at same time but only one satisfaction can be had; Trustees v. Dickson, 1 Freem. Ch. 482, holding statute of Mississippi as to presentment of claims against decedents does not apply to mortgage debts.

Equity applies statute of limitations equally to an ordinary mortgage and deed absolute in form but intended as mortgage.

Approved in Holmes v. Cleveland, C. & C. R. Co., 93 Fed. 111, holding when land company had dedicated street to town of Cleveland, and it had been used as such for fifty years, successors of land company had no title; Clarke v. Southwick, 1 Curt. 304, Fed. Cas. 2863, where twenty years' possession under law of Massachusetts bars legal action to foreclose, a less time will not bar a bill to foreclose an equitable mortgage; Dexter v. Arnold, 3 Sumn. 155, Fed. Cas. 3859, applying rule where law of Rhode Island allowed redemption of a mortgage after twenty years' possession it will be followed in equity; Fisk v. Stewart, 24 Minn. 110, holding where loan was to stand as long as interest was paid, each payment of interest kept alive right of foreclosure and redemption.

Acknowledgment or part payment taking specialty debt out of statute of limitations. Note, **16 E. R. C. 291.**

Absolute deed intended as security for debt will be treated in equity as mortgage.

Approved in Alexander v. Cleland, 13 N. M. 536, 86 Pac. 427, following rule; Cabrera v. American Colonial Bank, 214 U. S. 231, **53 L. Ed. 977,**

29 Sup. Ct. 623, holding parol testimony admissible to show bill of sale was intended as security; Peters v. McLaren, 218 Fed. 416, 134 C. C. A. 198, holding parol evidence admissible to show intention of parties to deed by one partner of all his assets to copartner; Tobriner v. White, 19 App. D. C. 173, holding parol evidence admissible to show maker of notes secured by deed of trust took title and made notes for accommodation of payee as part of sale to other parties; Dulany v. Morse, 39 App. D. C. 526, holding deed to be intended as mortgage; Fitzgerald v. Flanagan, 155 Iowa, 226, Ann. Cas. 1914C, 1104, 135 N. W. 742, holding grantee could show by parol mortgage was excepted from covenants of deed; Jolivet v. Chaves, 125 La. 936, 32 L. R. A. (N. S.) 1046, 52 South. 103, holding "sale with right of redemption" could not be shown to be mortgage as against one who purchased after time to redeem had expired; Weiseham v. Hocker, 7 Okl. 253, 54 Pac. 465, where deed absolute given in security for debt, and grantee at same time executed agreement to reconvey on payment of debt secured, it is mortgage; Peugh v. Davis, 96 U. S. 336, 24 L. Ed. 776, applying principle in suit for redemption by grantor and admitting evidence, written or oral, to show real character of transaction; Brick v. Brick, 98 U. S. 516, 25 L. Ed. 257, applying rule to certificate of stock issued and delivered as security for loan; Jackson v. Lawrence, 117 U. S. 681, 29 L. Ed. 1025, 6 Sup. Ct. 916, construing effect of deed absolute to Missouri land with verbal understanding that it was to be security for loan; The Ellen Holgate, 30 Fed. 127, applying rule to bills of sale of ship intended as collateral security for loans; Ray v. Tatum, 72 Fed. 114, 30 U. S. App. 535, applying rule to deed given in accordance with Georgia code (§§ 1969–1971); Cleveland v. La Crosse & M. R. R. Co., 5 Fed. Cas. 1035, holding a deed by railroad could be held to be mortgage even without accompanying deed of defeasance; Hudson v. Isbell, 5 Stew. & P. 77, holding that parol evidence was admissible to convert an absolute conveyance into mortgage; Mobile, B. & L. Assn. v. Robertson, 65 Ala. 388, holding lease by building and loan association to stockholder to be in effect mortgage; Harman v. May, 40 Ark. 149, holding whenever at time of sale vendor is indebted to purchaser and so continues with right to call for reconveyance on payment of debt his absolute deed will be held a mortgage; Lee v. Evans, 8 Cal. 430, 435, holding that parol evidence could not be received to prove a deed absolute a mortgage except in case of fraud or mistake; Sears v. Dixon, 33 Cal. 333, holding absolute a deed of homestead accompanied by covenant to reconvey on repayment of purchase money void as a mortgage; Bacon v. Brown, 19 Conn. 34, holding deed can operate as mortgage without creating a personal obligation of the sum named in condition; Hall v. Livingston, 3 Del. Ch. 374, holding courts of equity would admit parol evidence to enforce equities in declaring an absolute deed as mortgage even without element of fraud or mistake; First Nat. Bank v. Ashmead, 23 Fla. 389, 2 South. 661, holding deed by husband and wife of homestead with separate agreement of defeasance in favor of husband,

when made as security, only created mortgage; Morgan v. Morgan, 10 Ga. 305, as to what evidence was admissible to prove mortgagee had treated deed as a mortgage; Gibson v. Hough, 60 Ga. 590, holding under Georgia code deed in fee without defeasance or condition, accompanied by bond to reconvey, does not create mortgage; Baxter v. Child, 39 Me. 112, holding express provision that mortgagee shall hold absolutely on default cannot deprive mortgagor of right to redeem; Campbell v. Dearborn, 109 Mass. 139, 12 Am. Rep. 677, holding equity courts had undoubted power to declare a deed a mortgage; McMillan v. Bissell, 63 Mich. 69, 29 N. W. 738, holding nature of deed may be shown by parol on adequate proof; Stephens v. Sherrod, 6 Tex. 298, 55 Am. Dec. 778, holding that bill of sale of negro and defeasance executed at same time as security for loan were mortgage, enforceable notwithstanding death of negro; Baxter v. Willey, 9 Vt. 280, 31 Am. Dec. 625, holding that sale and conveyance in payment of pre-existing debt with simple right to repurchase is not mortgage, otherwise if object is to secure payment.

When, how and at whose instance deed may be avoided for breach of condition subsequent. Note, 44 Am. Dec. 746.

Parol evidence that instrument importing a complete transfer was intended as a mortgage or pledge. Note, L. R. A. 1916B, 573, 596, 597.

Mortgagor's right to redeem and mortgagee's right to foreclose are barred by twenty years' adverse possession without acknowledgment of continuance of mortgage.

Approved in New York Life Ins. Co. v. Lord, 100 Fed. 23, holding under contract to furnish marketable title, mortgages over forty-five years old held by company which became insolvent five years after execution of mortgage and no steps had been taken to foreclose, the title was good; Mack v. Anderson, 165 N. Y. 532, 59 N. E. 290, holding where two tracts of land are mortgaged and smaller tract is conveyed without mention of mortgage, and grantee of larger tract assumes mortgage, and no payments are made by grantee of smaller tract or by mortgagor for twenty years, under Code Civ. Proc., §§ 380, 381, foreclosure against smaller tract is barred; Willison v. Watkins, 3 Pet. 52, 7 L. Ed. 600, applying rule to holding of adverse possession by a tenant after his disclaimer of a lease; Peyton v. Stith, 5 Pet. 494, 8 L. Ed. 203, applying principle to tenant seeking by purchase of an adverse claim of title to assert title against his landlord; Piatt v. Vattier, 9 Pet. 417, 9 L. Ed. 178, refusing to recognize claim of title of assignee of mortgagor after thirty years' adverse possession by mortgagee; Boone v. Chiles, 10 Pet. 221, 9 L. Ed. 404, applying rule in adjudicating claim which had been allowed to sleep for more than twenty years; Jenkins v. Pye, 12 Pet. 262, 9 L. Ed. 1079, holding general doctrine well established that stale demands will not be enforced; Bowman v. Wathen, 1 How. 194, 11 L. Ed. 99, holding doctrine of equitable

bar by lapse of time was settled law; Zeller v. Eckert, 4 How. 297, 11 L. Ed. 983, applying rule denying suit to recover real estate by heirs at law twenty-five years after right of entry accrued; Slicer v. Bank of Pittsburg, 16 How. 580, 14 L. Ed. 1066, where mortgagor sought to redeem more than twenty years after levy upon and sale of mortgaged premises, mortgagee purchasing; Mitchell v. Thompson, 1 McLean, 106, Fed. Cas. 9669, holding that fraudulent title may be protected by time, running from the time when fraud was discovered; Piatt v. Vattier, 1 McLean, 162, Fed. Cas. 11,117, holding title of assignee of a mortgagee in possession became absolute after statutory period; Bowman v. Wathen, 2 McLean, 396, Fed. Cas. 1740, holding that time in equity can operate as bar where at law statute could have no effect; Ferson v. Sanger, 1 Wood. & M. 148, Fed. Cas. 4752, holding a purchaser having taken possession could not, after six or seven years, claim to rescind contract on ground of misrepresentation; Fox v. Blossom, 17 Blatchf. 355, Fed. Cas. 5008, holding under law of Connecticut second mortgagee may after fifteen years' possession by mortgagor, without acknowledgment of debt of a first mortgagee, bring suit to have first mortgage canceled; Amory v. Lawrence, 3 Cliff. 533, Fed. Cas. 336, refusing to hold mortgage barred when there had been verbal recognitions and payments on account within time; Tillotson v. Kennedy, 5 Ala. 412, 39 Am. Dec. 333, holding possession of tenant becomes adverse after disclaimer and statute runs against landlord from time he has notice of disclaimer; Sullivan v. Hadley, 16 Ark. 145, holding that equity courts had apparently adopted same period of limitation for foreclosure as was allowed to mortgagee to bring ejectment; Rings v. Woodruff, 43 Ark. 491, holding the seven years' adverse possession required to bar action for recovery must be in open denial of mortgagee's title sufficient to put him on notice; Haskell v. Bailey, 22 Conn. 572, holding it was well settled lapse of time would operate as bar without any statute of limitations; Perkins v. Cartmell, 4 Harr. 275, 42 Am. Dec. 756, holding when court of equity acts in analogy to statutes of limitation it adopts exceptions also; Pollock v. Maison, 41 Ill. 520, holding mortgage collateral to notes is barred of foreclosure when action on notes barred unless it contains independent covenant for payment; Locke v. Caldwell, 91 Ill. 420, holding rule of bar by adverse possession was reciprocal and applied to mortgagor and mortgagee; Lingan v. Henderson, 1 Bland Ch. 282, holding bill of foreclosure can only be barred by same time limit as action in ejectment.

Distinguished in Dexter v. Arnold, 3 Sumn. 159, Fed. Cas. 3859, as not applicable where only evidence in support of right to redeem was parol statements to third parties.

Effect of payment or acknowledgment by mortgagor to toll limitations as against person holding through him. Note, 28 L. R. A. (N. S.) 169.

Under treaty with Great Britain of 1794, alien entitled to possession at date of treaty may maintain ejectment, and independently of treaty mortgagee, though alien, may have decree of sale for payment of mortgage debt.

Cited in Pollard v. Kibbe, 14 Pet. 413, 10 **L. Ed. 519**, with reference to provision that French subjects at time of treaty with France of 1778 should not be considered aliens; Neilson v. Lagow, 12 How. 108, **13 L. Ed. 914**, holding that act of Congress of May, 1820, did not preclude the United States from taking a mortgage on lands to secure debt; Hauenstein v. Lynham, 100 U. S. 489, **25 L. Ed. 630**, concerning Swiss treaty of 1850, as to effect of treaties on alienage being superior to State laws; Baldwin v. Franks, 120 U. S. 703, **30 L. Ed. 772**, 7 Sup. Ct. 765, dissenting opinion, on construction of treaty with China of 1868, with reference to right of Chinese to emigrate to United States; Parrott's Chinese Case, 6 Sawy. 371, 1 Fed. 503, holding California constitution and statutes prohibiting employment of Chinese by corporations void, as conflicting with treaty with China of 1868; People v. Gerke, 5 Cal. 382, 386, holding treaty-making power of the Federal government was competent to prevent escheat to State of property of foreign citizens; Opel v. Shoup, 100 Iowa, 424, **37 L. R. A. 587**, 69 N. W. 563, disqualification of an alien under State law from dealing with real property will be removed by a national treaty conferring right; Bank v. Johnson, 47 Ohio St. 314, **8 L. R. A. 616**, 24 N. E. 505, fact mortgage is made to partnership incapable of holding title does not affect its validity, which can be enforced in equity; Williams v. Wilson, Mart. & Y. 253, applying rule to land acquired by alien prior to treaty with Great Britain.

Effect of treaties on alien's right to inherit. Note, **32 L. R. A. 178.**

When mortgagor remains in possession, mortgage after twenty years presumed to be discharged.

Approved in McLaughlin v. Senne, 78 Neb. 634, 111 N. W. 379, holding part payment by one authorized to bind property tolled statute of limitations against foreclosure of mortgage; Woodlief v. Wester, 136 N. C. 166, 48 S. E. 579, mortgagee may foreclose by action brought within four months after death of life tenant, though last payment on mortgage debt made more than ten years prior to date of suit; Ransdale v. Grove, 4 McLean, 284, Fed. Cas. 11,570, holding a deed may be presumed from long possession; Almy v. Wilbur, 2 Wood. & M. 403, Fed. Cas. 256, holding where possession is rightfully given, no conversion can be considered as made till demand of return and refusal; Byrd v. McDaniel, 33 Ala. 27, holding that though the mortgagor is a quasi-tenant to mortgagee that does not affect the presumption of payment; Browne v. Browne, 17 Fla. 625, **35 Am. Rep. 103**, holding principal case was no authority for contention that action of equity and law was concurrent; Cheever v. Perley, 11 Allen, 588, holding act of recognition of mortgage to overcome presumption must be positive and unequivocal; Nevitt v. Bacon, 32 Miss. 227, **66 Am. Dec. 613**, holding right to foreclose will be barred when rights to

recover possession and to sue on note were barred; Cape Giradeau Co. v. Harbison, 58 Mo. 96, holding that in Missouri, by analogy, ten years' adverse possession would suffice to raise presumption; Tripe v. Marcy, 39 N. H. 449, holding presumption of payment could not arise short of twenty years from default; Murdock v. Waterman, 145 N. Y. 66, 27 L. R. A. 422, 39 N. E. 832, payment, to arrest running of statute, must be by party bound to pay obligation or his agent authorized in fact or in law; Roberts v. Welch, 8 Ired. Eq. 292, applying rule where mortgage had been unrecognized for twenty-eight years; Ray v. Pearce, 84 N. C. 487, applying rule where mortgage remained unacknowledged nearly thirty years; Royster v. Farrell, 115 N. C. 310, 20 S. E. 476, holding written acknowledgment operated not only on statute of limitations but on right to foreclose; Barrett v. Prentiss, 57 Vt. 300, holding partial payment by maker of note sufficient to rebut presumption extending to his grantee; Snavely v. Pickle, 29 Gratt. 39, holding presumption may be repelled by conversations and admissions by mortgagee to third parties; Troll v. Carter, 15 W. Va. 583, refusing to enforce a parol trust where long time had elapsed since absolute deed executed, collecting authorities.

Distinguished in Wyman v. Babcock, 2 Curt. 399, Fed. Cas. 18,113, as not applicable where there has been no breach of a condition and nothing attributable to the mortgagor as neglect; Chouteau v. Burlando, 20 Mo. 488, as having no application where neither mortgagor nor mortgagee were in possession; Johnston v. Real Estate Assn., 2 Tex. Civ. App. 499, 21 S. W. 962, as authority for holding a mortgagor could, by promise, subsequent to second mortgage, revive a prior obligation so as to deprive second mortgagee of defense of statutory bar.

Doubted in Blackwell v. Barnett, 52 Tex. 332, whether second mortgage, given after first mortgage debt, barred by time, was made subordinate by subsequent recognition of first mortgage.

Refusal of relief in equity because of laches. Note, 54 Am. Dec. 130.

Bar of principal debt as bar to foreclosure of mortgage or deed of trust. Note, 21 L. R. A. 554.

Under Kentucky registration law, registration of a mortgage is constructive notice of it and equal to direct notice.

Cited in Tripe v. Marcy, 39 N. H. 448, applying rule to registration in New Hampshire.

Approved in Lefmann v. Brill, 142 Fed. 48, wife who recovered decree against husband in maintenance suit which awarded her specific property, including realty which husband had previously mortgaged, cannot avoid mortgage as fraudulent conveyance; Austin v. Steele, 68 Ark. 355, 58 S. W. 355, holding S. & H. Dig., §§ 5094, 5095 (Ark.), requiring indorsements of payments of notes to be indorsed on record, does not apply to mortgage kept alive by consent; Balch v. Arnold, 9 Wyo. 37, 59 Pac. 438, and Cook

v. Union Trust Co., 106 Ky. 803, 51 S. W. 601, 602, both holding payment on note secured by vendor's lien extends period of limitation.

Distinguished in Duke v. Story, 116 Ga. 389, 42 S. E. 722, holding if obligation is barred security deed therefor is barred.

Purchaser of mortgaged property with notice of mortgage is bound by same equities as mortgagor.

Approved in Wadley v. Ward, 99 Ark. 215, 137 S. W. 810, holding bar of limitations against debt secured by mortgage did not protect subsequent purchasers from foreclosure of mortgage; dissenting opinion in Colonial & U. S. Mtg. Co. v. Northwest Thresher Co., 14 N. D. 174, **116 Am. St. Rep. 642, 8 Ann. Cas. 1160, 70 L. R. A. (N. S.) 814,** 103 N. W. 926, majority holding defendant, who as grantee of mortgagor took subject to mortgage, could plead limitations on foreclosure though debt was not barred as to debtor by reason of his absence from State; Whittington v. Flint, 43 Ark. 516, **51 Am. Rep. 579,** holding rule applied in all States where mortgage carried legal title except in Mississippi; Medley v. Elliott, 62 Ill. 535, holding that mortgagor and purchaser may both be treated as tenant or trespasser by mortgagee on forfeiture of condition of mortgage; Palmer v. Butler, 36 Iowa, 582, holding that purchaser was bound by acknowledgment of mortgage by mortgagor preventing bar of statute; Schmucker v. Sibert, 18 Kan. 110, **26 Am. Rep. 768,** holding when note is barred mortgage is also barred, but is not barred until note is; Mundy v. Monroe, 1 Mich. 71, holding mortgagee's right to bring ejectment after default was absolute and State law forbidding it was unconstitutional; Carson v. Cochran, 52 Minn. 75, 53 N. W. 1132, holding principle was undoubted as to payments by mortgagor prior to purchase, but not settled as to subsequent payments; Tripe v. Marcy, 39 N. H. 448, applying rule to purchaser where mortgage had been registered; Den v. McKnight, 11 N. J. L. 393, applying rule to purchase from executors when intent of sale was legal fraud, with notice of which purchaser was chargeable; Heyer v. Pruyn, 7 Paige, 469, **34 Am. Dec. 359,** holding that where purchaser had recognized mortgage his grantees were bound; Murdock v. Waterman, 145 N. Y. 66, 39 N. E. 832, accepting principle, saying mortgagee is not called on to inquire how mortgagor has dealt with equity of redemption; Jennings v. Wood, 20 Ohio, 282, holding when mortgagee purchases mortgaged premises and delivers up the note, the mortgage is thereby extinguished although remaining of record; Clark v. Potter, 32 Ohio St. 61, holding where a decree of foreclosure remained unacted on for over twenty years, mortgagor remaining in possession, decree could not be enforced against his vendees; Presbyterian Corporation v. Wallace, 3 Rawle, 148, holding a sheriff's sale of part of mortgaged premises under younger judgment against purchaser from mortgagor freed land from the mortgage; Nixon v. Bynum, 1 Bail. 151, holding mortgage duly registered prevents purchaser from mortgagor setting up title by possession against mortgagee; Kendall v. Tracy, 64 Vt. 526, 24 Atl. 1119, applying

rule and holding mortgagee could assert his rights over part of mortgaged property sold by mortgagor, notwithstanding he had stood by and seen large expenditure thereon.

Mortgagor in possession is not accountable to mortgagee for rents, though land when sold is insufficient to pay debt.

Cited in Teal v. Walker, 111 U. S. 250, **28 L. Ed. 418**, 4 Sup. Ct. 424, applying rule to trust deed and holding that under Oregon statute a mortgagee is not entitled to rents and profits before foreclosure; Willis v. Eastern Trust etc. Co., 169 U. S. 311, **42 L. Ed. 759**, 18 Sup. Ct. 353, holding mortgagee not entitled to summary process to recover possession of land under landlord and tenant act of District of Columbia; Dow v. Memphis etc. R. R. Co., 20 Fed. 770, applying rule to a mortgage of railroad, including the income, tools, etc., holding mortgagee not entitled to account of receipts.

Nature of mortgagor's estate at common law, and remedies available by him to recover possession and otherwise obtain his rights by suit or action. Note, **7 Am. St. Rep. 33.**

Improvements made on mortgaged property inure for the benefit of mortgagee.

Cited in Mobile Marine Dock etc. Co. v. Huder, 35 Ala. 720, holding on foreclosure lands to be sold must be estimated at present value, including improvements; Porter v. Pillsbury, 36 Me. 284, holding that under State law mortgagee secured by note and mortgage may recover balance of debt, deducting value of mortgaged premises at foreclosure; Tripe v. Marcy, 39 N. H. 451, holding neither mortgagor nor purchaser of equity could set up claim for betterments; Walker v. Walker, 64 N. H. 56, 5 Atl. 461, applying rule to improvements made by holder of a remainder in fee upon condition, when the condition was broken; Savings Bank v. Creswell, 100 U. S. 640, **25 L. Ed. 714**, as to judgment liens.

Knowledge or notice of adverse claim as affecting right to compensation for improvements. Note, **Ann. Cas. 1916B, 62.**

When mortgaged property is partly sold to various purchasers right of mortgagee to call for foreclosure and sale of all mortgaged property is not affected.

Cited in Mobile Marine Dock etc. Co. v. Huder, 35 Ala. 720, holding that portions of land unsold must be first subjected, then other portions in inverse order of alienation; Gibson v. McCormick, 10 Gill & J. 105, holding decree for sale for payment of creditors erroneous if it directs payment by contribution by devisees; Presbyterian Corp. v. Wallace, 3 Rawle, 164, arguendo; Savings Bank v. Creswell, 100 U. S. 640, **25 L. Ed. 714**, as to subjection of different properties to judgment lien.

Right of person whose debt is secured by trust deed, pledge, mortgage or other lien to maintain action at law to recover judgment on debt. Note, **73 Am. St. Rep. 560.**

Miscellaneous. Cited in Kelly v. Leachman, 3 Idaho, 673, 34 Pac. 814, holding that payment of sum of money was for interest due on debt may be proved by parol; Medley v. Elliott, 62 Ill. 534, saying it was settled law the interest of a mortgagee was a mere chattel interest similar to that in debt secured; Iglehart v. Armiger, 1 Bland Ch. 525, but not in point; Neale v. Hagthrop, 3 Bland Ch. 582, apparently error; Ladue v. Detroit etc. R. R. Co., 13 Mich. 396, 87 Am. Dec. 763, as to general nature of a mortgage, holding that in Michigan it was only an accessory to the debt; Tripe v. Marcy, 39 N. H. 452, as to notice to purchaser from mortgagor; McCloskey v. O'Brien, 16 W. Va. 848, on question whether mortgage charges on estate merge in legal title on payment.

9 Wheat. 502–515, 6 L. Ed. 145, STEPHENS v. McCARGO.

A claimant of same property under different titles may assert all his titles in same bill.

Approved in Westinghouse Air Brake Co. v. Kansas City S. Ry. Co., 137 Fed. 32, union of cause of action upon mechanic's lien and cause of action upon equitable preference in bill to enforce same demand against same property does not render pleading multifarious; Halsey v. Goddard, 86 Fed. 28, holding bill not multifarious because alleging two alternative grounds on which complainants may be entitled to an estate.

Miscellaneous. Cited in The S. W. R. R. Co. v. Paulk, 24 Ga. 371, not in point.

9 Wheat. 515–525, 6 L. Ed. 149, LOVE v. SIMM'S LESSEE.

Plaintiff must show right to possession to be in himself, but tenant may always prove title out of plaintiff.

Approved in Scott v. Herrell, 31 App. D. C. 53, and Reeves v. Low, 8 App. D. C. 118, both holding plaintiff in ejectment could be defeated by outstanding title by adverse possession in third person; McGuire v. Blount, 199 U. S. 144, 50 L. Ed. 128, 26 Sup. Ct. 1, arguendo; Hamilton v. Brown, 161 U. S. 274, 40 L. Ed. 699, 16 Sup. Ct. 592, applying rule to an escheat of lands in Texas; Commyns v. Latimer, 2 Fla. 88, holding that vague description without any designation to give beginning of a survey, insufficient to support action in ejectment; note to Doe v. West, 1 Blackf. 136, holding prior peaceable possession under claim of right will prevail against mere intruder; Boylan v. Meeker, 28 N. J. L. 297, applying rule where plaintiff claimed title under a will, holding defendant could use will to show the title was elsewhere; Williams v. Seawall, 1 Yerg. 84, applying rule to alternative defense; dissenting opinion in Henderson v. State, 10 How. 325, 13 L. Ed. 440, arguendo.

Distinguished in Turner v. Aldridge, McAll. 230, Fed. Cas. 14,249, holding that rule was subject to be limited and qualified by each case, and that a plaintiff having documentary title with possession could recover

against a defendant, a mere trespasser; Rush v. French, 1 Ariz. Ter. 153, as not applicable to disputed mining claims when both parties showed color of title.

For what property or invasion of possession ejectment is maintainable. Note, 116 Am. St. Rep. 569.

What title or interest will support ejectment. Note, 18 L. R. A. 781, 783.

Miscellaneous. Cited in State v. Kirke, 12 Fla. 291, 95 Am. Dec. 325, not in point.

9 Wheat. 526, 6 L. Ed. 151, STEWART v. INGLE.

Return to writ of certiorari on suggestion of diminution of record may be made by clerk of lower court instead of judge.

Approved in Carter v. Louisiana Purchase Exposition Co., 124 Mo. App. 538, 102 S. W. 8, holding Circuit Court had power to correct error of clerk in entering judgment of justice of peace; Worcester v. State, 6 Pet. 565, 8 L. Ed. 502, applying rule to return of a writ of error; Deans v. Wilcoxon, 18 Fla. 549, as to form of writ of certiorari and its service.

9 Wheat. 527–528, 6 L. Ed. 151, PEYTON v. ROBERTSON.

In replevin for property distrained for rent, real matter in controversy is sum claimed; in replevin to try title to property, it is value of property.

Approved in Martinez v. International Banking Corporation, 220 U. S. 221, 55 L. Ed. 442, 31 Sup. Ct. 408, holding value of matter in dispute was test of jurisdiction of Supreme Court of Philippine Islands; Graves v. Thompson, 35 Wash. 285, 77 Pac. 385, in action for recovery of personal property, alleged damages for detention thereof cannot be added to value of property for purpose of determining appellate jurisdiction; Hilton v. Dickinson, 108 U. S. 171, 27 L. Ed. 690, 2 Sup. Ct. 428, holding demand governs jurisdiction until it appears that it is not the sum in dispute, then the sum shown will govern; Gibson v. Shufeldt, 122 U. S. 29, 30 L. Ed. 1084, 7 Sup. Ct. 1067, applying rule to appeal from Circuit Court under act of 1875, holding in suit by several on distinct demands defendant can only appeal as to those to whom more than five thousand dollars is decreed; Carne v. Russ, 152 U. S. 252, 38 L. Ed. 429, 14 Sup. Ct. 579, holding, in bill to redeem, right of appeal depends on amount to be redeemed.

Distinguished in Grambling v. Dickey, 118 N. C. 989, 24 S. E. 672, as inapplicable to interpleader before a justice to try title to personal property.

9 Wheat. 529–531, 6 L. Ed. 152, EX PARTE BURR.

Proceedings by mandamus to review action of Circuit and District Courts in disbarring attorney not entertained unless it has been irregular or flagrantly improper.

Approved in Thatcher v. United States, 212 Fed. 804, 129 C. C. A. 255, holding mandamus not exclusive remedy for review by Circuit Court of Appeals of order disbarring attorney; Barnes v. Lyons, 187 Fed. 883, 110 C. C. A. 15, holding writ not employed to revise decision of inferior court proceeding from judicial act; State v. Cole, 4 Okl. Cr. 40, 109 Pac. 742, denying mandamus to proceed with criminal trial; State v. Matthews, 81 S. C. 417, 128 Am. St. Rep. 919, 16 Ann. Cas. 182, 22 L. R. A. (N. S.) 735, 62 S. E. 696, issuing writ to compel board of pharmaceutical examiners to issue license as pharmacist; State v. Bare, 60 W. Va. 487, 56 S. E. 391, denying writ against officer vested with discretion when there was no willful disregard of duty; State v. Stiles, 48 W. Va. 429, 37 S. E. 621, holding judgment of disbarment may be reviewed by writ of error; Ex parte Bradley, 7 Wall. 377, 379, 19 L. Ed. 219, holding that one court could not disbar for contempt before another court; in dissenting opinion, p. 380, 19 L. Ed. 219, showing reason for refusal of mandamus in principal case; Davidson v. Washburn, 56 Ala. 597, holding mandamus would not lie to compel the rendering of particular judgment; State v. Kirke, 12 Fla. 286, 95 Am. Dec. 321, holding mandamus is proper to review disbarment of an attorney; s. c., p. 300, 95 Am. Dec. 333, holding State Supreme Court could interpose when decision of lower court manifestly erroneous and conduct improper; People v. Pearson, 2 Scam. 204, 33 Am. Dec. 448, as one of fifteen cited cases where mandamus has been refused, stating principles resulting from refusals; Jelley v. Roberts, 50 Ind. 7, holding mandamus will not lie to compel performance of a discretionary act; Walls v. Palmer, 64 Ind. 495, as to when mandamus is proper to review disbarment.

Distinguished in Matter of Eldridge, 82 N. Y. 166, holding guilt or innocence of an appellant did not rest in the absolute discretion of any court, and always open to review.

Right of attorney to review of disbarment proceedings. Note, 10 Ann. Cas. 546.

Law of mandamus. Note, 89 Am. Dec. 740.

Discretionary power of courts to control attorneys should be exercised with great moderation and judgment, but it must be exercised and by court itself.

Approved in In re Ulmer, 208 Fed. 467, disbarring attorney for perjury committed in Federal court; In re Thatcher, 190 Fed. 975, 976, disbarring attorney on ground of professional misconduct amounting to moral turpitude; In re Durant, 80 Conn. 148, 150, 10 Ann. Cas. 539, 67 Atl. 501, upholding disbarment of attorney for fraud in divorce action; In re Proposed Disbarment of Adriaans, 17 App. D. C. 45, disbarring attorney for false and scandalous statements as to judge and fellow-attorney; State v. McElhinney, 241 Mo. 606, 145 S. W. 1142, holding refusal of court to recognize attorney was not disbarment; In re Schnitzer, 33 Nev. 594, 33 L. R. A.

(N. S.) 941, 112 Pac. 852, suspending attorney for advertising to procure persons to come to State to procure divorce; In re Boone, 83 Fed. 949, holding attorney could not by contract enable himself to act against former client and use knowledge then obtained; United States v. Green, 85 Fed. 861, holding filing brief in appeal court libeling judges of Circuit Courts ground for disbarment; Beene v. State, 22 Ark. 154, holding court on appeal would only inquire as to regularity of proceedings, and not abuse of discretion; People v. Green, 7 Colo. 240, 49 Am. Rep. 353, 3 Pac. 67, holding that where power was statutory its use was by implication mandatory, and offense need not occur in open court; People v. MacCabe, 18 Colo. 191, 36 Am. St. Rep. 274, 19 L. R. A. 232, 32 Pac. 281, attorney disbarred for advertising to obtain divorces; State v. Kirke, 12 Fla. 287, 95 Am. Dec. 322, holding discretion to disbar must be sound and according to law; People v. Barker, 56 Ill. 301, 303, applying rule in case of breach of professional obligation of secrecy; Rice v. Commonwealth, 18 B. Mon. 483, 484, for adding to letter before publication; Walker v. Commonwealth, 8 Bush, 94, holding court could not act summarily when fact of malpractice was not actually known to it; Bradley v. Tochman, 3 Fed. Cas. 1167, where court refused to proceed to summary disbarment on account of a letter written by an attorney; State v. McClaugherty, 33 W. Va. 258, 10 S. E. 409, for publishing an article in a newspaper reflecting on conduct of a judge.

Summary jurisdiction over attorneys. Note, 2 Am. St. Rep. 848, 858, 859, 862.

Power of disbarment of attorneys is incidental to all courts, and is necessary for preservation of decorum.

Approved in Wernimont v. State, 101 Ark. 218, Ann. Cas. 1913D, 1156, 142 S. W. 197, and Commonwealth v. Roe, 129 Ky. 659, 19 L. R. A. (N. S.) 413, 112 S. W. 686, both following rule; In re Biggers, 24 Okl. 847, 25 L. R. A. (N. S.) 622, 104 Pac. 1085, holding disbarment was civil proceeding; In re Evans, 94 S. C. 416, 78 S. E. 228, holding rule did not apply where charges were made by Bar Association or attorney general; Thatcher v. United States, 212 Fed. 806, 129 C. C. A. 255, holding charges sufficient, strict rules of criminal indictments not being applicable; People v. Mead, 29 Colo. 346, 68 Pac. 241, holding when disbarment proceedings are instituted by petition filed by State Bar with Supreme Court and referred to attorney general, neither petition nor information filed by attorney general need be under oath; dissenting opinion in In re Dorsey, 7 Port. 396, 398, holding that oath in relation to dueling could be imposed prior to admission of an attorney; Ex parte Law, 35 Ga. 291, holding act of Congress of 1865, prescribing oath for attorneys who had been pardoned and taken oath of amnesty was void; Ricker's Petition, 66 N. H. 211, 24 L. R. A. 741, 29 Atl. 561, holding that woman may be an attorney at law; Matter of Knapp, 85 N. Y. 292, holding that court has jurisdiction to determine the amount of a lien claimed by an attorney on moneys

received by him for a client; Matter of ———, an Attorney, 86 N. Y. 568, applying rule where attorney had published in newspaper a libelous charge against judge.

Disbarment of attorneys and causes and proceedings therefor and for restoration. Note, 95 Am. Dec. 342, 344.

Charges against an attorney must be made on oath; but verification may be waived by attorney.

Cited in Beene v. State, 22 Ark. 157, stating usual practice; State v. Kirke, 12 Fla. 296, 95 Am. Dec. 330, holding defect of nonservice of rule cured by appearance; State v. Finley, 30 Fla. 313, 11 South. 503, holding that charges must be specific and particular; Matter of ———, an Attorney, 86 N. Y. 568, applying rule when attorney made no objection as to mode of procedure, and having had due notice, appeared.

Distinguished in In re Shepard, 109 Mich. 633, 67 N. W. 971, holding that court may act on charges verified on information and belief only.

9 Wheat. 532–537, 6 L. Ed. 152, SMITH v. McIVER.

Case involving fraud, once tried at law, cannot be heard in equity unless by reason of some equitable circumstance of which party could not avail himself at law.

Approved in Levin v. Northwestern Nat. Ins. Co., 146 Fed. 77, in action at law in Federal court on insurance policy, award of arbitrators, fixing amount of plaintiff's loss made in accordance with provisions of policy and pleaded by defendant, cannot be impeached for fraud; Church v. Anti-Kalsomine Co., 118 Mich. 241, 76 N. W. 392, holding necessity for accounting in action for fraud will not deprive law side of court of jurisdiction; Baker v. Biddle, 1 Bald. 408, Fed. Cas. 764, applying rule to a bill for discovery; Pierpont v. Fowle, 2 Wood. & M. 30, Fed. Cas. 11,152, holding that where relief is as complete at law as in equity, unless case begun in equity and disclosure obtained there, equity will not proceed; Fuller v. Montague, 59 Fed. 217, 16 U. S. App. 391, holding equitable suit for partition will not be entertained on a bill in nature of ejectment seeking to establish claimant's title; Jones v. Watkins, 1 Stew. 102, holding equity will not relieve against mistake in law after writ of error is barred by statute; s. c., p. 124, holding that equity will not re-examine a question decided in action at law; Herbert v. Hobbs, 3 Stew. 14, holding that injury resulting from neglect to sue on verbal request by surety is an available defense, both in law and equity; Wilkins v. Judge, 14 Ala. 138, holding that when question of fraud had been decided at law, it could not be again litigated in equity; Waring v. Lewis, 53 Ala. 623, holding judgment of probate court not reviewable in chancery unless special equitable circumstance shown; Andrews v. Fenter, 1 Ark. 197, refusing relief in equity when party lost remedy at law by negligence; Hempstead v. Watkins, 6 Ark. 362, 368, 369, 42 Am. Dec. 707, 712, 713, and Garvin v.

Squires, 9 Ark. 535, 50 Am. Dec. 225, holding that where party has elected tribunal for defense he is bound by decision; dissenting opinion in Gaines v. Hale, 26 Ark. 211, court could not adjudicate on question of law decided in law court; Dutil v. Pacheco, 21 Cal. 442, 82 Am. Dec. 750, refusing to interfere to set aside judgment where the fraud alleged might have been pleaded in the action at law; Bell v. Railroad Co., 34 La. Ann. 794, holding that registered judgment of State court creates no lien on property at the time in custody of receiver appointed by Federal court; Green v. Robinson, 5 How. (Miss.) 106, where equity court refused to restrain collection of a note on which judgment had been obtained, although fraud might have been pleaded; Miller v. Palmer, 55 Miss. 335, holding equity will enjoin judgment on default for balance of purchase money suffered by defendant under mistaken belief that sale was valid; Tennant's Case, 3 Web. 426, holding that courts of law could not determine the jurisdiction of State Senate in adjudging member guilty of contempt; Dwyer v. Garlough, 31 Ohio St. 160, holding in foreclosure suit defendant-assignee of mortgagor could not plead proceedings in insolvency; Kearney v. Smith, 3 Yerg. 132, 24 Am. Dec. 552, where bill in equity dismissed because of previous trial at law, where fraud might have been alleged; Thompson v. Hill, 3 Yerg. 170, holding no jurisdiction in equity where dispute of boundary had been tried and decided at law; Chester v. Apperson, 4 Heisk. 646, where equity refused to enjoin judgment at law suffered by defendant's own neglect, but gave relief on account of equitable defenses which could not have been urged in action at law.

Right to control action as between two courts of concurrent jurisdiction. Note, 1 Ann. Cas. 409.

Equitable jurisdiction as to injunctions against judgments. Note, 32 L. R. A. 322.

In all cases of concurrent jurisdiction court which first has possession of subject must decide it.

Approved in Jackson v. Parkersburg etc. Ry. Co., 233 Fed. 788, holding where creditor who sued railroad in State court delayed sale of road till receiver appointed in later suit in Federal court had been in possession for two years, suit in State court would be enjoined; Birdsall v. Welch, 6 D. C. 325, holding where action had been first tried at law, equity would not take cognizance without additional equitable circumstance to give such jurisdiction; Nash v. McCathern, 183 Mass. 348, 67 N. E. 324, holding where law court has acquired jurisdiction of action involving fiduciary relations and complex accounts, equity will not entertain bill; Blake v. Alabama & C. R. R. Co., 6 N. B. R. 332, 3 Fed. Cas. 587, giving preference to receiver first appointed by State court, Federal courts also having jurisdiction; The Celestine, 1 Biss. 11, Fed. Cas. 2541, holding that when vessel was lawfully seized under State law, State court and officers had jurisdiction to the exclusion of admiralty; Bell v. Ohio Life & Trust Co.,

1 Biss. 268, Fed. Cas. 1260, holding as between Federal and State courts, priority of jurisdiction is determined by service of process, not by commencement of suit; note to Union Mutual Life Ins. Co. v. Chicago University, 10 Biss. 197, on concurrent jurisdiction of Federal and State courts; Re The Boston, H. & E. R. R. Co., 9 Blatchf. 109, Fed. Cas. 1677, applying principle to administration of bankruptcy law, petitions being filed in District Courts in different States; Two Hundred and Fifty Barrels etc. v. United States, Chase, 507, Fed. Cas. 14,293, holding where seizure for violation of revenue laws first made on shipboard, admiralty court had jurisdiction; Mallett v. Dexter, 1 Curt. 179, Fed. Cas. 8988, holding administrator in process of accounting before probate court cannot be compelled to account in equity; Taylor v. The Royal Saxon, 1 Wall. Jr. 331, Fed. Cas. 13,803, holding replevin in State court is valid plea, both in abatement and bar against second replevin in District Court; Haines v. Carpenter, 1 Woods, 268, Fed. Cas. 5905, holding Federal court will not interfere in contest as to validity of will begun in State court; Wilmer v. Atlanta & R. A. L. R. R. Co., 2 Woods, 420, Fed. Cas. 17,775, holding that service of process and restraining order gave constructive possession to trustee; s. c., 2 Woods, 427, Fed. Cas. 17,775, holding that actual possession taken by another receiver appointed by State court took priority; Young v. Montgomery & E. R. R. Co., 2 Woods, 619, Fed. Cas. 18,166, holding first mortgagee could not interfere with possession by receiver under second mortgage appointed by another court; Board of Missions v. McMaster, 3 Fed. Cas. 781, holding authority of State court paramount in aiding executor in administering trust involving interest of residents and nonresidents; Mason v. Jones, 16 Fed. Cas. 1044, holding in matter of fraud, court which first has possession of case has exclusive jurisdiction till disposed of; Yeadon v. Planters' Bank, 30 Fed. Cas. 796, holding that opposition by assignees in bankruptcy to foreclosure proceedings in State court must be made there; Bruce v. Manchester & K. R. R. Co., 19 Fed. 344, applying rule to foreclosure in State court and application to enforce trusts in Federal court; Owens v. Ohio Central R. R. Co., 20 Fed. 13, holding that court first obtaining jurisdiction by service of process does not lose it by subsequent seizure under proceedings in another court; Adams v. Mercantile Trust Co., 66 Fed. 621, 30 U. S. App. 204, sustaining ruling as to appointment of receivers by State and Federal courts; Foster v. Bank, 68 Fed. 726, applying rule to application for receiver to oust one already appointed by State court; Foley v. Hartley, 72 Fed. 573, applying rule in suit for administration of intestate's estate in State court, where suit instituted in Federal courts, to invalidate claim of illegitimate heir; King v. Smith, 15 Ala. 269, holding that settlement of an administrator's account in the Orphans' Court cannot be reopened in chancery; Foster v. State Bank, 17 Ala. 675, holding that all defenses, legal and equitable, are finally precluded by a decision of the cause at law; Moore v. Lesueur, 33 Ala. 241, holding Court of Chancery would

not, without special equities, take charge of suit begun in the Orphans' Court; Waring v. Lewis, 53 Ala. 625, holding final decree of probate court in administration conclusive as to facts involved in its rendition; Beatty v. Ross, 1 Fla. 207, holding that on territory becoming State, cause in progress would not be removed from State to Federal court where jurisdiction was concurrent; In the Matter of an Executive Communication, 14 Fla. 301, holding Senate has exclusive jurisdiction to try impeachment of Governor of State, power of courts limited to ascertainment of continuance or discharge from impeachment; Sanford v. Cloud, 17 Fla. 542, holding that in order to stay proceedings on ground of another suit pending, it must be specifically pleaded and proved; Minns v. Wimberly, 33 Ga. 596, holding that plea of former recovery or pendency of previous action will always lead to dismissal of a later suit; Hines v. Rawson, 40 Ga. 359, 2 Am. Rep. 582, holding that if mortgagee commences foreclosure in State court and is there temporarily enjoined he cannot proceed in Federal court; Taylor v. City of Fort Wayne, 47 Ind. 282, holding that town council could not proceed to annex territory after application for incorporation filed with court having jurisdiction; Hill Mfg. Co. v. Providence & New York Steamship Co., 113 Mass. 500, 18 Am. Rep. 532, holding action in State court for damage to goods by fire on ship through negligence of owner cannot be defeated by subsequent proceedings for limitation of liability in admiralty court; Weeks v. Billings, 55 N. H. 374, holding that action in State court cannot be removed into Federal court by bare trustee for principal defendant; Ex parte Bushnell, 8 Ohio St. 601, holding State court has no authority to withdraw persons by habeas corpus from custody of Federal court; Norman v. Zieber, 3 Or. 202, holding Circuit Court could not, by habeas corpus, review commitment by Justice's Court, but could inquire into its jurisdiction; Chapin v. James, 11 R. I. 89, 23 Am. Rep. 414, holding that State court cannot enjoin levy by marshal of Federal court to enforce its own decree; McCulla v. Beadleston, 17 R. I. 27, 20 Atl. 14, holding in action at law on bond, charge of fraud could be inquired into without intervention of equity; Walker v. Howard, 10 Tex. Civ. App. 611, 30 S. W. 1096, court having once acquired jurisdiction, no other court will interfere; Bank of B. Falls v. R. & B. R. R. Co., 28 Vt. 478, where court of equity refused to enjoin parties who resided out of the State from a proceeding at law begun in another State; Craig v. Hoge, 95 Va. 280, 28 S. E. 319, holding bill attacking one of several debts under deed of trust and seeking substitution could not be entertained during pendency of prior suit for administering the trust; Ex parte Mooney, 26 W. Va. 41, 53 Am. Rep. 63, holding that errors making a judgment merely voidable could not be inquired into under writ of habeas corpus; Smith v. Ford, 48 Wis. 155, 2 N. W. 159, holding a State court competent to judge of a plea of bankruptcy.

Distinguished in Loring v. Marsh, 2 Cliff. 323, Fed. Cas. 8514, holding that pendency of another action for same cause in State court not good

plea in abatement; Central Trust Co. v. South Atlantic & O. R. R. Co., 57 Fed. 9, refusing to appoint receivers when one had already been appointed in suit pending in State court; Nelson v. Dunn, 15 Ala. 514, holding that if plaintiff at law subsequently, and with defendant's consent, submits the controversy to Court of Chancery, that could will retain jurisdiction; Gould v. Hayes, 19 Ala. 449, holding that settlement in Orphans' Court would not bar chancery jurisdiction when the will contained executory trusts not enforceable in former court; Inerarity v. Curtis, 4 Fla. 188, as not applicable to cases sought to be transferred from territorial courts on territory becoming State, denying Beatty v. Ross, 1 Fla. 207.

Conflict of jurisdiction in actions against vessels. Note, **62 Am. Dec. 245.**

Miscellaneous. Cited in Pratt v. Northam, 5 Mason, 105, Fed. Cas. 11,376, as instance of concurrent jurisdiction of law and equity; Pierpont v. Fowle, 2 Wood. & M. 32, Fed. Cas. 11,152, as instance where relief was adequate at law but equitable jurisdiction obtained by relief sought against fraud; Goodenow v. Miliken, 1 Hask. 352, Fed. Cas. 5535, as having recognized the principle of concurrent jurisdiction in matters of fraud; Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 157, 11 L. R. A. 627, fraud can always be set up as a legal defense to an action on an instrument; Wright v. Leclaire, 3 Iowa, 233, holding statute of limitations applied by analogy equally to cases in law and equity; Taylor v. Taylor, 74 Me. 588, holding State court had full jurisdiction in equity in cases of fraud to entertain suit by assignee in insolvency.

9 Wheat. 537–540, 6 L. Ed. 154, MOLLAN v. TORRANCE.

Jurisdiction of Federal courts depends on state of things at time of commencing action; after vesting, it cannot be ousted by subsequent events.

Approved in Mutual Life Ins. Co. v. Blair, 130 Fed. 975, where equity obtained jurisdiction of persons and subject matter of suit to cancel insurance policy for fraud prior to insurer's death, fact that insured died before answer and that action at law immediately brought on policy does not deprive equity court of jurisdiction; Ritchie v. Burke, 109 Fed. 9, holding where court has jurisdiction between citizens, after judgment court may determine issues between codefendants although court would not have had jurisdiction in action brought by one defendant against codefendant, they residing in same State; Irmegar v. Tazewell County, 264 Ill. 174, 106 N. E. 228, holding withdrawal of certain petitioners from election contest did not divest court of jurisdiction already attached; State v. Wilkins, 67 N. H. 165, 29 Atl. 693, holding under Laws N. H. 1887, c. 77, providing that court shall have jurisdiction to restrain sale of liquor on petition of twenty voters, the court is not affected by death or withdrawal of any petitioner; Clarke v. Mathewson, 12 Pet. 171, 9 L. Ed. 1044, to a bill of error by resident administrators of a deceased

plaintiff who had resided in different State; Anderson v. Watt, 138 U. S. 703, 34 L. Ed. 1081, 11 Sup. Ct. 451, where pleadings showed plaintiff and defendants resided in same State, but plaintiff being a married woman had domicile of her husband, who resided in different State; Hardenbergh v. Ray, 151 U. S. 118, 38 L. Ed. 95, 14 Sup. Ct. 306, affirming s. c., 13 Sawy. 162, 33 Fed. 814, where substitution of defendants was made, one being of same residence as plaintiff; Tunstall v. Worthington, Hempst. 664, Fed. Cas. 14,239, holding that in garnishment proceeding, judgment creditor and garnishee must be of different States; Trigg v. Conway, Hempst. 712, Fed. Cas. 14,173, where administrator of deceased plaintiff resided in same State as defendant; Mellus v. Thompson, 1 Cliff. 133, Fed. Cas. 9405, where, on death of defendant, his administrator was temporarily in same State with plaintiff; Culver v. Woodruff County, 5 Dill. 394, Fed. Cas. 3469, where, by act of Congress, certain counties of State of Arkansas were changed from one district to another; Rawle v. Phelps, 2 Flipp. 471, Fed. Cas. 11,588, remanding cause to State court because requisite diverse citizenship was wanting when suit commenced; Barnard v. Hartford etc. Co., 2 Fed. Cas. 836, holding decree dismissing the original bill does not dispose of cross-bill by a defendant praying relief against another defendant; Gilmer v. City of Grand Rapids, 16 Fed. 710, holding former suit defeated by reason of citizenship no bar to subsequent suit on same cause of action when domicile had actually been changed; Jarboe v. Templer, 38 Fed. 217, holding jurisdiction not lost by subsequent transfer of cause of action to a citizen of same State; The Tolchester, 42 Fed. 183, holding jurisdiction in admiralty in suit for limiting liability not lost by reduction of claims in State courts below the appraised value; Laskey v. Newtown Min. Co., 56 Fed. 629, holding allegation of diverse citizenship in amended complaint insufficient; Jones v. Shapera, 57 Fed. 461, 13 U. S. App. 481, holding assignee may sue on note if payee or first holder was resident of different State where action brought; Ex parte Kyle, 67 Fed. 309, holding jurisdiction acquired by Cherokee court not lost by subsequent naturalization of defendant; Brigel v. Tug River Coal etc. Co., 73 Fed. 14, affirmed in s. c., 86 Fed. 819, in suit for foreclosure, where one of the plaintiffs changed residence after commencement of suit; Cross v. Evans, 86 Fed. 4, 52 U. S. App. 728, where citizenship of defendant changed after removal of case from State court, and jurisdiction was held not lost; Indianapolis etc. Ry. Co. v. Risley, 50 Ind. 65, where removal to Federal court refused when citizenship of parties changed after action commenced; Dorr v. Davis, 76 Me. 304, holding jurisdiction of county probate court not lost because minor heir went to reside out of county; Brighton Market Bank v. Merick, 11 Mich. 420, on question whether note indorsed before maturity to citizen of another State was discharged by insolvent laws of maker State, court equally divided; State v. St. Louis County Court, 38 Mo. 407, holding that jurisdiction once acquired was not lost by legislative amendment, unless by express prohibition; Laird

v. Railroad Co., 55 N. H. 379, **20 Am. Rep. 219**, where suit could have been removed to Federal court at commencement; but State court was allowed to take jurisdiction, held not affected by subsequent change of residence; Trapier v. Waldo, 16 S. C. 285, holding order for sale in foreclosure suit made by court having jurisdiction not affected by legislation after jurisdiction had attached; Machine Co. v. Marchant, 11 Utah, 76, 39 Pac. 485, holding jurisdiction of Justice's Court not lost because at time of judgment claim with interest exceeds limit, the judgment is good only up to limit, and on appeal judgment may be given for full amount; dissenting opinion in Dred Scott v. Sandford, 19 How. 571, **15 L. Ed. 769**, arguendo.

Limited in Thaxter v. Hatch, 6 McLean, 70, Fed. Cas. 13,866, to cases where jurisdiction had actually vested by commencement of the suit.

Distinguished in Vattier v. Hinde, 7 Pet. 261, **8 L. Ed. 678**, holding where, of several defendants, some reside in State, some not, jurisdiction could be had by striking out the nonresident defendants; Florida v. Georgia, 17 How. 508, **15 L. Ed. 200**, showing that principal case did not rest on the ground that there is jurisdiction by implication over a third necessary party; Clarke v. Mathewson, 2 Sumn. 265, Fed. Cas. 2857, as not applicable to a bill of revivor when a new party plaintiff is of same State with defendant, case overruled on appeal (see s. c., 12 Pet. 171, **9 L. Ed. 1044**).

Indorsee residing in different State may sue immediate indorser in Federal court, although latter resides in same State as maker of note.

Approved in Farr v. Hobe-Peters Land Co., 188 Fed. 14, 15, 110 C. C. A. 160, holding limitation of act of August 13, 1888, on right of assignee of note to sue did not extend to intermediate assignees; Hoadley v. Day, 128 Fed. 304, upholding Federal jurisdiction over suit to foreclose trust deed securing accommodation notes; Superior City v. Ripley, 138 U. S. 96, **34 L. Ed. 916**, 11 Sup. Ct. 289, following rule; Parker v. Ormsby, 141 U. S. 85, **35 L. Ed. 656**, 11 Sup. Ct. 913, denying jurisdiction over suit by assignee of note payable to order, where record does not show original payee could sue in Federal court; Noell v. Mitchell, 4 Biss. 348, Fed. Cas. 10,287, following rule; Towne v. Smith, 1 Wood. & M. 120, Fed. Cas. 14,115, in case of note passing by delivery without assignment; Milledollar v. Bell, 2 Wall. Jr. 337, Fed. Cas. 9549, as not applicable to suit by mortgagee-assignee against mortgagor.

To sustain Federal jurisdiction in suit against remote indorser of note, plaintiff must show intermediate indorser could have sued in Federal court.

Approved in Kolze v. Hoadley, 200 U. S. 83, **50 L. Ed. 381**, 26 Sup. Ct. 220, applying rule to suit to foreclose trust deed, where bill also prayed cancellation of release to grantor for fraud; Emsheimer v. New Orleans, 186 U. S. 46, **46 L. Ed. 1048**, 22 Sup. Ct. 775, holding Circuit Court has jurisdiction on ground of diverse citizenship of suit by assignee of payees

of police warrants if payees could have prosecuted suit; Moore Bros. Glass Co. v. Drevet Mfg. Co., 154 Fed. 738, holding original owner of chose in action could sue in Federal court upon reacquiring it, when he could originally have so sued; Utah-Nevada Co. v. De Lamar, 133 Fed. 121, 122, 66 C. C. A. 179, applying rule to suit by assignee of oral contract to recover money due thereon; In re Pilger, 118 Fed. 207, holding in bankruptcy proceedings proof must show bankrupt is not in excepted class; Emsheimer v. City of New Orleans, 116 Fed. 894, holding Circuit Court has jurisdiction of suit by assignee to recover choses in action when requisite diversity of citizenship exists between complainant and defendant and original payee and defendant; Knopfi v. Roofing etc. Co., 92 Mo. App. 286, holding where a majority of property owners remonstrate against paving street, and most of them withdraw before any action is taken, the board contracting for the work has no jurisdiction to proceed; Bank of United States v. Moss, 6 How. 37, 12 L. Ed. 334, Coffee v. Planters' Bank of Tennessee, 13 How. 187, 14 L. Ed. 106, Bradley v. Rhine, 8 Wall. 396, 19 L. Ed. 469, Morgan v. Gay, 19 Wall. 83, 22 L. Ed. 100, Corbin v. County of Black Hawk, 105 U. S. 667, 26 L. Ed. 1139, Bradford v. Jenks, 2 McLean, 133, Fed. Cas. 1769, Astrom v. Hammond, 3 McLean, 107, Fed. Cas. 596, Dundas v. Bowler, 3 McLean, 208, Fed. Cas. 4140, following rule; Campbell v. Jordan, Hempst. 535, Fed. Cas. 2362, holding principle did not apply to a suit against an immediate indorser; Hampton v. Truckee Canal Co., 9 Sawy. 383, 19 Fed. 3, holding that assignee of mechanics' liens must show that court had jurisdiction of original lienor; s. c., p. 386, holding, and not deciding the point, that the authorities were conflicting as to power to sue when there were intermediate assignees presumably residing in same State as defendant; Jewett v. Bradford Savings Bank etc., 45 Fed. 802, as establishing law of action by indorsee of note against immediate indorser; Skinner v. Barr, 77 Fed. 818, reversing verdict for plaintiff, where immediate assignor of plaintiff could not have maintained the action.

Distinguished in Jewett v. Bradford Savings Bank etc., 45 Fed. 802, as not applicable to suit to compel transfer of corporate stock.

Plea to jurisdiction must aver condition of affairs at time of action brought, not at time of plea pleaded.

Cited in Upton v. New Jersey Southern R. R. Co., 25 N. J. Eq. 375, where application for removal refused on account of death of nonresident complainant; Holden v. Putnam Fire Ins. Co., 46 N. Y. 6, 7 Am. Rep. 290; Peachner v. Phoenix Ins. Co., 65 N. Y. 200, where removal of cause refused for failure to aver diverse citizenship at commencement of suit.

Amendment of pleading allowed when plea to jurisdiction sustained by reason of defective averment of residence.

Cited as example of order for amendment by Supreme Court in Garland v. Davis, 4 How. 154, 11 L. Ed. 918.

To sustain Federal jurisdiction, indorsee of note against remote indorser need not show that action was sustainable by intermediate indorser.

Cited in Phillips v. Preston, 5 How. 291, **12 L. Ed. 157**, where suit between indorsees was founded on an alleged contract to divide the losses; Bank of United States v. Moss, 6 How. 37, **12 L. Ed. 334**, where money counts stated an indebtedness and promise to pay directly by defendants to plaintiffs; Brown v. Noyes, 2 Wood. & M. 79, Fed. Cas. 2023, holding that in actions for money had, allegations of different citizenship, and amount, were alone required to give prima facie jurisdiction.

Miscellaneous. Cited in Dred Scott v. Sandford, 19 How. 473, **15 L. Ed. 729**, as supporting doctrine that facts upon which Federal jurisdiction is founded should appear upon the record; s. c., 19 How. 566, **15 L. Ed. 767**, as example of proceeding on writ of error after dismissal of suit for want of jurisdiction; Donaldson v. Hazen, Hempst. 425, Fed. Cas. 3984, also to same effect; United States v. Woolsey, 28 Fed. Cas. 767, holding that whether jurisdiction is sufficiently stated the defendant must plead specially to avoid it.

9 Wheat. 541–553, 6 L. Ed. 155, WALKER v. TURNER.

Judgment by court of limited jurisdiction is void unless grounds of jurisdiction appear on face of proceedings.

Approved in Copley v. Ball, 176 Fed. 689, 100 C. C. A. 234, holding will properly admitted to probate by county recorder during court vacation; dissenting opinion in Nind v. Myers, 15 N. D. 424, **8 L. R. A. (N. S.) 157**, 109 N. W. 345, majority holding valid certificate of sale for taxes; Tolmie v. Thompson, 3 Cr. C. C. 130, Fed. Cas. 14,080, applying rule to sale of real estate of intestate under special jurisdiction of County Court; Arrowsmith v. Burlingim, 4 McLean, 499, Fed. Cas. 563, to an auditor's deed for land sold for taxes in Illinois; Burnham v. Webster, 2 Ware, 243, Fed. Cas. 2178, to plea of a foreign judgment; Forbes v. Hyde, 31 Cal. 349, as to facts necessary to be stated in affidavit for publication of summons; Grier v. McLendon, 7 Ga. 364, to a record offered to prove appointment of guardian of ward resident in Alabama; Mason & W. R. R. Co. v. Davis, 13 Ga. 76, to records of arbitrators to assess damages against railroad company for injuries to property; State v. Metzger, 26 Mo. 66, and Smith v. Simpson, 80 Mo. 637, to transcript of justice in case of assault and battery omitting to state that offense was committed in his county; Staples v. Fairchild, 3 N. Y. 46, as to application for attachment of a nonresident debtor; Camp v. Wood, 10 Watts, 120, as to necessity for stating appearance and confession of judgment in judgment of justice of peace for amount in excess of his jurisdiction; Mayer v. Adams, 27 W. Va. 254, 255, as to necessity for record of posting notice of special session of County Court; Wagon Co. v. Peterson, 27 W. Va. 324, distinguishing between total lack of statement of jurisdictional facts and suggestion of facts which could be inquired into.

Void judgment will not support an execution or order of sale founded on it.

Cited in Mayhew v. Davis, 4 McLean, 222, Fed. Cas. 9347, as to deed for land sold for taxes which showed that no legal notice of sale had been given; Camp v. Wood, 10 Watts, 122, where jurisdiction of Justice Court limited to one hundred dollars and judgment given for one hundred dollars and thirty-five cents.

Void sheriff's deed will not support possessory title under laws of Tennessee, which require grant, or deed founded on grant.

Cited and rule applied in Redfield v. Parks, 132 U. S. 250, 33 L. Ed. 331, 10 Sup. Ct. 87, to possessory title founded on void tax deed in Arkansas,

Cited in dissenting opinion in Moore v. Brown, 11 How. 435, 13 L. Ed. 760, as having been founded on a misconception of the decisions in Tennessee and subsequently overruled by Green v. Neal, 6 Pet. 291, 8 L. Ed. 402, majority holding that void tax deed was insufficient to support statute of limitations in Illinois; Toll v. Wright, 37 Mich. 99, as having been overruled by Green v. Neal, 6 Pet. 291, 8 L. Ed. 402; Gray v. Darby, Mart. & Y. 424, as having properly followed decisions of courts of State since overruled.

Distinguished in Wilson v. Atkinson, 77 Cal. 488, 11 Am. St. Rep. 301, 20 Pac. 67, as being founded on local law and holding that tax deed void on its face might, under California code, be sufficient to give color of title to support title by adverse possession; Hirst v. Xeter Realty, 138 La. 406, 70 South. 342, holding in action to annul tax deed, in absence of evidence of contents, it was presumed valid.

Miscellaneous. Cited erroneously in Wilkins v. Judge, 14 Ala. 138.

9 Wheat. 553–555, 6 L. Ed. 158, CATLETT v. BRODIE.

Bond on appeal when intended to operate as supersedeas must be for amount to secure whole judgment if affirmed.

Approved in Hardesty v. United States, 184 Fed. 273, 106 C. C. A. 411, holding on affirmance of judgment imposing fine, United States could recover amount of fine from surety on appeal bond; Egan v. Chicago Great Western Ry. Co., 163 Fed. 350, holding under conformity statute Circuit Court on affirmance could issue execution against surety on appeal bond; Wood v. Brown, 104 Fed. 206, holding measure of damages under supersedeas, provided for by Rev. Stats., §§ 1000, 1010, 1012 (Colo.), to reverse personal judgment for money, is amount due obligee by the terms of judgment, just damages for delay, and costs; Bankers Surety Co. v. Security Trust Co., 39 App. D. C. 357, holding surety on appeal bond was, under its terms, liable for amount of judgment; Russian Cement Co. v. Le Page Co., 174 Mass. 358, 55 N. E. 74, holding under rule 13, United States Circuit Court of Appeals for First Circuit (31 C. C. A. liii, 90 Fed. liii), a supersedeas bond on appeal does not dissolve attachment; Stafford v. Union Bank of Louisiana, 16 How. 139, 14 L. Ed. 878, holding when stay of exe-

cution not desired, then, under act of 1794, security only required to answer costs; United States v. Dashiel, 3 Wall. 701, 18 L. Ed. 270, following rule; Davidson v. Lanier, 4 Wall. 454, 18 L. Ed. 379, holding that the judge's approval of the bond need not be in writing; French v. Shoemaker, 12 Wall. 99, 20 L. Ed. 271, holding the bond must cover damages for delay, costs and interest; dissenting opinion in Telegraph Co. v. Eyser, 19 Wall. 429, 22 L. Ed. 44, majority holding under judiciary act of 1872, § 11, may be executed after sixty days from judgment with permission of judge; Butchers' Assn. v. Slaughter House Co., 1 Woods, 54, Fed. Cas. 2234, holding both appeals and writs of error operated as supersedeas without an express order; The Sydney, 47 Fed. 263, applying rule as extended by rule 23; Rosenstein v. Tarr, 51 Fed. 370, applying rule as varied by Jerome v. McCarter, 21 Wall. 17, 22 L. Ed. 515, holding bond covered compensation for delay as well as amount payable in money under the decree appealed from; Many v. Sitzer, 6 Gray, 144, holding that on dismissal of writ of error defendant was liable, under the bond, for the original judgment, and the costs inserted therein by the judge below; Rose v. Richmond Co., 17 Nev. 76, 27 Pac. 1117, holding that amount of security was left to discretion of court; Ex parte Dunn, 6 S. C. 309, holding Supreme Court had full power to decide all questions as to scope of a writ of error; Harris v. Wheeler, 8 Blatchf. 83, Fed. Cas. 6130, holding execution could not issue until entry of formal decree; Tucker v. Lee, 3 Cr. C. C. 686, 687, Fed. Cas. 14,221, as to amount which could be recovered on bond, and method of assigning breach of condition; Richardson v. Richardson, 82 Mich. 307, 46 N. W. 671, as to power of State Supreme Court to fix penalty of appeal bond; Mason v. Germaine, 1 Mont. 281, holding same rules as to bonds applied to appeals from State Supreme Court and from Circuit Courts.

Overruled in Jerome v. McCarter, 21 Wall. 29, 22 L. Ed. 516, holding that since adoption of rule 29 amount was in the discretion of the judge below.

Distinguishable in Vaill v. Town Council, 18 R. I. 410, 28 Atl. 345, as not applicable to an appeal to State court from doings of a town council requiring a particular bond.

Criticised in Kountze v. Omaha Hotel Co., 107 U. S. 386, 27 L. Ed. 613, 2 Sup. Ct. 918, holding amount recoverable under bond in ordinary foreclosure suit was limited to the costs on appeal, waste, and, perhaps, taxes paid and loss from improper insurance.

Distinguished in Cook v. Smith, 67 Kan. 55, 72 Pac. 525, in action on bond conditioned for payment of damages occasioned by stay of money judgment allegation that debtor insolvent when judgment rendered no basis for substantial damages.

Bond on appeal, if to act as a supersedeas, must be filed within ten days after judgment.

Cited in Bigler v. Waller, 12 Wall. 149, 20 L. Ed. 262, following rule; dissenting opinion in Telegraph Co. v. Eyser, 19 Wall. 429, 22 L. Ed. 44,

majority holding that since the amending act of 1872, time was extended to sixty days.

In this case proper appeal bond not being filed, cause ordered dismissed unless sufficient bond filed thirty days after end of term.

Approved in Gay v. Hudson River Elec. Power Co., 190 Fed. 821, 822, 824, holding when judge of Circuit Court of Appeals allowed appeal from Circuit Court and fixed bond to be approved by "this court," neither judge nor clerk of court from which appeal was taken could approve bond; Brown v. Northwestern Mut. Life Ins. Co., 119 Fed. 150, holding obligee in bond which supersedes order confirming sale of real estate, directing execution and delivery of possession, is entitled to rents and profits while he is kept out of possession; Walker v. Houghtaling, 104 Fed. 514, holding where plaintiff in error has failed to file bond on writ of error in specified amount, but cause has been transferred to Circuit Court of Appeals, although time for suing out writ of error has elapsed, court may allow another bond to be filed, but not supersedeas; Whitney v. Frisbie, 6 D. C. 272, holding where appeal bond was inadequate, remedy would seem to be by application to dismiss appeal; Anson, Bangs & Co. v. Blue Ridge R. R. Co., 23 How. 2, 16 L. Ed. 518, granting appellant sixty days to file bond; Hudson v. Parker, 156 U. S. 287, 39 L. Ed. 428, 15 Sup. Ct. 454, holding that on writ of error in criminal case, justice of Supreme Court may admit to bail and fix amount of bond.

Requirement or permission of new or additional appeal or supersedeas bond in appellate court. Note, 10 Ann. Cas. 805.

Writ of error from United States Supreme Court as staying proceedings in State court. Note, Ann. Cas. 1912A, 259.

Practice and procedure governing transfer of causes to Federal Supreme Court for review. Note, 66 L. R. A. 861.

Miscellaneous. Cited in Bryan v. Bates, 12 Allen, 213, holding that Supreme Court was sole tribunal to determine as to sufficiency of bond taken on writ of error.

9 Wheat. 556–557, 6 L. Ed. 159, BAITS v. PETERS.

Simple contract debt is not extinguished by subsequent special contract to settle at future date, which elapses before suit brought, and no settlement is made.

Cited in Kelsey v. Western, 2 N. Y. 511, holding that bond for payment of a legacy charged on real estate given by devisee does not extinguish charge; Scott v. Howsman, 2 McLean, 185, Fed. Cas. 12,532, holding that assumpsit, not covenant, is maintainable on single contract subsequent to and varying terms of contract under seal.

Action on original claim upon failure to pay at time stipulated in accord or compromise. Note, 45 L. R. A. (N. S.) 1064.

9 Wheat. 558–565, 6 L. Ed. 160, SEBREE v. DORR.

Declaration on promissory note must state where payable, omission is fatal.

Cited in Lowe v. Bliss, 24 Ill. 169, 76 Am. Dec. 743, holding declaration describing note, without any place of payment, not sustained by note payable specifically at a certain place; also in Faulkner v. Faulkner, 73 Mo. 336, and Orr. v. Hopkins, 3 N. M. 47, 1 Pac. 183, both to same effect; Mygatt v. City of Green Bay, 1 Biss. 298, Fed. Cas. 9998, showing that rate of interest, exchange and place of demand are controlled by place named for payment; Roberts v. Mason, 1 Ala. 375, holding that when note names place for payment a demand at that place is condition precedent to indorser's liability.

If note is payable to order and names place for payment, declaration must state these facts or there will be fatal variance.

Approved in New York Life Ins. Co. v. McPherson, 137 Ala. 119, 33 South. 826, holding defense to action on life insurance policy that same was forfeited by failure to pay premium at Central Nat. Bank of New York is not sustained by producing premium note payable at Lowey Banking Co., Atlanta, Ga.; Wilkins v. McGuire, 2 App. D. C. 452, holding presentment not required as between maker and payee when not required by terms of note; Orr v. Hopkins, 3 N. M. (15) 47, 1 Pac. 183, where note declared on was negotiable generally, and the note proved was payable at a particular place.

Modified in Harrison v. Weaver, 2 Port. 544, holding that omission to plead that note was payable to order was an immaterial variance; Sappington v. Pulliam, 3 Scam. 387, as not applicable to statute of Illinois making notes assignable though they contain no words of negotiability.

Secondary evidence of contents of written instruments is not admissible when originals are within control or custody of party.

Approved in Doughty v. Funk, 24 Okl. 320, 103 Pac. 637, holding action not maintainable on promissory note on behalf of indorsee unless original be produced, where it is in custody of plaintiff; Halderman v. Halderman, Hempst. 560, Fed. Cas. 5909, applying rule to copy of account of deceased partner with firm in suit for settlement of account; The Alice, 12 Fed. 924, refusing to admit copy of bill of lading certified by United States consul; Anglo-American Packing Co. v. Cannon, 31 Fed. 314, holding each part of telegram is primary evidence, but letter-press copy of letter or telegram only secondary; Guthrie v. Merrill, 4 Kan. 193, holding it error to admit copy of contract when original known to be in custody of third party; Hoitt v. Moulton, 21 N. H. 591, where parol evidence of a mortgage not admitted when it disclosed the existence of higher evidence; Putnam v. Goodall, 31 N. H. 424, holding parol evidence which showed the existence of a lease not admissible to prove the lease; Vanauken v. Hornbeek, 14 N. J. L. 181, 25 Am. Dec. 510, holding in action on note worn out and destroyed, proof of the destruction was necessary.

Modified in United States v. Doebler, 1 Bald. 521, Fed. Cas. 14,977, holding that degree of diligence in procuring production of original depends on nature of transaction, importance of paper, and the circumstances.

Rules of evidence requiring production of original documents will not be dispensed with merely because proof of due execution is not always required.

Cited in Matossy v. Frosh, 9 Tex. 614, as to a statute of Kentucky dispensing with proof of execution of a note when signature not denied upon oath.

Notwithstanding statute dispenses with proof of instrument sued upon, its production at trial still required.

Cited in Lustig v. McCulloch, 10 Colo. App. 45, holding acceptor of bill entitled to have same surrendered over to court's custody upon entry of judgment against him.

9 Wheat. 565–573, 6 L. Ed. 161, KERR v. MOON.

Title and disposition of real property are exclusively subject to laws of place where situate.

Approved in Crossett Lumber Co. v. Files, 104 Ark. 602, 149 S. W. 909, following rule; Thomas v. Woods, 173 Fed. 593, **19 Ann. Cas. 1080, 26 L. R. A. (N. S.) 1188,** 97 C. C. A. 535, holding right of bankrupt's wife to dower governed by law of State where land is situated; Kane v. Luckman, 131 Fed. 617, applying rule to contract for sale of cows in exchange for farm; Readman v. Ferguson, 13 App. D. C. 71, holding validity of will determined by loans of State where realty devised was situated; Chidsey v. Brooks, 130 Ga. 220, **14 Ann. Cas. 975,** 60 S. E. 530, holding devisee under will probated in another State could not recover lands in Georgia until will was probated in that State; Succession of Hasling, 114 La. 295, 38 South. 174, validity of will made in Louisiana by citizen thereof devising realty in Mississippi is governed by laws of latter; McCormick v. Sullivant, 10 Wheat. 202, **6 L. Ed. 303,** will probated in Pennsylvania held inoperative to pass land in Virginia unless proved there; Taylor v. Benham, 5 How. 273, **12 L. Ed. 149,** holding failure to record a will will not avoid sale thereunder, unless required by laws of State where land situate; Burbank v. Conrad, 96 U. S. 298, **24 L. Ed. 726,** holding that in Massachusetts acknowledgment and recording are necessary to perfect title as against strangers; United States v. Ames, 1 Wood. & M. 80, Fed. Cas. 14,441, holding that State laws apply to government lands over which there has been no cession of jurisdiction, unless otherwise required by Constitution, treaties or statutes of United States; Magill v. Brown, 16 Fed. Cas. 447, construing devise of land to charitable uses; In re Zug, 30 Fed. Cas. 948, in questions touching tenure of real estate, Federal courts are governed by lex loci; Leavens v. Butler, 8 Port. 401, holding County Court could not decree division of lands in another State; Goodman v. Winter,

64 Ala. 426, holding probate was as indispensable to force and effect of a devise as to bequest of personalty; s. c., p. 428, holding that leges rei sitae must be observed as to essentials to pass title without regard to domicile of owner or place of alienation or devise; Sloan v. Frothingham, 65 Ala. 598, holding when title has to be made through an executor, he must be one recognized by the lex rei sitae; Keith v. Proctor, 114 Ala. 686, 21 South. 506, holding that failure of person named as executor to act within time limited by statute is an implied renunciation of his right, which cannot be retracted; Chappell v. Jardine, 51 Conn. 66, holding mortgage of property, which by change of boundary subsequently became part of another State, is governed by the laws of original State at date of mortgage; Key v. Harlan, 52 Ga. 477, holding foreign probated will cannot be admitted to probate in Georgia unless executed as required by Georgia law; Rogers v. Stevens, 8 Ind. 467, holding by analogy to English law, a will must be properly probated before it could be read in evidence; Lucas v. Tucker, 17 Ind. 45, holding that leges loci sitae control as to transfer of title of real estate and that will must be probated in State before executor can act; Evansville etc. Co. v. Winsor, 148 Ind. 688, 48 N. E. 594, holding foreign will cannot be contested until proved or recorded in State; Doyle v. McGuire, 38 Iowa, 412, holding foreign contracts between husband and wife on security of real estate are governed by lex loci rei sitae; Acker v. Priest, 92 Iowa, 616, 61 N. W. 237, holding that whether trust interest has been created in lands is to be determined by the lex loci rei sitae; Sneed v. Ewing, 5 J. J. Marsh. 465, 22 Am. Dec. 47, holding that foreign will to pass title to real estate must be executed conformably to law of Kentucky; Corrie's Case, 2 Bland, 499, in petition to appoint guardian of infant heirs to recover property in foreign country; Hutchins v. State Bank, 12 Met. 424, holding that when title to real estate has to be made by official act of executor will must have been probated in State; Ross v. Ross, 129 Mass. 246, 37 Am. Rep. 322, holding validity and form of a mortgage of real estate determined by lex loci rei sitae; Crusoe v. Butler, 36 Miss. 167, holding rule as to necessity for probate in State, of foreign wills, not affected by act of Congress of 1790; Emmons v. Gordon, 140 Mo. 500, 62 Am. St. Rep. 741, 41 S. W. 1001, holding as to lands in a foreign State, owner dies intestate unless will made in accordance with laws of that State; Bentley v. Whittemore, 18 N. J. Eq. 373, holding preferential assignment valid in foreign State, covering lands in home State, void as to such lands; Wills v. Cowper, 2 Ohio, 129, holding, under laws of Ohio, a power to sell lands given by will to executor could not be exercised by administrator with will annexed; Thrasher v. Ballard, 33 W. Va. 288, 289, 25 Am. St. Rep. 896, 897, 10 S. E. 412, holding foreign probated will ineffectual to pass title to land in Virginia unless proved there.

Execution of will of realty controlled by lex situs. Note, 2 Ann. Cas. 591.

Law governing construction of will of realty. Note, 11 Ann. Cas. 498.

Conflict of laws as to contracts relating to realty. Note, L. R. A. 1916A, 1012, 1021.

Probate is operative only in State where granted. Administrator cannot sue or be sued in courts of another State.

Approved in Higgins v. Eaton, 188 Fed. 967, holding State not required to give more force to judgment of another State than law or custom of such other State demands; Moore v. Petty, 135 Fed. 673, 68 C. C. A. 306, executor may sue in another State to recover from his agents proceeds of sale of realty belonging to decedent's estate; Blanchard v. Wilbur, 153 Ind. 390, 55 N. E. 100, holding under Burns' Rev. Stats. 1894, § 2366 (Ind.), (Rev. Stats. 1881, § 2218, Horner's Rev. Stats. 1897, § 2218), providing for admission of wills to probate by clerk, that objector cannot contest will after probate without filing a bond; Seery v. Murray, 107 Iowa, 389, 77 N. W. 1059, holding under Code Iowa, 1873, §§ 2338, 2339, 2353, providing that will not probated has no effect, devisees under such will acquire no rights under settlement secured from other heirs, when settlement is attacked for fraud; Newcomb v. Newcomb, 108 Ky. 598, 57 S. W. 6, holding will of British subject domiciled in this country probated in England is conclusive as to personal property in England; Anthes v. Anthes, 21 Idaho, 310, 121 Pac. 555, arguendo; Vaughn v. Northup, 15 Pet. 6, 10 L. Ed. 641, holding an administrator under probate in another State might receive but could not be sued in District of Columbia for assets due the deceased by government; Bartlett v. Rogers, 3 Sawy. 63, Fed. Cas. 1079, holding will proved in New York no authority for action by executor to collect assets in California; Caldwell v. Harding, 5 Blatchf. 501, Fed. Cas. 2301, to same effect will proved in Massachusetts, as to assets in New York; Mellus v. Thompson, 1 Cliff. 128, 132, 134, Fed. Cas. 9405, holding bill of revivor will not lie in Massachusetts against an executor under California probate; Second Nat. Bk. v. New York Silk Mfg. Co., 11 Fed. 535, holding that same rule applied to receivers under decision in Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Lusk v. Kimball, 87 Fed. 547, holding defect in power to sue is not cured by taking out letters of administration after suit brought; Harrison v. Mahorner, 14 Ala. 835, holding that, under law of 1821, foreign executor entitled to sue on recording his letters testamentary; Moore v. Lewis, 21 Ala. 580, holding administrator of will proved in Cuba incapable of suing in Alabama for a legacy due his testator; Wood v. Mathews, 53 Ala. 4, holding suit by parties claiming under will of heir of intestate could not sue before probating will in State; Greer v. Ferguson, 56 Ark. 330, 19 S. W. 967, holding that judgment could not be rendered against administrators of a deceased defendant appointed in another State; Davis v. Smith, 5 Ga. 296, 48 Am. Dec. 295, holding that foreign administrator cannot be made personally responsible for failing to appear and defend action on his intestate's covenant in another State; State v. Joyce, 48 Ind. 317, applying laws of Indiana, allowing duly probated foreign will to be certified and recorded in State and to be of same effect as

if there probated; Pitts v. Melser, 72 Ind. 471, holding foreign will not probated in State inoperative to pass title or establish any right under it; Sneed v. Ewing, 5 J. J. Marsh. 467, 22 Am. Dec. 48, holding that foreign probate gave no right to meddle with personal property in State; Turley v. Dreyfus, 33 La. Ann. 887, holding judgment against a foreign administrator could not be enforced against another administrator appointed in State; Cabanne v. Skinker, 56 Mo. 367, and Emmons v. Gordon, 140 Mo. 499, 62 Am. St. Rep. 740, 41 S. W. 1001, holding executor of will not probated in another State cannot be held liable on his bond for his acts done in that State; Taylor v. Barron, 35 N. H. 495, holding there is no privity between administrators of same intestate appointed in different States; Schultz v. Pulver, 11 Wend. 363, holding administrator in New York is bound to take necessary steps to collect debts in foreign States, and obtain proper representation for that purpose; Carr v. Lowe's Exrs., 7 Heisk. 88, 89, holding that until foreign will probated in State the deceased will be regarded as intestate; United States v. Union Pacific R. R. Co., 11 Blatchf. 390, Fed. Cas. 16,598, holding that rule was changed by act of Congress of March, 1873, but that the act was inoperative; Thurber v. Carpenter, 18 R. I. 784, 31 Atl. 6, holding that a foreign executor could sell mortgaged property in State as being persona designata, not deriving his authority from court of another State.

Distinguished in Higgins v. Eaton, 183 Fed. 390, 105 C. C. A. 608, holding legatee, citizen of another State, could sue executor in Federal court to establish rights under will.

Conclusiveness of decrees and orders granting, revoking and refusing probate of wills. Note, 60 Am. Dec. 361.

Judgments in rem and their effect as res adjudicata. Note, 75 Am. Dec. 722.

Probate of foreign wills. Note, 113 Am. St. Rep. 213.

Conclusiveness in domestic courts of foreign will duly probated abroad. Note, 9 Ann. Cas. 422, 423.

Effect of probate of will in other State. Note, 48 L. R. A. 137, 140.

Conflict of laws as to wills. Note, 2 L. R. A. (N. S.) 413.

Foreign judgments against an executor or administrator. Note, 27 L. R. A. 102, 107, 108.

Failure to aver probate and record of foreign will in home State is not cured by nondenial of facts in answer.

Cited in Bartlett v. Rogers, 3 Sawy. 64, Fed. Cas. 1079, holding objection may be taken at hearing, when issue joined on allegation of due issue of letters testamentary; Seery v. Murray, 77 N. W. 1059, to point that will not probated cannot be read in evidence.

Right to question sufficiency of complaint for first time on appeal. Note, 3 Ann. Cas. 545.

Miscellaneous. Cited incidentally in Southern Life Ins. etc. Co. v. Cole, 4 Fla. 363.

9 Wheat. 573–575, 6 L. Ed. 163, MEREDITH v. PICKETT.

Not cited.

9 Wheat. 576–578, 6 L. Ed. 164, WALDEN v. CRAIG.

In ejectment, amendment to enlarge term laid in declaration should be allowed in discretion of court.

Approved in Hartley v. Lapidus & Holub Co., 216 Fed. 96, 132 C. C. A. 336, holding denial of leave to file reply after commencing trial was within discretion of court; Liebing v. Matthews, 216 Fed. 11, 132 C. C. A. 245, holding order denying leave to file supplemental bill in suit to redeem was within discretion of court when complainant had repeatedly failed to redeem; Pacific Mut. Life Ins. Co. v. Tompkins, 101 Fed. 541, holding within discretion of court to allow amendment of declaration as to citizenship so as to conform to writ; Morris v. Wheat, 11 App. D. C. 214, holding court had discretion to allow amendment by striking out name of one plaintiff in ejectment, and order was not appealable; Walden v. Craig, 14 Pet. 153, 10 L. Ed. 397, holding that when the court gives leave to extend the term, it is not an amendment similar to the exercise of an original jurisdiction; Avery v. Bowman, 39 N. H. 397, holding that an officer's return of levy on execution may be amended at any time after return day in court's discretion.

Writ of error will not lie to review action of Circuit Court in granting or refusing motion to enlarge term stated in ejectment.

Approved in Whitworth v. United States, 114 Fed. 304, holding Circuit Court of Appeals cannot review action of District Court in denying motion to set aside judgment and to permit defendant to withdraw plea of guilty; Phillips v. Negley, 2 Mackey, 246, 247, 257, holding order vacating ex parte judgment not appealable; Cross v. Phillips, 14 App. D. C. 237, holding order of commissioner of patents granting leave to amend statement was discretionary and not appealable; Pickett v. Legerwood, 7 Pet. 149, 8 L. Ed. 639, reversing s. c., 1 McLean, 144, Fed. Cas. 8175, and dismissing writ of error from judgment on writ of error coram vobis; Poole v. Nixon, 9 Pet. 773, 9 L. Ed. 306, 19 Fed. Cas. 995, holding that where erroneous judgment was corrected by writ of error coram vobis in lower court, judgment sustaining that writ could not be reviewed on writ of error; Slicer v. Bank of Pittsburg, 16 How. 579, 14 L. Ed. 1066, refusing to review an order to enter judgment nunc pro tunc; United States v. Plumer, 3 Cliff. 59, Fed. Cas. 16,056, holding writ of error will not lie to review criminal proceedings in Circuit Court; Chapman v. Barney, 129 U. S. 681, 32 L. Ed. 801, 9 Sup. Ct. 427, nor to an amendment substituting a new sole plaintiff for sole original plaintiff; Stevens' Admr. v. Nichols, 157 U. S. 371, 39 L. Ed.

737, 15 Sup. Ct. 641, nor to an order denying leave to amend a petition for removal; The Elmira, 16 Fed. 139, nor to an order denying a motion to stay execution not being a final order in suit; note to Jared v. Goodtitle, 1 Blackf. 31, on review of amendment of declaration in ejectment; Brush v. Carter, 32 N. J. L. 559; motion on the trial for leave to amend and plead justification is in discretion of court and cannot be reviewed on error; Austin v. Clapp, 5 Tex. 133, holding order allowing clerk to amend by changing date of writ, and of filing petition in action for negligence, discretionary and not reviewable by error; Fowler v. Colton, 1 Pinn. 337, holding refusal to defendant of leave to amend notice of special matter in action of slander, not reviewable.

Distinguished in Avery v. Bowman, 39 N. H. 395, holding that refusal of an amendment for supposed lack of power may be corrected on writ of error; Welch v. County Court, 29 W. Va. 68, 1 S. E. 340, holding that ruling must be confined to cases which are purely matters of discretion or such as in their result cannot do injury.

Miscellaneous. Referred to in Walden v. Bodley, 9 How. 36, 38, 13 L. Ed. 36, 37, being further chapter in litigation of same case.

9 Wheat. 579–581, 6 L. Ed. 165, UNITED STATES v. PEREZ.

Discharge of jury from giving any verdict in capital case, where necessary to effect ends of justice, is in discretion of trial judge.

Approved in United States v. Jim Lee, 123 Fed. 742, State v. Jorgensen, 3 Idaho, 622, 32 Pac. 1130, People v. Ham Tong, 155 Cal. 581, 132 Am. St. Rep. 110, 24 L. R. A. (N. S.) 481, 102 Pac. 264, and State v. Costello, 29 Wash. 370, 69 Pac. 1100, all following rule; Dreyer v. Illinois, 187 U. S. 85, 86, 47 L. Ed. 86, 23 Sup. Ct. 33, holding plea of former jeopardy cannot be barred on discharge of jury after deliberating from 4 P. M. to 9:30 A. M.; Andrews v. State, 174 Ala. 50, 51, Ann. Cas. 1914B, 760, 56 South. 1011, holding discharge of jury was authorized, and accused subject to second trial; Cunningham v. Fair Haven & Westville R. Co., 72 Conn. 252, 43 Atl. 1050, holding in action for personal injuries, court may properly dismiss panel when council reads to jury findings in similar reported case; United States v. Bigelow, 3 Mackey, 407, 425, discharge of jury held not equivalent to acquittal; Dreyer v. The People, 188 Ill. 48, 58 N. E. 622, holding discharge of jury, without accused's consent, for failure to agree is no bar to further proceedings; State v. Duvall, 135 La. 726, 65 South. 910, People v. Sharp, 163 Mich. 83, 127 N. W. 760, Hedger v. State, 144 Wis. 300, 128 N. W. 89, and State v. Hansford, 76 Kan. 684, 14 L. R. A. (N. S.) 548, 92 Pac. 553, all holding jury containing disqualified juror was properly discharged and another jury impaneled; People v. Parker, 145 Mich. 499, 108 N. W. 1004, holding discharge during trial without showing of ground therefor was improper and accused not subject to another trial; In re Ascher, 130 Mich. 548, 550, 90 N. W. 421, 422, holding jury was properly discharged when it appeared after being sworn that some of them

had concealed facts showing prejudice against the State; that they had given liquor to other jurors, and that they had gotten the bailiff intoxicated; State v. Buente, 256 Mo. 241, Ann. Cas. 1915D, 879, 165 S. W. 344, holding where accused was tried for assault and battery in court of criminal correction, but jury was discharged and he was held in bail to grand jury, and thereafter charged with assault to murder, but convicted only of assault, plea of former jeopardy did not avail; State v. Keerl, 33 Mont. 511, 513, 517, 85 Pac. 863, 864, 866, discharge of jury for failure to agree is not once in jeopardy; State v. Stephenson, 54 S. C. 237, 32 S. E. 306, holding an abuse of discretion under Rev. Stats., § 2404 (S. C.), to send jury out three times; Vela v. State, 49 Tex. Cr. 591, 95 S. W. 531, upholding plea of former jeopardy where jury was discharged in absence of accused; Woodward v. State, 42 Tex. Cr. 198, 58 S. W. 138, holding under section 737, Code Cr. Proc. (Tex.), serious illness of child of juror creates necessity for discharge of jury; dissenting opinion in Kepner v. United States, 195 U. S. 135, 49 L. Ed. 126, 24 Sup. Ct. 797, majority cannot appeal from acquittal in court of first instance in Philippines; Ex parte Lange, 18 Wall. 201, 21 L. Ed. 887, holding that rule of "twice in jeopardy" did not apply to mistrial; Coleman v. Tennessee, 97 U. S. 520, 521, 24 L. Ed. 1123, 1124, holding prisoner could be retried, if after verdict judgment was arrested or new trial granted at request of accused; Simmons v. United States, 142 U. S. 154, 35 L. Ed. 971, 12 Sup. Ct. 172, where judge dismissed the jury on account of reported bias; Logan v. United States, 144 U. S. 298, 36 L. Ed. 441, 12 Sup. Ct. 628, where a jury after forty hours announced they could not agree, they were held properly discharged by the judge and defendant retried; Thompson v. United States, 155 U. S. 274, 39 L. Ed. 149, 15 Sup. Ct. 74, where during the trial it was shown that one of the jury was disqualified, because a member of grand jury which found indictment; United States v. Keen, 1 McLean, 434, Fed. Cas. 15,510, applying rule to trial for stealing letter from the mails; United States v. Shoemaker, 2 McLean, 115, Fed. Cas. 16,279, holding prosecution cannot after jury is impaneled enter nolle prosequi; United States v. Watson, 3 Ben. 3, Fed. Cas. 16,651, holding that illness of prosecuting attorney after the jury was impaneled was not sufficient ground for discharging the jury against will of defendant, and that such discharge was equivalent to acquittal; United States v. Morris, 1 Curt. 36, Fed. Cas. 15,815, applying rule in case of misdemeanor where bias was shown in one of the jurors; Holmes v. Oregon & Cal. R. R. Co., 7 Sawy. 394, 9 Fed. 239, arguendo, as to effect of exercise of discretionary power by court, that when determining the truth of allegations of jurisdictional facts its adjudication was conclusive; Kelly v. United States, 27 Fed. 617, 618, where jury in criminal case disagreed and were discharged; Atkins v. State, 16 Ark. 577, 578, as to power to discharge jury on a member becoming disabled by sickness; People v. Shotwell, 27 Cal. 399, where judge ordered discharge of jury by sheriff if they failed to agree by a certain hour, held prisoner could be retried;

People v. Smalling, 94 Cal. 116, 29 Pac. 422, holding, in case of murder, discharge of jury for failing to agree no bar to retrial; State v. Lee, 65 Conn. 274, **48 Am. St. Rep. 206, 27 L. R. A. 499**, 30 Atl. 1111, holding that by State law there could be an appeal by State in nature of motion for new trial, after verdict of acquittal; In re Allison, 13 Colo. 532, **16 Am. St. Rep. 229, 10 L. R. A. 793**, 22 Pac. 822, except in case of gross abuse of court's discretion, objection of twice in jeopardy is not ground for reversal on error or discharge on habeas corpus; Ellis v. State, 25 Fla. 706, 6 South. 769, holding jury may be discharged on account of sudden sickness of juror, illness of prisoner or other urgent cause, and prisoner retried; Tervin v. State, 37 Fla. 402, 20 South. 553, to same effect; Ochs v. People, 124 Ill. 410, 16 N. E. 665, holding that reasons for discharge of jury include outside influence and return of a juror under suspicious circumstances; State v. Walker, 26 Ind. 353, where jury was out nineteen hours and failed to agree, held their discharge was proper; State v. Nelson, 26 Ind. 369, where jury deliberated three days and failed to agree in case of grand larceny, their discharge held proper; Shular v. State, 105 Ind. 300, **55 Am. Rep. 217**, 4 N. E. 876, when an accused takes a new trial under statute he waives privilege of pleading twice in jeopardy; State v. Leach, 120 Ind. 125, 22 N. E. 112, in trial before justice of peace for misdemeanor, jury were properly discharged after three hours' deliberation; State v. Calendine, 8 Iowa, 294, construing "urgent circumstances," which authorize discharge of jury; State v. White, 19 Kan. 448, **27 Am. Rep. 139**, where jury in trial for bigamy were out fourteen hours, they were properly discharged, and prisoner's absence at discharge irregular, but immaterial; O'Brian v. Commonwealth, 6 Bush, 568, where juror properly discharged as having been member of grand jury finding the indictment, court could not summon another juror and proceed with trial; State v. Ferguson, 8 Rob. (La.) 616, where jury dismissed for failure to agree; State v. Costello, 11 La. Ann. 285, where jury, in murder case, after being impaneled, but before indictment read, were allowed to separate, their discharge was proper; State v. Blackman, 35 La. Ann. 484, where, in case of shooting, with intent to murder, jury were discharged after being out two or three hours, there was no abuse of discretion; State v. Nash, 46 La. Ann. 203, 14 South. 610, where, after being sworn, but before any testimony offered, juror was removed from panel on murder trial, it being shown that he had conscientious objections to capital punishment, prisoner not in jeopardy; Hoffman v. State, 20 Md. 434; Anderson v. State, 86 Md. 481, 38 Atl. 938, holding no man is in jeopardy till verdict is rendered; Commonwealth v. Roby, 12 Pick. 503, discussing cases in which plea of twice in jeopardy could not be made; Commonwealth v. Townsend, 5 Allen, 218, holding that the time for exercise of power of discharge lay in court's discretion, and suggesting proper course; Commonwealth v. Sholes, 13 Allen, 556, holding that motion by defendant to quash indictment, made after jury impaneled, all parties consenting, did not entitle him, on his

being overruled, to plead twice in jeopardy on new impaneling of same or another jury; Commonwealth v. McCormick, 130 Mass. 62, 39 Am. Rep. 424, where, after trial begun, court properly discharged jury on finding juror was surety on a recognizance of one of defendants before trial; Commonwealth v. Cody, 165 Mass. 136, 42 N. E. 576, where jury discharged for failure to agree; People v. Pline, 61 Mich. 250, 28 N. W. 84, where jury discharged in Justice's Court, after being out only fifteen minutes; Hare v. State, 4 How. (Miss.) 200, holding plea of former trial must allege either acquittal or conviction; Price v. State, 36 Miss. 544, 72 Am. Dec. 200, mentioning that rule was not accepted in Pennsylvania, Virginia, North Carolina and Tennessee, but was in that State; State v. Ulrich, 110 Mo. 358, 359, 360, 19 S. W. 658, 659, holding that sickness of judge was proper ground for discharge of jury and defendant could be retried; State v. Shuchardt, 18 Neb. 456, 457, 25 N. W. 723, holding, where case submitted to jury at 7 P. M., and at 6 A. M., next morning, they reported inability to agree, their discharge was unauthorized and prisoner entitled to release; Davis v. State, 51 Neb. 345, 70 N. W. 999, denying plea of former jeopardy, where jury at first trial were dismissed because juror became insane; Ex parte Maxwell, 11 Nev. 434, mere fact that foreman states jury were unable to agree does not warrant discharge of jury; State v. Pritchard, 16 Nev. 112, holding discharge of an incompetent juror after jury is sworn, and before any evidence given, does not necessitate discharge of entire jury nor entitle prisoner to plead twice in jeopardy; State v. Hall, 9 N. J. L. 259, upholding discharge where, after case submitted to jury, one member went away; People v. Green, 13 Wend. 57, where jury discharged after only thirty minutes' consultation, judge's decision could not be reviewed; State v. Washington, 90 N. C. 666, holding it was duty of judge to withdraw juror in order to guard against fraudulent practices and in such case there is no jeopardy; Poage v. State, 3 Ohio St. 239, holding that on discharge of jury in criminal case without consent of prisoner and without lawful cause, prisoner cannot be retried for same offense; Mitchell v. State, 42 Ohio St. 394, defining reasons which authorize discharge of jury; State v. Shaffer, 23 Or. 557, 32 Pac. 546, holding, that under law of Oregon, prisoner's consent not necessary when jury discharged for just cause; State v. McKee, 1 Bail. 653, 21 Am. Dec. 501, holding that after jury were charged they could be discharged for four reasons only, viz., consent of prisoner, illness of juryman, prisoner or court, absence of juryman, impossibility of agreeing; State v. Waterhouse, Mart. & Y. 280, 281, holding that improper exercise of discretion of judge in discharging jury would be an acquittal; Mahala v. State, 10 Yerg. 536, 31 Am. Dec. 593, holding that discharge of jury early in the morning, when charged the previous evening, and when court continued in session till following day, was not necessary discharge; Swindel v. State, 32 Tex. 104, holding entry of nolle prosequi before verdict no bar to second prosecution; Moseley v. State, 33 Tex. 671, holding retrial of prisoner on capital charge, after

discharge of jury for failure to agree, not inhibited by provision in United States Constitution; Simco v. State, 9 Tex. App. 346, holding defendant convicted under an illegal indictment could be again prosecuted for same offense; Powell v. State, 17 Tex. App. 351, holding that discharge of jury for other reasons than prescribed by code entitled the prisoner to plead twice in jeopardy; People v. Kerm, 8 Utah, 271, 30 Pac. 989, holding defendant consenting to discharge of jury, cannot plead once in jeopardy; Fells' Case, 9 Leigh, 616, applying rule where jury kept together for nine days; Gruber v. State, 3 W. Va. 702, holding that, when after being impaneled, jury was discharged on question of prisoner's sanity being raised, he could not be tried for same offense before another jury; State v. Davis, 31 W. Va. 393, 7 S. E. 26, holding that juror might be discharged during course of trial and new juror substituted and trial proceeded with de novo; Ex parte Lange, 18 Wall. 175, 21 L. Ed. 878, as illustrating class of cases which did not offend against rule of twice in jeopardy; Atkins v. State, 16 Ark. 575, to show practice as to raising question of right to discharge of accused by motion on arrest of judgment; State v. Burke, 54 N. H. 95, as to sufficiency of indictment for murder in describing the method and instrument of the crime; State v. M'Lemore, 2 Hill, 682, holding seventh amendment of Federal Constitution applicable only to Federal courts; State v. Waterhouse, Mart. & Y. 283, holding that weight of authority was that mistrial ordered by court against the prisoner's authority, discharged the prisoner, but that the principal case was binding as an authoritative construction of the constitutional provision; Mahala v. State, 10 Yerg. 539, 31 Am. Dec. 595, explaining and reconciling principal case.

Distinguished in United States v. Gilbert, 2 Sumn. 56, Fed. Cas. 15,204, as wholly inapplicable where verdict had been rendered upon sufficient indictment; Ned, a Slave, v. State, 7 Port. 209, holding discharge of jury for inability to agree irregular, and equivalent to acquittal; Hawes v. State, 88 Ala. 61, 7 South. 310, as not being rule in Alabama, and holding that action of court in discharging jury was always open to review on appeal or writ of error.

Dissented from in State v. Ephraim, 2 Dev. & B. 170, holding that in case of felony a jury could not be discharged without prisoner's consent, and not then but for evident urgent overruling necessity which must appear on the record; Powell v. State, 17 Tex. App. 362, 365, 366, in general discussion on petition for rehearing as supporting the rule that jeopardy does not attach until verdict and that the discretion of the court in dismissing a jury is subject to review; dissenting opinion in Diaz v. United States, 223 U. S. 465, Ann. Cas. 1913C, 1138, 56 L. Ed. 509, 32 Sup. Ct. 250, majority upholding conviction of crime where court of Philippine Islands at end of trial took case under advisement without adjournment to definite day and rendered opinion and judgment of guilty ninety days later.

Discharge of jury without verdict. Note, 1 Am. Dec. 177.

Discharge of juries or jurors for incapacity, or impropriety of accepted jurors. Note, 1 Am. St. Rep. 522.

Inability of jury to agree as justification for discharge. Note, **12 Am. Dec. 547.**

Time for deliberation of jury before ordering mistrial in criminal case. Note, **11 L. R. A. (N. S.) 178.**

Where jury is discharged for failure to agree, prisoner may be again tried.

Cited as instance where jury failed to agree, in People v. Sheldon, 156 N. Y. 277, **66 Am. St. Rep. 568, 41 L. R. A. 647,** 50 N. E. 843, granting new trial where trial judge had coerced jury into verdict; approved in Kent v. State, 8 Okl. Cr. 199, 126 Pac. 1045, and State v. Barnes, 54 Wash. 497, 499, **23 L. R. A. (N. S.) 932,** 103 Pac. 794, both following rule; Keerl v. State of Montana, 213 U. S. 137, **53 L. Ed. 736,** 29 Sup. Ct. 469, holding rule properly followed under Montana statute.

What is jeopardy. Note, **21 Am. Dec. 505.**

Former jeopardy notwithstanding order of mistrial. Note, **1 Ann. Cas. 118.**

Miscellaneous. Cited erroneously in Ruffner v. Hill, 31 W. Va. 436, 7 S. E. 18, case intended is 6 Wheat. 580.

9 Wheat. 581–598, 6 L. Ed. 166, RENNER v. BANK OF COLUMBIA.

Indorser of note, payable at bank, is bound by bank's usage to give four instead of three days of grace.

Cited in Merchants' Bank v. Central Bank, 1 Ga. 434, holding parties dealing with Central Bank, bound by its charter exemption from liability to give demand and notice.

To charge indorser, demand of payment must be made on maker on third day after that limited on note.

Cited in McGruder v. Bank of Washington, 9 Wheat. 599, **6 L. Ed. 170,** following rule; Wood v. Corl, 4 Met. 205, holding that proof of special custom of no grace lies on the party making plea; Stuckert v. Anderson, 3 Whart. 120, holding that a notice sent through the postoffice to the maker did not make an indorser liable; Apperson v. Bynum, 5 Cold. 348, holding that when exact presentation and demand, according to the terms of the note, become impossible or impracticable, but presentment and demand were subsequently made, the liability of indorser continues as if presentment had been made; Lumber Co. v. Bank, 86 Tex. 300, 24 S. W. 260, following rule; Jackson v. Henderson, 3 Leigh, 213, holding that if declaration counted on general law-merchant, proof of presentation on fourth day of grace did not support the issue; Catlin v. Jones, 1 Pinn. 132, and Corwith v. Morrison, 1 Pinn. 490, holding that a plaintiff must aver due presentation and refusal to pay and notice to indorser.

Time for payment of contract is to be ascertained either from contract alone or from it taken in connection with known custom.

Cited in Mills v. Bank of United States, 11 Wheat. 438, 6 L. Ed. 514, holding that when note is payable at a bank whose rule is to demand payment and give notice on fourth grace day, the parties are bound with or without personal knowledge of rule; Bank of Washington v. Triplett, 1 Pet. 32, 7 L. Ed. 41, holding usage of place where a bill is drawn or where payment is demanded, regulates number of grace days; Sampson v. Gazzam, 6 Port. 135, 30 Am. Dec. 583, holding, when law raises presumption of existence of fact, presumption is itself proof of fact; Kilgore v. Bulkley, 14 Conn. 388, holding certificate of deposit in New York was governed by local custom, and when by its terms it fell due on a Sunday, it was payable on the previous day; dissenting opinion in Georgia Nat. Bank v. Henderson, 46 Ga. 505, majority holding that when a bank treated bill of exchange as bank check not entitled to days of grace, it was liable in damages for failing to present and give notice of dishonor; Leach v. Perkins, 17 Me. 464, 35 Am. Dec. 269, holding that usage might be admitted to explain intention of parties in contracting, but not to establish the rights under the contract, and applying rule to action by materialmen against one of several owners of a vessel; Marine Bank v. Smith, 18 Me. 102, as to rules founded on usage and as to sufficiency of notice given by a bank when note remained in bank; Bank of Columbia v. Magruder, 6 Har. & J. 180, 14 Am. Dec. 274, holding that special custom of banks in Columbia, being well known to defendant at the time of his indorsement, he must be supposed to have assented to it; Bank v. Pinkers, 83 N. C. 379, holding that testimony might be admitted to prove a general custom by a bank to receive papers for discount without any purpose or practice on its part to present them for payment.

Dissented from in Dabney v. Campbell, 9 Humph. 682, 683, 684, 685, holding customers of a bank not bound by its special custom of treating one particular day as a holiday, in absence of knowledge.

Customs of banks. Note, 50 Am. Dec. 97.

Banking customs. Note, 21 L. R. A. 442, 445.

Three grace days are allowed by custom only and interest is taken for that time; at law, note is payable when due.

Cited in Fowler v. Brantly, 14 Pet. 320, 10 L. Ed. 475, where note was negotiated after being refused discount at a bank; Weems v. Ventress, 14 La. Ann. 267, holding that when note bears interest from maturity, interest runs from the due date without allowing for grace days; Crump v. Nicholas, 5 Leigh, 257, following Virginia custom as to discounting notes.

Common law is made up of general rules originating in customs observed from time immemorial and is liable to variation by proof of local customs.

Cited in Strother v. Lucas, 12 Pet. 436, 9 L. Ed. 1147, to construction of terms used in treaty ceding Missouri to the United States, as affecting land held under former grants and laws; Sampson v. Gazzam, 6 Port. 134, 30 Am. Dec. 582, holding custom of Alabama merchants admissible to prove intention of parties to a contract; Bowen v. Blount, 48 Ala. 674, constru-

ing a conveyance to a married woman, with reference to State law, making the estate a separate estate of wife.

Parol evidence is not admissible to contradict or vary legal import of writing; usage admitted only to ascertain understanding of parties.

Approved in Cudahy etc. Co. v. State Nat. Bank, 134 Fed. 545, 67 C. C. A. 662, provision for payment of attorney's fees in case note is not paid at maturity does not destroy negotiability of note otherwise negotiable; Lillard v. Kentucky Dist. etc. Co., 134 Fed. 174, 67 C. C. A. 74, where contract was to deliver distillery slop at cattle feeding lot supplied by distiller, evidence of custom that lot be supplied by distillery with suitable pens equipped with pipes and troughs is admissible; Union Selling Co. v. Jones, 128 Fed. 677, holding where contract for sale of binder twine contained words "quality guaranteed," such words import that twine was reasonably fit for use for which binder twine is designed, and parol is inadmissible to show that by prior negotiations such warranty included representations as to quality; Metzerott v. Ward, 10 App. D. C. 524, holding one of four makers of note could not show, in absence of fraud, that he was to be bound as indorser only; Andrus v. Blazzard, 23 Utah, 255, 63 Pac. 893, holding where facts are known to both parties, and language intended in contract is used, mistake of legal effect cannot be shown by parol; Bank of United States v. Dunn, 6 Pet. 57, 8 L. Ed. 319, holding that liability of indorser could not be varied by secret understandings; Dickens v. Veal, 10 Pet. 581, 9 L. Ed. 541, to inquiry as to what would be reasonable diligence in giving notice of dishonor of a bill of exchange as depending on local usage; Strother v. Lucas, 12 Pet. 437, 9 L. Ed. 1147, with reference to Spanish titles in Missouri; Phillips v. Preston, 5 How. 291, 12 L. Ed. 158, holding that collateral agreement by parol may be proved by parol; Bliven v. New England Screw Co., 23 How. 432, 16 L. Ed. 513, holding parol evidence admissible as to usage in filling customers' orders in turn, and in proportion; Martin v. Cole, 104 U. S. 38, 39 Am. Rep. 118, 26 L. Ed. 650, as an unquestioned authority for the rule as to the nonadmissibility of parol evidence, and refusing to admit it to prove that an indorsement in blank was without recourse; Burke v. Dulaney, 153 U. S. 232, 38 L. Ed. 700, 14 Sup. Ct. 817, admitting parol evidence to show collateral agreement delaying operation of note pending examination of the property for which it was given; Bank of Alexandria v. Deneale, 2 Cr. C. C. 496, Fed. Cas. 846, to prove usage of banks with which a defendant was cognizant as showing the intention of the parties; s. c., p. 497, Fed. Cas. 846, defining the limits within which parol evidence was admissible; Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 45, Fed. Cas. 2730, holding that, what were properly to be deemed contracts on account of owners of a ship and what merely personal contract by master, was a matter to be proved dehors the contract; Marye v. Strouse, 6 Sawy. 209, 5 Fed. 488, as to custom of stock brokers in charging for telegrams; Chubb v. Bushels of Oats, 5 Fed. Cas. 664, admitting evidence to prove general custom of stowing goods for water carriage; Gorrell v. Home L. Ins. Co., 63 Fed. 377, 24 U. S. App.

188, holding parol evidence not admissible to show that a note, absolute in terms, was payable out of a particular fund; Price v. White, 9 Ala. 566, as to alleged custom to pay clerks' traveling expenses to place of business, held parol evidence incompetent; Barlow v. Lambert, 28 Ala. 709, **65 Am. Dec.** 378, holding that custom cannot overturn the positive requirements of the law or the express contracts of the parties, whether written or verbal; McClure v. Cox, 32 Ala. 622, **70 Am. Dec.** 553, admitting parol testimony to show custom of carrying cotton in tow on certain parts of Alabama River; Herbert v. Easton, 43 Ala. 553, in estimating amount payable under contract which might have been discharged in Confederate notes; Casteel v. Walker, 40 Ark. 120, **48 Am. Rep.** 6, holding that construction of the maker's obligations for interest on note after maturity was matter of law for the court, and parol evidence of intention not admissible; Kilgore v. Buckley, 14 Conn. 392, admitting parol to prove that by special custom in New York certificates of deposit falling due on a Sunday were payable on previous day; Rogers v. Atkinson, 1 Ga. 20, court there refusing to admit conversations or stipulations anterior to a written agreement, but allowing parol evidence of subsequent circumstances in certain events to prove in fact another contract; Batturs v. Sellers, 6 Har. & J. 251, refusing to admit a bill of parcels to prove contents of a contract to deliver a specific article; Lyon v. George, 44 Md. 301, holding, where no written contract for services, evidence may be given of uniform usage in regard to such services, applied to rate of commissions on sales by agent; Taunton Bank v. Richardson, 5 Pick. 447, holding parol evidence was admissible to prove waiver of notice; Farwell v. St. Paul Trust Co., 45 Minn. 498, **22 Am. St. Rep.** 745, 48 N. W. 327, refusing to allow evidence of parol agreement by indorser waiving presentment and notice; Farnsworth v. Chase, 19 N. H. 542, **51 Am. Dec.** 209, allowing parol to prove usage of purchases not for cash by dry-goods' jobbers in Boston, where bills not marked; Hayes v. Waldron, 44 N. H. 587, **84 Am. Dec.** 110, as illustration of case of admission of testimony to prove customs and usages of trade, and applying rule to use of stream into which manufacturer's waste was discharged; Babcock v. May, 4 Ohio, 347, admitting parol evidence to prove custom of navigating Lake Erie in construction of bill of lading; Stubbs v. Goodall, 4 Ga. 111, indorser in blank cannot show note was given for negotiation.

Distinguished in Bank of Alexandria v. Deneale, 2 Cr. C. C. 494, Fed. Cas. 846, holding parol not admissible to show that an indorser agreed to be absolutely bound to pay in any event; Mead v. Steger, 5 Port. 504, showing exceptions to general rule, e. g., to prove true consideration for deed, or fraudulent omission to state contract truly,—latent ambiguity—no consideration stated—other considerations than stated; dissenting opinion in Bank of St. Marys v. Mumford, 6 Ga. 77, majority holding parol admissible to prove that one of two joint makers of note was only surety, fact not being apparent on face of note.

Parol evidence to contradict written instrument. Note, **11 E. R. C.** 235.

In construing contract, known usage or custom may be looked to to ascertain understanding of parties.

Cited in Ogden v. Saunders, 12 Wheat. 298, 6 L. Ed. 635, holding that a bankrupt law of any State is not a law impairing the obligations of a contract; s. c., p. 342, 6 L. Ed. 650, dissenting opinion, that when usage was made part of a contract, it was so by act of parties not by interference of the legislature; The Gazelle, 5 Hughes, 395, 11 Fed. 432, applying rule to evidence offered to construe charter-party; The Cyprus, 20 Fed. 145, in construction of term "working days" in a charter-party; State v. Rives, 12 Ark. 726, holding that county warrants, made legal tender to a collector of county taxes, were legal tender by him in payment of county revenue; Kean v. Davis, 20 N. J. L. 430, to show that extrinsic evidence of custom might be admitted to prove that signature of a cashier bound bank; Towner v. Lucas, 13 Gratt. 712, holding where note was made payable with grace, evidence of the established and known usage of bank was admissible to show when the grace expired; Woodward etc. Co. v. Foster, 18 Gratt. 213, to same effect.

Usage or custom becomes part of and is law governing contracts entered into with reference thereto.

Cited in United States v. Arredondo, 6 Pet. 715, 8 L. Ed. 556, with reference to land titles, derived from Spain; Dillard v. Paton, 19 Fed. 625, holding that where parties were shown to have long dealt with each other without reference to local custom of Memphis Cotton Exchange, that custom was thereby negatived; Bridgeport Bank v. Dyer, 19 Conn. 140, holding that known custom of a bank to send checks to New York for collection by boat instead of by mail, was sufficient evidence of an agreement between the bank and indorser, to waive usual law regarding transmission of checks; Cadwell v. Meek, 17 Ill. 229, recognizing rule, but refusing to extend it to an individual course of dealing, which would enable a fraud to be perpetrated; Evansville etc. R. R. Co. v. Young, 28 Ind. 518, defining conditions under which a local commercial usage is valid to control general principle and render contracting parties subject to it; dissenting opinion in Patrick v. Beazley, 6 How. (Miss.) 622, 623, majority holding indorser not sufficiently notified of dishonor; Crosby v. Wyatt, 10 N. H. 324, holding well-known bank usage to receive payment by installments at regular intervals is presumptive evidence of surety's assent until contrary is shown; Sewall v. Allen, 6 Wend. 361, admitting proof of usage of senders of money to compensate common carriers for taking bills; Merchants' & Manuf. Ins. Co. v. Shillito, 15 Ohio St. 566, 86 Am. Dec. 494, holding that when goods carried on deck were protected by a marine insurance, it was on account of a custom which became part of the contract.

Custom of banks in Columbia, Washington and Georgetown, of demanding payment on fourth instead of third day after time limited, is not unreasonable.

Cited in Thornton v. Bank of Washington, 3 Pet. 41, 7 L. Ed. 595, holding that renewal of a note on the third grace day was not per se usury, as each note was considered distinct transaction; Cookendorfer v. Preston, 4 How. 325, 11 L. Ed. 995, reviewing decision holding that the usage has since been changed as to notes deposited for collection, and that local usage may be changed in the same mode it was established; Adams v. Otterback, 15 How. 545, 14 L. Ed. 808, holding that change in usage in Columbia, made in 1846, as to making demand on fifth instead of fourth day, was not, in 1853, sufficient to establish usage; Hill v. Norvell, 3 McLean, 585, Fed. Cas. 6497, holding that demand made on third day was within present usage; Lumber Co. v. Bank, 86 Tex. 301, 24 S. W. 260, by way of illustration of a valid custom departing from common-law rule, but holding Texas rule was three days.

Evidence of local custom being admitted at trial without objection, although not sufficiently pleaded, objection cannot be taken on appeal.

Cited in Townsend v. Jemison, 7 How. 721, 12 L. Ed. 886, where record showed demurrer apparently not disposed of, court presumes it withdrawn or overruled; Leavitt v. Cowles, 2 McLean, 493, Fed. Cas. 8171, holding it was now unnecessary to insert special count on lost note to let in secondary evidence; Neis v. Yocum, 9 Sawy. 27, 16 Fed. 171, holding in action on contract to sell and deliver on demand, where no time was stated, an averment of demand and readiness to pay without specifying time, is sufficient on general demurrer; Gindrat v. Mechanics' Bank, 7 Ala. 334, holding no necessity to allege special usage of giving notice by deposit in postoffice; dissenting opinion in Coles v. Kelsey, 2 Tex. 565, majority holding bar of the statute may be taken advantage of by demurrer where apparent on petition; Harrison v. Nixon, 9 Pet. 513, 514, 537, 9 L. Ed. 212, 213, 221, dissenting opinion, majority holding a bill claiming legacy defective for lack of averment as to testator's domicile.

Where, by special custom, four days of grace are allowed, suit against indorser must aver custom and demand on such day.

Cited as being a dictum in Jackson v. Henderson, 3 Leigh, 210.

Secondary evidence of contents of lost documents is admissible, if original lost by accident, and no fault is imputable to party nor suspicion of fraud.

Approved in Brown v. Harkins, 131 Fed. 66, 65 C. C. A. 301, refusing secondary evidence of contents of record-book in action by distiller to recover revenue tax wrongfully imposed; Boteler v. Dexter, 9 Mackey, 30, holding action at law maintainable on note accidentally lost; Burton v. Driggs, 20 Wall. 134, 22 L. Ed. 302, admitting copy of depositions, certified by clerk, original being lost; McPhaul v. Lapsley, 20 Wall. 288, 22 L. Ed. 348, refusing admission of testimony to disprove verity of photographic copies, when other evidence of alleged fraud and forgery was obtainable; United States v. Doebler, 1 Bald. 521, Fed. Cas. 14,977, holding

degree of diligence in procuring production of original depends on nature of transaction, importance of paper, and circumstances of case; Halderman v. Halderman, Hempst. 560, Fed. Cas. 5909, holding copy of individual account of deceased partner not admissible; The Alice, 12 Fed. 924, refusing to admit certified copy of bill of lading when it was not shown that original was lost; Bagley v. Eaton, 10 Cal. 148, holding that in cases of voluntary destruction motive was controlling fact, and if destroyed under mistaken belief of effect, secondary evidence was admissible; Sellar v. Clelland, 2 Colo. 546, holding, when no suspicion attaches of fraudulent destruction, and no doubt can arise as to proof of contents, secondary evidence is admissible; Sharp v. Lockwood, 12 Conn. 159, to show that court could not admit secondary evidence without finding fact of loss; Witter v. Latham, 12 Conn. 400, holding that object of rule was to guard against fraud; Vaughn v. Biggers, 6 Ga. 197, admitting secondary evidence to prove an execution under which land had been sold; Joannes v. Bennett, 5 Allen, 173, **81 Am. Dec. 741**, refusing secondary evidence of an alleged libelous letter destroyed by libeled party suing for the libel; Pipes v. Norton, 47 Miss. 81, in action to recover money paid on drafts or notes, they should be produced or their destruction or loss proved; Young v. Dearborn, 22 N. H. 378, holding person called to prove what deceased witness testified on former trial, may state merely gist of testimony; Broadwell v. Stiles, 8 N. J. L. 60, refusing to allow secondary evidence to disprove genuineness of signature by party who had voluntarily erased it; Vanauken v. Hornbeck, 14 N. J. L. 182, **25 Am. Dec. 511**, holding that in action on worn-out and destroyed note, destruction must be proved; Wyckoff v. Wyckoff, 16 N. J. Eq. 403, admitting oral evidence of contents of will, voluntarily destroyed by witness, the residuary legatee; Mandeville v. Reynolds, 68 N. Y. 533, allowing proof of a judgment-roll proved to have been lost or destroyed; Hawkins v. Stevenson, Dall. (Tex.) 559, holding accurate description in pleadings of note lost by attorney after suit begun sufficient.

Distinguished in Butler v. Joyce, 9 Mackey, 193, **16 L. R. A. 205**, holding action not maintainable where note was capable of transfer at time of loss.

Presumption against spoliator of evidence. Note, **34 L. R. A. 583.**

Secondary evidence of lost document must be best obtainable, and such as to leave no reasonable doubt of substantial parts of paper.

Approved in Bare v. Ford, 74 Kan. 596, **118 Am. St. Rep. 336, 11 Ann. Cas. 251**, 87 Pac. 732, following rule; Cornett v. Williams, 20 Wall. 246, **22 L. Ed. 257**, admitting copy of certified copy of judgment on proof of destruction of certified copy and loss of original; Morehead v. United States, 17 Fed. Cas. 730, holding, where the contents of lost document are unquestionable, secondary evidence may be admitted; Harvey v. Thorpe, 28 Ala. 262, **65 Am. Dec. 346**, holding where secondary evidence is offered, it may be shown that better exists; Shorter v. Sheppard, 33

Ala. 653, holding oral admissions by a grantee, fugitive from justice, that he had reconveyed to the grantor, under the circumstances, insufficient to establish reconveyance; Jacques v. Horton, 76 Ala. 246, on failure to prove by copy, contents of document may be shown by competent parol evidence; Witter v. Latham, 12 Conn. 399, admitting parol evidence to prove discharge in insolvency, original certificate being lost; Vaughn v. Biggers, 6 Ga. 199, holding that in the absence of better evidence it was proper to admit evidence of presumption in case of a lost execution on which a sale had been had; Mandeville v. Reynolds, 68 N. Y. 533, sustaining proof of lost judgment-roll by entries in the clerk's judgment-book and docket of judgments; Hobbs v. Beard, 43 S. C. 379, 21 S. E. 309, where contents of lost deed, proved by declaration of grantee in a letter written while in possession of the premises, oral declarations of the grantor and evidence of deed having been recorded; Tisdale v. Tisdale, 2 Sneed, 607, 64 Am. Dec. 782, admitting secondary evidence to prove contents of paper constituting declaration of trust by one heir for himself and coheirs.

Kinds of secondary evidence in respect to lost instrument. Note, 11 E. R. C. 505, 506.

Declaration on lost note does not require special count to justify admission of secondary evidence, particularly when note is lost after declaration filed.

Approved in Villiere v. Armstrong, 4 Mart. (N. S.) 22, applying rule to parol evidence offered to prove bond lost after notice filed; Vanauken v. Hornbeck, 14 N. J. L. 181, 25 Am. Dec. 510, holding no special count necessary in declaring on a lost or destroyed note; Sargent v. Railroad Co., 32 Ohio St. 455, in action on destroyed note, destruction need not be averred in petition.

Necessity of alleging loss in action on lost instrument. Note, 11 Ann. Cas. 253.

Right of action at law on lost negotiable paper. Note, 16 L. R. A. 207.

Miscellaneous. Cited in Harris v. Robinson, 4 How. 349, 11 L. Ed. 1006, on necessity for notice to drawer of note where residence could not be ascertained; Beeding v. Pie, 2 Cr. C. C. 152, Fed. Cas. 1227, as to usage of banks in demanding payment on fourth day; Brent's Exrs. v. Coyle, 2 Cr. C. C. 288, Fed. Cas. 1837, as governing decision in that case as to demand and notice; Sloo v. Roberts, 7 Ind. 131, discussing necessity of showing nonindorsement of a lost note, and distinguishing between actions on notes lost before and after due date; Tuttle v. Standish, 4 Allen, 483, 81 Am. Dec. 714, as an illustration of recovery against an indorser of a lost note, showing there had been a previous suit against maker in which the note had been used; Adams v. Baker, 16 R. I. 4, 27 Am. St. Rep. 723, 11 Atl. 170, discussing, but not deciding, point of right to recover on note lost when overdue; Moses v. Trice, 21 Gratt. 562, 8 Am. Rep. 611, as to action on lost negotiable note.

9 Wheat. 598–602, 6 L. Ed. 170, McGRUDER v. BANK.

If maker not found at place of abode or business, inquiry must be made and due diligence exercised to find him.

Cited in Ex parte Heidelback, 2 Low. 533, Fed. Cas. 6322, holding that demand must be made at the domicile, irrespective of place of making or negotiating note; Taylor v. Branch, 1 Stew. & P. 252, **23 Am. Dec. 295**, holding that bond presented at late residence of maker, which he was then found to have left, sufficient; Leonard v. Olson, 99 Iowa, 174, **61 Am. St. Rep. 236, 35 L. R. A. 384**, 68 N. W. 679, showing that head-note of principal case not sustained by the opinion, and mere presentation at former residence without further inquiry, is not sufficient; Baggett v. Rightor, 4 Rob. (La.) 19, holding diligent inquiry for the maker and his domicile excuses formal demand; Bellievre v. Bird, 4 Mart. (N. S.) 187, holding that, where demand had not been made personally, nor at former or present domicile, all being known, due diligence had not been exercised.

Demand on maker is indispensable, and must be made at his place of abode, not by mail. Notice to indorser may be given by mail.

Cited in Bank of Columbia v. Lawrence, 2 Cr. C. C. 512, Fed. Cas. 872, holding that when residence and place of business of indorser were known to holder and were in same neighborhood, notice left at postoffice was not sufficient; Dennie v. Walker, 7 N. H. 200, holding temporary absence from State of maker of note having a domicile in the State, no excuse for not making demand at the domicile; Stuckert v. Anderson, 3 Whart. 122, holding demand on maker of note cannot be made through postoffice.

Removal of maker of note to another State, without holder's knowledge, excuses actual demand of payment.

Approved in Citizens' Nat. Bank v. Great West Elev. Co., 13 S. D. 6, 82 N. W. 187, holding pledgee of warehouse receipts is excused from making demand for grain when warehouse is closed and no one in charge and defendant has no other warehouse in State; Dickins v. Beal, 10 Pet. 580, **9 L. Ed. 541**, where notice by mail to the indorser held sufficient; Roberts v. Mason, 1 Ala. 377, holding, where a note was made payable at certain bank, which had ceased to exist before maturity, no demand on maker was necessary; Leonard v. Olson, 99 Iowa, 172, **61 Am. St. Rep. 235**, 68 N. W. 679, holding further, that if note is made payable at a particular place, demand must be made there, except maker removes from State before maturity; Central Bank v. Allen, 16 Me. 44, holding note payable at bank which went out of business before maturity, sufficiently presented at the office of the bank occupying its place; Wheeler v. Field, 6 Met. 295, holding that demand should have been made at maker's last place of residence in State, if ascertainable by due diligence; Grafton Bank v. Cox, 13 Gray, 504, affirming necessity where maker has left State, for demand at the last place of business and residence or due efforts to find them; Herrick v. Baldwin, 17 Minn. 213, **10 Am. Rep. 164**, holding it was

apparently doubtful whether on authority of principal case presentment and demand, even at maker's last place of residence in State, were not entirely dispensed with; Salisbury v. Bartleson, 39 Minn. 366, 40 N. W. 266, holding it sufficient in case maker left State to present note at his former residence; Atherton v. Thornton, 8 N. H. 182, holding removal to another jurisdiction could not defeat liability of a bail and notice of execution sufficiently given him at his last abode in the State; Caldwell v. Porter, 17 N. H. 32, in case of removal from State it is sufficient to present note at usual place of residence in State; Taylor v. Snyder, 3 Denio, 151, 45 Am. Dec. 461, to same effect; dissenting opinion in Spies v. Gilmore, 1 N. Y. 328, 329, majority holding that when maker resided out of State, when note was made, presentment and demand of payment from him must be made to charge indorser; Foster v. Julien, 24 N. Y. 31, 35, 36, 38, 39, 80 Am. Dec. 322, 323, 325, 326, holding rule of principal case was that no demand or inquiry was necessary when, after the date of the note, the maker had removed into another State, that head-note of principal case was misleading, and no presentment was necessary; Adams v. Leland, 30 N. Y. 311, holding it was sufficient to present note at former residence or place of business; Gist v. Lybrand, 3 Ohio, 319, 17 Am. Dec. 596, in case of removal no actual demand from maker required; Reid v. Morrison, 2 Watts & S. 406, where maker of note, in Ireland, emigrated to America before maturity, presentment is unnecessary; McVeigh v. Bank, 26 Gratt. 806, 811, 823, in general discussion as to sufficiency of notice of dishonor of note left at last place of abode of indorser.

Distinguished in Farmers' Bank v. Gunnell, 26 Gratt. 142, on facts.

Limited in Taylor v. Snyder, 3 Denio, 154, 45 Am. Dec. 463, holding, when maker and indorser lived in different States at date of note, demand on maker necessary.

Miscellaneous. Cited in Brent v. Coyle, 2 Cr. C. C. 288, Fed. Cas. 1837, as turning on same question of demand and notice as principal case; Baumgardner v. Reeves, 35 Pa. St. 256, on question of discrepancy in pleading and proof as not touched by principal case; Terbell v. Downer, 27 Vt. 512, 65 Am. Dec. 214, holding, when note payable at bank, no presentment necessary to charge maker.

9 Wheat. 603–615, 6 L. Ed. 171, EX PARTE WOOD.

Procedure for repeal of patent under act of 1793.

Cited and construction of statute approved in Delano v. Scott, Gilp. 493, Fed. Cas. 3753, where workman obtained a patent for an article he had been employed to make; United States v. American Bell Tel. Co., 32 Fed. 602, and Attorney General v. Rumford Chem. Works, 32 Fed. 622, in review of this and subsequent legislation on subject.

Where court exercises special jurisdiction, all preliminary proceedings required to give jurisdiction must appear of record.

Approved in Copley v. Ball, 176 Fed. 689, 100 C. C. A. 234, upholding probate of will by recorder during vacation of court; Turner v. Thrower, 5 Port. 53, holding that on sheriff's sale under special power, evidence must be given in support of title of every act required by statute.

9 Wheat. 616–649, 6 L. Ed. 174, THE MONTE ALLEGRE.

Neither owner, marshal nor auctioneer can be charged with fraud, because goods sold are subsequently found defective.

Cited in note to Morgan v. Fencher, 1 Blackf. 12, holding declaration by constable that goods offered at execution sale belonged to the execution debtor, no warranty of title; Phillips v. City of Hudson, 31 N. J. L. 152, holding that sale of personalty only implies that the seller had authority to sell such a title as the ostensible owner had.

Sale by sample in private transactions implies warranty that bulk corresponds with sample; this rule does not apply to judicial sales.

Approved in Belmont, Exr., v. Talbot (Ky.), 51 S. W. 588, holding warranty of soundness of horse by agent at public sale binds principal; Schuchardt v. Allens, 1 Wall. 369, 17 L. Ed. 646, holding that authority, without restriction, to agent to sell carried authority to warrant; Middleton v. Findla, 25 Cal. 81, one employing an agent to sell cannot refuse to pay his commission, because title proves defective; Hitchcock v. Griffin, 99 Mich. 453, 41 Am. St. Rep. 628, 58 N. W. 375, holding same rule applied when sale was made by broker and accepted by principal; Cooley v. Perrine, 41 N. J. L. 325, 32 Am. Rep. 213, and Andrews v. Kneeland, 6 Cow. 358, holding sale by broker, by sample, when not restricted by his instructions as to mode of sale, bound principal by implied warranty; North River Bank v. Aymar, 3 Hill, 268, holding principal bound by notes issued by agent in name, but in fraud, of principal, if within letter of his authority.

Authority of agent to sell by sample. Note, 7 Am. Dec. 131.
Authority of agent to warrant. Note, Ann. Cas. 1913D, 480.
Warranty on sale by sample. Note, 70 L. R. A. 660.

There is no warranty, either by owner, marshal or the auctioneer, and maxim "caveat emptor" applies.

Approved in Hoffeld v. United States, 186 U. S. 276, 46 L. Ed. 1162, 22 Sup. Ct. 929, holding purchaser of original right of entryman at execution sale is not an assignee within 21 Stats. at Large, 287, c. 244, providing when entry on public lands has been allowed and cannot be confirmed, repayment shall be made; Horner v. Continental & Commercial Trust etc. Co., 198 Fed. 835, 117 C. C. A. 474, holding rule applied where purchaser examined goods though receiver could not deliver certain goods in inventory; Lewis v. Peck, 154 Fed. 280, 83 C. C. A. 211, holding, on foreclosure of mortgage, court could not decree that bondholders, not par-

ties to action except by trustee, be enjoined from setting up their claim under mortgage; Am. Press Assn. v. Daily Story Pub. Co., 120 Fed. 770, holding owner of copyrighted production does not lose exclusive property because a licensee omitted to print therewith the usual copyright notice; Terre Haute & L. Ry. Co. v. Harrison, 96 Fed. 910, holding rule of caveat emptor as applied to judicial sale deprives purchaser under foreclosure of any recourse against proceeds on account of existing liens, and also from certain funds in registry of court; English v. Otis, 125 Iowa, 560, 101 N. W. 295, purchasers of property at execution sale are not purchasers in good faith within Code, § 3797; Trigg v. Jones, Admr., 102 Ky. 50, 42 S. W. 849, holding court will relieve purchaser at judicial sale from deception by court or its agent in reference to amount of land sold; Rocksell v. Allen, 3 McLean, 357, Fed. Cas. 11,983, applying rule to sale of land on execution by sheriff; Searey v. M'Chord, 1 Fed. 262, setting aside sale by assignee in bankruptcy, where purchaser innocently misled by advertised notice of sale; Fidelity Ins. etc. Co. v. Roanoke Iron Co., 84 Fed. 746, holding purchaser under decree for sale cannot, after completion, claim discharge of unpaid taxes out of purchase money; Perkins v. Winter, 7 Ala. 868, on sale by commissioners under order of court, purchaser not entitled to indemnity for encumbrance after order passed to make deed; Branham v. M. & C. C. of San Jose, 24 Cal. 607, holding naked purchaser at judicial sale, under foreclosure decree, not entitled to have sale set aside as void, because he acquired no title; Worthy v. Johnson, 8 Ga. 240, 52 Am. Dec. 402, applying rule to public sales, under authority of law, by executors and guardians, who cannot bind the estate by covenants respecting the property sold; McWhorter v. Beavers, 8 Ga. 302, holding that on sale by sheriff there is no implied warranty; England v. Clark, 4 Scam. 490, holding that there was no remedy at law to relieve purchaser at judicial sale where title failed; Brown v. Wallace, 4 Gill & J. 492, 2 Bland, 599, holding that court in no case undertook to sell anything more than the title of the parties to the suit; Johnson v. Laybourn, 56 Minn. 333, 57 N. W. 933, holding sale by assignee in insolvency was sale by officer of law; Stephens v. Ells, 65 Mo. 460, holding sale in partition does not import any warranty of title whether purchaser be stranger or party interested; Frasher v. Ingham, 4 Neb. 535, but holding rule did not apply where, on sale by sheriff under levy, it subsequently appeared the levy had been made on wrong lands; Ellis v. Adderton, 88 N. C. 477, holding that purchaser having notice of defects in title and that only the interest of intestate would be sold, was bound by his purchase; Westfall v. Dungan, 14 Ohio St. 281, holding purchaser, after completion, could not be relieved against false and fraudulent representations made by executors at time of sale; Freeman v. Caldwell, 10 Watts, 10, holding that rule is applicable as well to sales of personalty as realty, and that purchaser at sheriff's sale, whose title is subsequently defeated by replevin, has no recourse; Lynch v. Baxter, 4 Tex. 437, 51 Am. Dec. 736, holding that bond for warranty of title given by an administrator on a sale could

not bind his intestate's estate; Stearns v. Edson, 63 Vt. 263, **25 Am. St. Rep. 760**, holding that on sale under execution of mortgaged realty, purchaser not excused from completion, because before deed from sheriff mortgage had been foreclosed; Saunders v. Pate, 4 Rand. 13, holding sheriff selling under execution in good faith incurred no responsibility as to title; Young v. McClung, 9 Gratt. 359, holding it duty of purchaser at judicial sale to see that all interested parties are concluded by decree.

Limited in Trigg v. Jones, 42 S. W. 850, holding that rescission will be accorded purchaser who is deceived by action of court or misrepresentations of its agents.

Distinguished in Lambert's Point Towboat Co. v. United States, 182 Fed. 391, 104 C. C. A. 598, Court of Admiralty which has ordered sale of libeled ship by marshal at auction cannot accept in open court, or authorize marshal to accept, a private bid; Stonerook v. Wisner, 171 Iowa, 112, **L. R. A. 1915E, 839**, 153 N. W. 352, holding rule did not apply to sale by guardian under order of court, where property was subject to undisclosed easement.

Rights of purchaser under execution getting no title. Note, **14 Am. Dec. 131.**

Implied warranty of title in sales of chattels. Note, **62 Am. Dec. 466.**

Caveat emptor as applied to judicial sales. Note, **26 Am. Rep. 38.**

Sheriff's duty to inform purchaser of existence of prior encumbrances. Note, **43 Am. Dec. 144.**

An auctioneer has no authority to give a warranty unless specially instructed.

Approved in Bice v. Siver, 170 Iowa, 260, 152 N. W. 500, following rule; Upton v. Suffolk County Mills, 11 Cush. 589, **59 Am. Dec. 164**, holding sale by general agent of flour, with unauthorized warranty to keep sweet during sea voyage, not binding on principals; Blood v. French, 9 Gray, 199, where auctioneer, acting as agent for administrator, stated hay was good, held not binding warranty.

Law of auction sales. Note, **131 Am. St. Rep. 483.**

Power of auctioneer to warrant property sold by him. Note, **Ann. Cas. 1915C, 581.**

Equitable relief will not be given in cases of executed contract of sale where maxim of caveat emptor applies.

Distinguished in Rockwell v. Allen, 3 McLean, 357, Fed. Cas. 11,983, showing that equity would relieve against completion of a contract where no interest would pass to the purchaser; Boykin v. Cook, 61 Ala. 478, holding purchaser will not be bound by absolutely void sale. See Frasher v. Ingham, 4 Neb. 535, an instance of sale where purchaser relieved in equity.

When purchaser at execution or judicial sale may obtain release from his bid. Note, 70 Am. Dec. 573.

Purchaser, after confirmation, cannot obtain relief on ground that title was imperfect or encumbered. Note, 52 Am. St. Rep. 177.

Miscellaneous. Cited in Le Roy v. Beard, 8 How. 468, 12 L. Ed. 1160, discussing powers of agents to give covenants of seisin; Turner v. Thrower, 5 Port. 53, on marshal exceeding his powers not binding anyone but himself; Frost v. Render, 65 Ga. 20, as having been cited by defendant in error, but to what point not stated.

9 Wheat. 650, 6 L. Ed. 182, McIVER v. WATTLES.

Costs are not allowed in any case dismissed for want of jurisdiction.

Approved in United States Envelope Co. v. Transo Paper Co., 229 Fed. 579, and Bice v. Boothsville Telephone Co., 62 W. Va. 522, 125 Am. St. Rep. 986, 59 S. E. 502, both following rule; Pillett v. Great Northern Ry. Co., 105 Fed. 195, holding under judiciary act of March 3, 1875 (§ 5), which provides that when Circuit Court remands case it shall make an order in reference to costs, such court has jurisdiction to award statutory costs and docket fee, although cause was remanded because court had no jurisdiction; State v. Lambert, 52 W. Va. 251, 43 S. E. 178, holding when court has no jurisdiction costs cannot be allowed; Hornthall v. The Collector, 9 Wall. 567, 19 L. Ed. 562, noting exception where defendant in lower court was also defendant in Supreme Court; Burnham v. Rangeley, 2 Wood. & M. 420, 421, 423, Fed. Cas. 2177, to Circuit Court costs where cause dismissed for lack of jurisdiction over person; Mead v. Platt, 21 Blatchf. 436, 17 Fed. 836, where appeal was from disallowance of claim by District Court in bankruptcy; Pentlarge v. Kirby, 22 Blatchf. 261, 20 Fed. 898, holding rule not changed by Revised Statutes, sections 823, 914, 983, Revised Statutes, United States; Abbey v. The R. L. Stevens, 1 Fed. Cas. 12, where appeal in admiralty dismissed for want of jurisdiction without costs; Thurston County v. Scammell, 7 Wash. 95, 34 Pac. 471, extending rule to action dismissed on account of repeal of statute on which it was founded.

Qualified in M. C. & L. M. Ry. Co. v. Swan, 111 U. S. 387, 28 L. Ed. 465, 4 Sup. Ct. 514, allowing costs against plaintiff in error who had wrongfully removed a cause from State court; Bradstreet Co. v. Higgins, 114 U. S. 263, 29 L. Ed. 176, 5 Sup. Ct. 880, allowing costs of printing record to enable defendant to move to dismiss plaintiff, having failed in his duty. See Rule 10, sections 2 and 7.

Denied as to Missouri State courts in State v. Thompson, 81 Mo. 167, holding that a contrary rule had been established as to costs improvidently incurred; Bitz v. Meyer, 40 N. J. L. 256, 29 Am. Rep. 236, holding that when issue of fact must be passed on by court, to reach conclusion that it had no jurisdiction, costs might be awarded.

Power of appellate court to award costs on dismissal of appeal for want of jurisdiction. Note, **13 Ann. Cas. 1048.**

Miscellaneous. Cited erroneously in Wallace v. Fairman, 4 Watts, 379.

9 Wheat. 651–658, 6 L. Ed. 182, WALTON v. UNITED STATES.

Public officer of United States is not entitled to notice, requiring him to render account of public moneys received and not accounted for.

Approved in Smythe v. United States, 188 U. S. 173, 47 **L. Ed. 431**, 23 Sup. Ct. 284, holding under United States Comp. Stats. 1901, pp. 695, 698, amount of treasury notes charred by fire cannot be credited as setoff on suit on bond of superintendent of mint unless claim was first presented to accounting officer of treasury; Watkins v. United States, 9 Wall. 763, **19 L. Ed. 822**, in action upon a marshal's official bond; United States v. Lent, 1 Paine, 422, Fed. Cas. 15,593, holding that statutory requirement of submission of agent's accounts to the treasury did not preclude settlement of the account in court of justice.

Treasury transcript as evidence and conclusiveness thereof.

Cited in United States v. Eggleston, 4 Sawy. 201, Fed. Cas. 15,027, holding that by Revised Statutes, section 886, transcript was made prima facie evidence; United States v. Patterson, 91 Fed. 855, holding credit claimed by Federal officer for errors by his bookkeeper, might not be pleaded, unless presented to, and disallowed by, treasury department.

Receiver of public moneys is individually responsible for all moneys received in his public capacity.

Cited in United States v. Wade, 75 Fed. 266, holding allowance of credit to an officer for money properly paid by him to superior officer, no discharge to latter on his failure to account to government.

Official bond is collateral security for faithful performance of official duties and does not discharge officer of individual responsibility.

Approved in Gallatin County v. United States Fidelity & Guaranty Co., 50 Mont. 61, 144 Pac. 1086, holding action on official bond of county treasurer was on liability created by statute, and not on instrument in writing; City of Butte v. Goodwin, 47 Mont. 167, **Ann Cas. 1914C, 1012**, 134 Pac. 672, holding action to recover interest from city treasurer was for breach of implied promise and not on bond, which was collateral security; Mason v. Fractional School District, 34 Mich. 231, in action by school district for moneys had and received; Cole Co. v. Dallmeyer, 101 Mo. 65, 13 S. W. 688, holding county could have recourse on bond of treasurer, and also sue him in assumpsit and claim might be allowed against his estate in probate; State v. Blake, 2 Ohio St. 149, holding obligation could exist no longer than the liability it was intended to secure; Spokane County v. Prescott, 19 Wash. 421, **67 Am. St. Rep. 736**, 53 Pac. 662, arguing that

action against official bondsmen not an action on written contract within statute of limitations.

Bill of exceptions is not valid unless for matter excepted to at trial.

Cited in Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 59, following rule; New Orleans & N. E. R. R. Co. v. Jopes, 142 U. S. 22, 35 L. Ed. 922, 12 Sup. Ct. 110, holding that bill of exceptions will be presumed to state only things occurring at trial, unless from its language contrary is disclosed; Nicoll v. American Ins. Co., 3 Wood. & M. 537, Fed. Cas. 10,259, following rule; Johnson v. Garber, 73 Fed. 525, 43 U. S. App. 107, applying rule even when there was practice, prevailing in trial court, but not embodied in rule of permitting exceptions to be taken after close of trial; Frank v. State, 40 Ala. 18, where entire evidence is set out, there is no exception for consideration where none is shown to have been made in trial court; Allen v. Smith, 12 N. J. L. 168, rejecting exceptions not made at trial; Garretson v. Appleton, 58 N. J. L. 392, 37 Atl. 152, applying rule where an instruction asked was refused and exception taken; Kearney v. Snodgrass, 12 Or. 312, 7 Pac. 310, holding no exception can be taken to an order on motion for a new trial.

Distinguished in Merchants' Exchange Bank v. McGraw, 76 Fed. 936, 48 U. S. App. 66, where exceptions were to further instructions given by court to jury after they had retired and returned for purpose, and in absence of counsel.

Bill of exceptions must state that exception was taken to court's ruling.

Cited in United States v. Jarvis, 3 Wood. & M. 225, Fed. Cas. 15,469, holding objections must be persisted in as exceptions; Croft v. Ferrell, 21 Ala. 357, holding that no ruling will be considered as excepted to unless so specifically stated; Lenox v. Pike, 2 Ark. 22, holding the exception must appear to have been taken and signed at the trial; Evans v. Fisher, 5 Gilm. 456, McKown v. Powers, 86 Me. 294, 29 Atl. 1080, and Patterson v. Phillips, 1 How. (Miss.) 573, all to same effect; Law v. Merrill, 6 Wend. 278, where bill showed on its face that it was not taken until after decision of court on application for new trial.

Distinguished in Baltimore Build. Assn. v. Grant, 41 Md. 564, 566, as not applicable where it appeared from the certificate that the exceptions were in fact taken pending the trial.

It is sufficient if exceptions are taken at trial and noted by court, and afterward, during term, reduced to form and signed by judge, nunc pro tunc.

Approved in Montana Min. Co. v. St. Louis etc. Co., 147 Fed. 908, where judge, after instructing jury but before sending them out, retired to chambers with counsel and there heard and allowed exceptions, he need not afterward allow further exceptions; Lengelsen v. McGregor, 162 Ind. 268, 70 N. E. 249, bill of exceptions not signed until after term nor within time fixed by court, not considered on appeal, though failure to sign in

time due to judge's absence; Haines v. Knowlton Danderine Co., 248 Ill. 261, 93 N. E. 744, holding bill of exceptions on appeal from municipal court of Chicago must be presented within time limited by statute creating court; Schlessinger v. Cook, 8 Wyo. 488, 58 Pac. 759, holding no order can be made in vacation extending beyond term time to reduce exception taken in term time under Rev. Stats. 1887, § 2646 (Wyo.); Brown v. Clarke, 4 How. 15, 11 L. Ed. 855, holding this also the rule in Mississippi; Sheppard v. Wilson, 6 How. 275, 12 L. Ed. 436, rejecting bill of exceptions signed two years after trial, there being no evidence of any exceptions taken at trial; Turner v. Yates, 16 How. 29, 14 L. Ed. 831, following rule; Miller v. Ehlers, 91 U. S. 251, 23 L. Ed. 320, that time was confined to term in which judgment was rendered; Davis v. Patrick, 122 U. S. 143, 30 L. Ed. 1092, 7 Sup. Ct. 1103, holding that if bill of exceptions is prepared and presented to judge for signature during term, his delay in signing them either with or without consent of parties did not render them invalid; Ward v. Cochran, 150 U. S. 603, 37 L. Ed. 1196, 14 Sup. Ct. 231, holding that an express order of court continuing cause for purpose of settling bill of exceptions, takes them out of general rule; United States v. Jarvis, 3 Wood. & M. 224, Fed. Cas. 15,469, as to completing bill after trial; Whalen v. Sheridan, 18 Blatchf. 309, 5 Fed. 437, where leave to file and serve bill of exceptions nunc pro tunc in terms following, judgment was denied; Sweet v. Perkins, 24 Fed. 779, denying application to settle bill of exceptions after nearly two years from judgment, no special cause being drawn; Marine City etc. Co. v. Herreshoff Mfg. Co., 32 Fed. 824, 825, holding bill should be presented for signature in trial term; Preble v. Bates, 40 Fed. 746, holding that in Federal courts the rule is bill must be signed at term in which judgment was rendered, not trial term; United States v. Claasen, 46 Fed. 69, holding that in criminal case presentation to and signing by judge of minutes of the trial used in moving for arrest of judgment and new trial, was waiver of all exceptions not therein included and that no further bill should be given; Sutherland v. Round, 57 Fed. 471, 16 U. S. App. 30, holding negligence of counsel not sufficient cause to permit amendment of bill long after being allowed and signed and after trial term; Strader v. Alexander, 9 Port. 444, holding bill could not be objected to because not signed and sealed during the term if exception was taken at trial and noted by judge and voluntarily sealed by him afterward; Pool v. Cahawba etc. R. R. Co., 5 Ala. 238, holding that noting of exception by judge not absolutely necessary if from recollection he could certify it; Ex parte Nelson, 62 Ala. 382, discussing practice in various States as influenced by their statutes; Rigler v. Rigler, 120 Ind. 434, 22 N. E. 776, rejecting bill which did not show on its face date of presentation to judge; Hallowell v. Hallowell, 1 T. B. Mon. 131, holding time to tender bill lay in court's discretion, and when enrolled without objection the court will presume that time was properly allowed; Williams v. Ramsey, 52 Miss. 858, affirming general rule; Ferrell v. Alder, 2 Swan, 79, stating practice in Tennessee as to signing bills of exception after trial;

Clark v. Lary, 3 Sneed, 79, holding bill filed out of term time is no part of record, and will not be noticed by Supreme Court; Mallon v. Tucker Mfg. Co., 7 Lea, 66, sustaining a rule of Circuit Court that bills when not agreed to should be presented within fifteen days after verdict; Nadenbousch v. Sharer, 2 W. Va. 295, holding that exception to the court's charge to jury after evidence closed may be taken at any time before verdict.

Distinguished in Tracy v. Carver Coal Co., 57 W. Va. 593, 50 S. E. 827, where skeleton bill of exceptions does not refer to evidence as transcribed, such evidence cannot be certified and identified thirty days after adjournment; Insurance Co. v. Boon, 95 U. S. 142, 24 L. Ed. 403, as not applicable to formal findings of fact which, being in the discretion of the court, might be made and filed in term following and ordered filed nunc pro tunc; Coe v. Morgan, 13 Fed. 845, holding rule might be relaxed when delay arose from unfamiliarity of attorney with the rules of practice, and time would have been granted, if asked; Woods v. Lindvall, 48 Fed. 73, 4 U. S. App. 49, holding bill of exceptions might be allowed and filed at the term when motion for new trial was finally acted on, where custom obtained of entering judgment immediately after rendition of verdict; V. & M. R. R. Co. v. Ragsdale, 51 Miss. 452, 462, holding that sealing of bill of exceptions is not judicial act, and any reasonable practice can be sustained, and defining reasonable practice in Mississippi; Dean v. Gridley, 10 Wend. 256, holding that practice in New York State did not require bill to be signed on the trial, nor nunc pro tunc.

Bill of exceptions, though drawn up after trial, must on its face purport to have been drawn pending trial.

Disapproved in Hunnicutt v. Peyton, 102 U. S. 357, 358, 26 L. Ed. 117, holding it unnecessary they should be signed nunc pro tunc or antedated.

Miscellaneous. Cited in United States v. Jarvis, 3 Wood. & M. 223, Fed. Cas. 15,469, discussing a statement made and signed by a judge in District Court of Maine as not amounting to a bill of exceptions.

9 Wheat. 658–673, 6 L. Ed. 184, THE FANNY.

Not cited.

9 Wheat. 673–680, 6 L. Ed. 188, DANFORTH v. WEAR.

Surveys and grants of land within Indian territory are wholly void.

Cited in Gaines v. Hale, 26 Ark. 184, holding that act of Congress of 1814 gave no right of pre-emption over lands in Indian territory; Montgomery v. Ives, 13 Smedes & M. 175, to land granted by government of West Florida in 1772, before the Indian title was extinguished.

Lands subject to entry are those over which State, after purchase from Indians, has extended county line.

Cited in Rhode Island v. Massachusetts, 12 Pet. 746, 9 L. Ed. 1269, in fixing limits of territorial jurisdiction of contiguous States.

Land patent lying partly within Indian territory is void as to that part, valid for residue.

Cited and rule applied in Patterson v. Jenks, 2 Pet. 236, 7 L. Ed. 409, to a land grant under laws of Georgia; Mitchel v. United States, 9 Pet. 733, 9 L. Ed. 291, as to grant of land in East Florida; s. c., 15 Pet. 88, 10 L. Ed. 671, to define what land passed to United States as belonging to fortress of St. Marks; Wallace v. Harris, 32 Mich. 400, holding that deed of land by husband alone, part of it being a homestead, was void as to homestead, valid as to the remainder; Weitzner v. Thingstad, 55 Minn. 248, 56 N. W. 818, to same effect as to a contract to sell; People v. Van Rensselaer, 9 N. Y. 323, holding that grant of lands by royal letters patent in 1685 were not rendered void by reason of their conferring manorial privileges and franchises; Den v. Nixon, 10 Yerg. 519, holding that statute of 1824, declaring void entry on land in occupation of another without notice only, voided the entry as to so much as was so occupied.

Miscellaneous. Cited, but not in point, in Lewis v. Durst, 10 Tex. 416, and Guilbeau v. Mays, 15 Tex. 417.

9 Wheat. 680–719, 6 L. Ed. 189, MILLER v. STEWART.

Liability of surety is not to be extended by implication beyond terms of his contract, and variation to which he does not assent is fatal.

Approved in Guaranty Co. v. Pressed Brick Co., 191 U. S. 423, 48 L. Ed. 245, holding surety on bond given in pursuance of act August 13, 1894 (28 Stats. 278), providing that principal would make prompt payment to all persons supplying him with material, is not released when principal accepts thirty-day note; United States v. Freel, 186 U. S. 315, 316, 46 L. Ed. 1181, 22 Sup. Ct. 878, holding surety on contractor's bond to construct dry-dock was released by change in contract without his consent, whereby location was changed and additional excavation was ordered, affirming 92 Fed. 301; Pittsburg-Buffalo Co. v. American Fidelity Co., 219 Fed. 824, 135 C. C. A. 488, holding contract not departed from so as to relieve surety; Eberhart v. United States, 204 Fed. 892, 123 C. C. A. 180, holding where sureties had been discharged by lapse of time under act of February 24, 1905, such liability was not revived by later act authorizing suit under terms of original act; United States v. Lynch, 192 Fed. 368, holding reasonable extension of credit for materials by subcontractor, without knowledge of surety, did not release surety on contractor's bond; McMullen v. United States, 167 Fed. 463, 93 C. C. A. 96, holding where construction contract provided party should have right to make certain changes therein, sureties on contractor's bond were deemed to have assented in advance to such changes; American Bonding Co. v. United States, 167 Fed. 921, 93 C. C. A. 310, holding surety on contractor's bond not liable when contract was annulled under its own provisions and work completed by another; Zeigler v. Hallahan, 131 Fed. 209, 66 C. C. A. 1, where defendant guaranteed lease and before tenant took possession contract modified with-

out surety's knowledge by insertion of provision that in event of destruction of premises lease should be void, there was material alteration; National Surety Co. v. United States, 129 Fed. 72, 63 C. C. A. 512, bond of letter-carrier for discharge of duties imposed by postal laws or rules of postoffice department makes surety liable for theft of registered package by carrier where duty of registering was imposed after execution of bond; Ziegler v. Hallahan, 126 Fed. 791, holding surety guaranteeing performance of lease that lessee would pay monthly rent in advance and keep premises in repair, is released by insertion in lease that in case of destruction by fire lease shall be void; United States v. Boyd, 118 Fed. 90, holding bond by public officer conditioned that he will faithfully discharge his duties cannot be subjected to claim that he failed to return to treasury sum overpaid on salary; Prescott Nat. Bank v. Head, 11 Ariz. 224, 21 Ann. Cas. 990, 90 Pac. 332, holding surety on contractor's bond not discharged by change at obligee's expense not increasing liability; Snodgrass v. Shader, 113 Ark. 432, 168 S. W. 567, holding change in lease released sureties for rent; Neale v. Head, 133 Cal. 46, 65 Pac. 133, holding maker of guaranty fund note given to mutual life company under Stats. 1865–66, p. 752 (Cal.), requiring reserve fund created by such notes and prohibiting withdrawal of same unless other notes are substituted, is released by the surrender of certain notes without taking others; Dunne Inv. Co. v. Empire State Surety Co., 27 Cal. App. 214, 150 Pac. 408, holding under Civil Code, section 2840, surety on contractor's bond not discharged because variations from contract which did not prejudice his rights; Alcatraz Masonic Hall Assn. v. United States T. & G. Co., 3 Cal. App. 342, 85 Pac. 157, holding surety on contractor's bond released by change in plans involving increased cost; Baglin v. Southern Surety Co., 41 App. D. C. 538, holding surety on bond for return of loaned securities released by change by practice of subject matter of loan; Knight v. Castle, 172 Ind. 110, 27 L. R. A. (N. S.) 592, 87 N. E. 981, holding surety released by failure to give notice of loss according to terms of bond; Singer Mfg. Co. v. Armstrong, 7 Kan. App. 329, 54 Pac. 576, holding where bond is given for faithful performance of employment as agent of corporation doing business in Kansas, surety on bond is released by transferring agent to Missouri; Hickman v. Fargo, 1 Kan. App. 705, 42 Pac. 384, holding sureties on bond to release debtor from imprisonment for fraud released by order made in absence of sureties releasing debtor from prison bounds for thirty days; Orleans etc. Ry. Co. v. International Const. Co., 113 La. 413, 37 South. 11, surety on railroad construction contract released by change in principal contract with his consent; Duffy v. Buena Vista Ice Co., 122 Md. 277, 281, 90 Atl. 54, 55, holding surety on contract to buy all plaintiff's ice for season, to be paid for at stated intervals, became liable for each installment as it fell due, and release from obligation to buy ice not shipped did not release surety; Board of Commrs. v. Greenleaf, 80 Minn. 244, 83 N. W. 158, holding surety on bond of depository of county funds was released where interest on the monthly balances was reduced from three

to two per cent per annum with consent of obligee but without consent of surety; State v. Smith, 173 Mo. 406, 407, 73 S. W. 213, holding where surety bound himself to indemnify electric light company for failure of another company to furnish electric power, he was released by amalgamation of electric light company with another company; Reissaus v. Whites, 128 Mo. App. 143, 106 S. W. 606, holding surety on contractor's bond discharged by changes in contract during performance; Martin v. Whites, 128 Mo. App. 120, 106 S. W. 609, holding, where surety on contractor's bond requested owner to extend contractor's time to complete work, surety was not released because written contract was interlined to show extension; City of Butte v. Cook, 29 Mont. 94, 74 Pac. 69, where names of two sureties appear in body of bond, which is signed by one only, there is notice to obligee sufficient to permit defense by surety signing that liability conditioned on both signing; Morgan v. Salmon, 18 N. M. 81, L. R. A. 1915B, 407, 135 Pac. 554, Eager v. Seeds, 21 Okl. 533, 96 Pac. 649, and Long v. American Surety, 23 N. D. 503, 137 N. W. 45, all holding failure to retain required portion of contract price released surety on contractor's bond; Lowe v. City of Guthrie, 4 Okl. 300, 44 Pac. 202, sureties on city clerk's bond not liable for payment of liquor licenses to him, where law requires payment to city treasurer; Hand Mfg. Co. v. Marks, 36 Or. 531, 59 Pac. 551, holding surety on contractor's bond is not discharged by owner making premature payment to contractor, where security of surety is not impaired; Griffith v. Newell, 69 S. C. 304, 48 S. E. 260, surety not bound by action of principal in waiving condition in contract; Crumley v. Reicon Co., 4 Tenn. Civ. App. 656, holding addition of another story to building released surety on contractor's bond; Stern v. Sawyer, 78 Vt. 11, 12, 112 Am. St. Rep. 894, 61 Atl. 38, where, pending term of lease, lessor sold portion of property with lessee's consent but without consent of lessee's sureties, sureties discharged; Ayers v. Hite, 97 Va. 469, 34 S. E. 45, holding bond of receiver appointed to succeed deceased receiver, conditioned for faithful performance, does not cover funds collected from estate of former receiver; Stephens v. Elver, 101 Wis. 395, 77 N. W. 738, holding surety on contractor's bond was not released by action of owner who loaned contractor small sums to be repaid out of next month's installment and advanced wages direct to contractor's workmen; Blyth v. Pinkerton, 10 Wyo. 152, 67 Pac. 623, holding where defendant executed a guaranty to pay for services rendered by detective in murder case, where a suspect was convicted and detective was paid, guaranty was discharged and was not liable for further services rendered on new trial; United States v. Boyd, 15 Pet. 208, 10 L. Ed. 714, holding official bond could not, by implication, be made retrospective; McMicken v. Webb, 6 How. 299, 12 L. Ed. 446, holding liability of two sureties on note could not be transferred to another contract without their consent; Leggett v. Humphreys, 21 How. 76, 16 L. Ed. 54, holding that surety who had satisfied penalty of his bond, at execution sale, would be relieved in equity from another judgment on same bond in another court; Martin v. Thomas,

24 How. 317, 16 L. Ed. 690, holding surety released by principal erasing his name from bond in replevin with consent of marshal; Smith v. United States, 2 Wall. 234, 17 L. Ed. 792, where erasure of name of one surety before approval of bond by judge, without consent of other surety, avoided the bond; United States v. Boecker, 21 Wall. 657, 22 L. Ed. 475, holding that liability under a distiller's bond was limited to the specific locality named; Magee v. Manhattan Life Ins. Co., 92 U. S. 98, 23 L. Ed. 700, holding sureties on bond for faithful performance not relieved by reason of previous undischarged indebtedness of their principal to obligee, when no fraud imputed; Union Life Ins. Co. v. Hanford, 143 U. S. 191, 36 L. Ed. 120, 12 Sup. Ct. 439, holding extension of mortgage, given to grantee without consent of his grantor, discharges latter from personal liability; Prairie State Bank v. United States, 164 U. S. 237, 41 L. Ed. 418, 17 Sup. Ct. 146, holding surety for faithful performance of building contract who, on default of his principal, completed contract, had superior equitable right to final reserved payment over that of an assignee of principal made without sureties' knowledge; Boody v. United States, 1 Wood. & M. 169, Fed. Cas. 1636, holding that sureties for deputy postmaster are liable for his noncompliance with subsequent as well as past laws or orders till his term expires; United States v. De Visser, 10 Fed. 658, holding sureties on warehouse bonds discharged by postponement of sale of goods in bond without their consent; United States v. Campbell, 10 Fed. 818, 820, holding sureties on warehouse bond could not be held on reliquidation of bonded goods withdrawn within specified time on discovery of error in duty paid; United States v. O'Neill, 19 Fed. 570, holding sureties discharged when name of an intended third surety was altered and another substituted; Evans v. Lawton, 34 Fed. 236, holding guarantor of an agent authorized to sell for "cash in all cases," discharged on permission given to sell for credit to any extent; Pascault v. Cochran, 34 Fed. 364, holding collateral mortgage given as security for purchase money not discharged by action of vendor in perfecting title after conveyance; Board of Commrs. v. Branham, 57 Fed. 181, holding sureties to contractor's bond discharged when contractor, by fraud, obtained an excessive payment on contract; Scott v. Scruggs, 60 Fed. 725, 23 U. S. App. 280, holding joint maker of note being surety, released by extension of note without his knowledge, although holder did not know he was surety; United States Glass Co. v. West Virginia Flint Bottle Co., 81 Fed. 995, 996, holding an alteration in contract, whether material or not, discharged sureties; dissenting opinion in Jacksonville etc. Ry. Co. v. Hooper, 85 Fed. 624, 52 U. S. App. 586, majority holding sureties on a supersedeas bond not released by an arrangement looking to a settlement of the judgment which subsequently failed; Tyler Min. Co. v. Last etc. Min. Co., 90 Fed. 23, holding sureties on preliminary injunction bond released by modification of same by court; Glover v. Robbins, 49 Ala. 221, 20 Am. Rep. 273, holding surety discharged by addition to note of words "with interest at four per cent," without his consent, though made by payee or principal; City Council v. Hughes, 65

Ala. 204, holding obligation of sureties' bond of city clerk did not extend beyond period for which he was originally elected; Anderson v. Bellenger, 87 Ala. 336, 13 Am. St. Rep. 48, 4 L. R. A. 680, 6 South. 82, variations in contract of suretyship, made by third party, without authority, and not affecting validity of contract, do not discharge surety; State v. Churchill, 48 Ark. 442, 3 S. W. 359, holding erasure of name of surety, sureties not assenting, discharges remaining sureties; Pierce v. Whiting, 63 Cal. 543, where undertaking given to obtain release of ship provided for surrender of property on demand, sureties were not chargeable when no demand made; Elder v. Kutner, 97 Cal. 493, 32 Pac. 564, defining obligations of sureties to undertaking on attachment; New Haven Co. Bank v. Mitchell, 15 Conn. 220, holding contract of suretyship should be interpreted by same rules as other contracts; Village of Chester v. Leonard, 68 Conn. 509, 37 Atl. 400, holding that sureties on contractor's bond, which provided for payments on engineer's certificates, were released, if payments were made without them; Mayor of Wilmington v. Horn, 2 Harr. 195, surety on official bond of an officer whose appointment is annual, not liable beyond actual term, though officer held over till successor is appointed; Raney v. Baron, 1 Fla. 331, surety on appeal bond conditioned for payment of damages and costs, not liable for additional damages awarded by the Court of Appeals; State v. Montague, 34 Fla. 36, 15 South. 591, sureties on tax collector's bond not liable for cost of advertising sales for delinquent taxes; Field v. Rawlings, 1 Gilm. 583, sureties on bond for return of certain moneys, if so decided by legislature or Supreme Court, were not bound to procure such decision, nor liable under decision of one branch only of legislature; Sans v. People, 3 Gilm. 336, surety on bail bond, amount of which was subsequently altered, was not bound, although he verbally assented to alteration; Sharp v. Bedell, 5 Gilm. 93, holding sureties on appeal bond conditioned to pay judgment rendered by specific court, not liable when venue changed and judgment rendered in another; Governor v. Lagow, 43 Ill. 141, sureties on bond by assignees in liquidation of bank not liable after four years allowed by law for the liquidation, although in interim an act was passed extending time; Chicago & A. R. R. Co. v. Higgins, 58 Ill. 133, sureties on agent's bond not bound for money received and retained by another and subordinate agent in same department, not appointed by principal; People v. Tompkins, 74 Ill. 487, sureties on grain inspector's bond not liable for moneys collected by him for inspection, where duty of collecting such money was not imposed on him before execution of bond; Ovington v. Smith, 78 Ill. 252, sureties on injunction bond, where two parties were enjoined, not liable when injunction dissolved against one only; Schnell v. North Side P. Mill Co., 89 Ill. 584, where court refused to regard indorsement of note in blank as contract of guaranty in absence of legal evidence to rebut necessary presumption; Judah v. Zimmerman, 22 Ind. 392, holding surety on contractor's bond not liable, when supplemental contract was entered into, which materially varied first contract; Jenkins v. Lemonds, 29 Ind. 295,

and State v. Roberts, 46 Ind. 205, sureties on bond of clerk of court not liable to make good, money which he was not authorized to receive; Markland etc. Co. v. Kimmel, 87 Ind. 569, guarantor of several lessees is not bound until all have executed lease; Hawkins v. Thomas, 3 Ind. App. 402, 29 N. E. 158, sureties on official bond are liable as far and no further than principal; Thompson v. Dickerson, 22 Iowa, 363, sureties on substituted official bond not liable for past delinquencies; Indiana Dist. v. Reichard, 50 Iowa, 101, changes made in school building contract extending time for completion, released sureties to contractor's bond; Spencer v. Sherwin, 86 Iowa, 121, 53 N. W. 87, sureties on bond enjoining collection of judgment, not bound on dismissal of bill, where the condition was only to pay all damages which might be adjudged by reason of injunction; McLennan v. Wellington, 48 Kan. 760, 30 Pac. 184, in bond for due performance of building contract, sureties were not released by changes in specifications which were allowed by contract; Peru Plow etc. Co. v. Ward, 1 Kan. App. 8, 41 Pac. 64, surety on three notes, payable one, two and three years after date, released by subsequent agreement, that on default on one note others should become payable; Hickman v. Fargo, 1 Kan. App. 705, 42 Pac. 384, sureties for debtor's release, bond conditioned for payment of specific judgment if he breaks bounds, are not liable to pay another judgment, though rendered by same court; Ruble v. Norman, 7 Bush, 583, extinguishment of debt secured by bond by delivery of an equivalent in property, released sureties and their liability was not revived by sale of property by debtor and retention of part of proceeds; Roman v. Peters, 2 Rob. (La.) 482, **38 Am. Dec. 224**, sureties on sheriff's official bond, released by creation of new office, altering duties and emoluments of sheriff; McGuire v. Wooldridge, 6 Rob. (La.) 50, holding that extension of time on note released indorser; Green v. Locke, 31 La. Ann. 659, holding surety on official bond released by temporary transfer of principal to other employment; Stillman v. Wickham, 106 Iowa, 599, 76 N. W. 1008, holding building contractor's bondsmen released by slight variation in contract, even though for contractor's benefit; Manufacturers' Bank v. Cole, 39 Me. 193, holding no action against surety on note maintainable where note made payable to president, etc., of bank or order, and note not discounted or negotiated by bank; Waterman v. Vose, 43 Me. 511, holding addition to note of words "with interest" is material, and if made without consent of indorser, he is discharged, although made before delivery; Strawbridge v. Baltimore etc. R. R. Co., 14 Md. 366, **74 Am. Dec. 543**, sureties on ticket agent's bond not discharged by conversion of station from second to first class, duties being same; Fullerton v. Miller, 22 Md. 8, holding liability of surety on appeal bond operating as a supersedeas, limited to make good damages awarded by courts and not to those suffered by reason of appeal; Wehr v. German etc. Congregation, 47 Md. 190, on bond to secure performance of builder's contract, alterations in work, if allowed and within limits prescribed, did not discharge sureties; First Nat. Bank v. Gerke, 68 Md. 456, **6 Am. St.**

Rep. 456, 13 Atl. 360, sureties on bond of assistant bookkeeper of bank discharged on his appointment as note-teller and discount clerk; Plunkett v. Sewing Machine Co., 84 Md. 533, 36 Atl. 116, holding on bond of agent in a limited territory, for sale of a specified article, where guaranty provided for variation of contract by agreement in writing, sureties were discharged, on territory being enlarged verbally; Grocers' Bank v. Kingman, 16 Gray, 476, sureties on cashier's bond discharged by subsequent increase of bank's capital stock; contra, Lionberger v. Krieger, 88 Mo. 165; Thomas v. Blake, 126 Mass. 321, liability of sureties on deputy sheriff's bond, which recited appointment without stating date, was confined to acts subsequent to date of bond; Warren v. Lyons, 152 Mass. 312, 9 L. R. A. 354, 25 N. E. 722, guarantor for payment of rent "in the manner therein mentioned," is discharged by lessee holding over at different rent, for time, but thereafter at former rent; Simonson v. Grant, 36 Minn. 442, 31 N. W. 862, sub nom. Simonson v. Thori, holding sureties on builder's contract discharged by owner making payments on order of contractors, in excess of amount due under contract; Blair v. Perpetual Ins. Co., 10 Mo. 566, 47 Am. Dec. 133, holding surety on corporation agent's bond only liable for acts which corporation can lawfully require of the agent; Fisher v. Cutter, 20 Mo. 209, holding guaranty of draft discharged by extension of time; Schuster v. Weissman, 63 Mo. 561, holding liability of sureties on deputy collector's bond not discharged by subsequent division of district into two; Nofsinger v. Hartnett, 84 Mo. 553, deciding liability of sureties on appeal bond to State Supreme Court, when case subsequently taken to Supreme Court of United States as defendant on disposition and destination of mandate of latter court; Schuster v. Weiss, 114 Mo. 171, 19 L. R. A. 186, 21 S. W. 442, sureties on appeal bond discharged by an alteration in law governing appeals; Home Savings Bank v. Traube, 6 Mo. App. 230, holding sureties of a bookkeeper not liable for his default as teller; Heim Brewing Co. v. Hazen, 55 Mo. App. 282, addition of word "seal," converting simple contract into specialty, discharged liability of sureties; Oberbeck v. Mayer, 59 Mo. App. 295, holding sureties on bond referring to specified building contract, cannot be held for performance of different contract unless proved that they knew of and authorized change; dissenting opinion in Hale v. Forbis, 3 Mont. 408, majority holding surety on promissory note was not released by subsequent change in rate of interest and extension of time, unsupported by valid consideration; Van Sickel v. Buffalo County, 13 Neb. 119, 42 Am. Rep. 763, 13 N. W. 27, holding in action on bond for county treasurer's third term, sureties could show entire defalcation was made before commencement of term of office covered by bond, and in such case would not be liable; Brennan v. Clark, 29 Neb. 399, 45 N. W. 476, and Gray v. School District, 35 Neb. 448, 53 N. W. 380, holding that sureties on contractor's bond were entitled to deduction for any losses sustained by them on account of unauthorized payments to contractor; Crane Co. v. Specht, 39 Neb. 130, 42 Am. St. Rep. 566, 57 N. W. 1017, holding that guaranty of an account for goods supplied by a corporation ceases on

corporation changing its corporate name; Quillen v. Arnold, 12 Nev. 244, where, on an undertaking to release an attachment, one of two plaintiffs was subsequently, without knowledge of sureties, allowed to discontinue suit, sureties were released; Truckee Lodge v. Wood, 14 Nev. 310, Carson Opera House v. Miller, 16 Nev. 338, holding that failure to make payments to contractors according to contract released sureties; Watriss v. Pierce, 32 N. H. 576, where two notes were given to secure advances with a bond to take up notes at end of two years, deduction of two years' interest from the advance, without consent of sureties, discharged their liability; Wright v. Bartlett, 43 N. H. 550, an agreement to extend time on note, without consent of surety, operated to discharge him; Manufacturers' Bank v. Dickerson, 41 N. J. L. 450, **32 Am. Rep. 239**, sureties for assistant clerk in bank not liable after his promotion to bookkeeper; Monroe v. De Forest, 53 N. J. Eq. 267, 31 Atl. 774, when creditor who holds collateral security taken from his debtor consents to material alteration, surety is thereby discharged; Clark v. Niblo, 6 Wend. 245, surety on recognizance discharged where, before breach of condition, it was rendered impossible of performance by acts of principal without knowledge of bail; Hunt v. Smith, 17 Wend. 180, **31 Am. Dec. 297**, guaranty for supply of goods to limited amount, bills to be sent to guarantor, avoided by supply of goods in excess of limit and giving of credit; McCluskey v. Cromwell, 11 N. Y. 598, where surety on contractor's bond held not liable for wages due by subcontractor, although contract prohibited subletting; Grant v. Smith, 46 N. Y. 97, where surety guaranteeing payment under contract for supply of a specified engine, held not liable when, by agreement between principals, different machine supplied without surety's consent; State v. Pennock, 60 N. Y. 427, holding sureties on supervisor's bond not liable for money received by principal, without authority of law, or voluntarily; Benjamin v. Rogers, 126 N. Y. 71, 26 N. E. 972, where joint maker of a note for accommodation to enable principal to obtain a loan from specified payee held not liable when loan obtained from another party, to whom note was transferred; Clinton Bank v. Ayres, 16 Ohio, 292, surety on note made payable to particular bank not liable when note discounted by third person without knowledge of surety; McGovney v. State, 20 Ohio, 97, holding sureties on executor's bond not liable when, by mistake, deceased described in bond by wrong name; State v. Cutting, 2 Ohio St. 6, holding sureties are never to be visited with penalties, nor their liability extended beyond strict letter of their obligation, applied to executor's bond; Grant v. Ludlow's Admr., 8 Ohio St. 68, holding that voluntary agent becoming liable by reason of his negligence for performance of contract between third party and his principal is discharged if material variation is made in its terms; Hall v. Williamson, 9 Ohio St. 23, sureties on bond to stay a judgment for named sum could not be held on record showing judgment for different sum; Reed v. Board of Education, 39 Ohio St. 637, holding sureties on treasurer's bond for due reimbursement of "funds" liable for certificates of deposit of tax money received by treasurer and lost by him through bank failure;

Eckert v. Myers, 45 Ohio St. 532, 15 N. E. 865, surety on bond for two administrators, survivor of whom defaults, is not liable until estates of both principals are exhausted; dissenting opinion in Commonwealth v. West, 1 Rawle, 34, majority holding that surety on prothonotary's bond conditioned to duly account for all moneys received, not liable for moneys earned, but collected and paid over by his successor; Wylie v. Gallagher, 46 Pa. St. 209, holding sureties of county treasurer liable for balance found due, although he had been charged with scrip illegally issued by county commissioners, but which he had received and paid out as money; Cannell v. Crawford County, 59 Pa. St. 203, holding that where taxes were collected by one under a warrant improperly issued, sureties on bond of duly appointed collecter were not liable for those collections; Bensinger v. Wren, 100 Pa. St. 505, holding bond of private bank corporation's cashier became inoperative when company ceased to do business as such; Hutchinson v. Woodwell, 107 Pa. St. 520, holding surety on contract under which collateral was deposited by principal to be sold in case of breach, not liable when, after breach, collateral was sold to answer another debt; Gardner v. Gardner, 23 S. C. 590, holding an extension of time for payment between debtor and creditor discharges surety; Borden v. Houston, 2 Tex. 607, holding sureties on bond of collector of customs not discharged because, since date of bond, collector was authorized to receive a different kind of funds in payment of duties; Smith v. Montgomery, 3 Tex. 210, holding that letter of guaranty addressed to two persons by their firm name, one of whom had previously withdrawn from firm, was not available as security to the continuing partner; Smith v. Doak, 3 Tex. 222, holding one who signs promissory note as surety for two joint promisors is not liable if both do not sign; Davis v. State, 5 Tex. App. 50, holding sureties on bail bond released by erasure of signature of surety; Coughran v. Bigelow, 9 Utah, 266, 34 Pac. 53, holding sureties on bond on contract to convey real estate, in which time was of essence, discharged by failure to make payment as provided; Bank of St. Albans v. Smith, 30 Vt. 152, holding that one who as surety signs joint note payable at certain time is not liable if note is, without his knowledge, deposited with payee as collateral for continuing loan; King Co. v. Ferry, 5 Wash. 554, **34 Am. St. Rep. 895, 19 L. R. A. 508,** 32 Pac. 544, sureties on official bond are not liable for official acts during an extension of original term effected by legislature since giving of bond; Leonard v. County Court, 25 W. Va. 52, where sureties on contractor's bond were held not to be discharged by payment and acceptance of work which subsequently proved defective; Yeager v. Musgrave, 28 W. Va. 111, holding alteration of an agreement containing mutual covenants, made by one with whom it is deposited for safekeeping without privity of any of the parties, will not affect liabilities of the parties; Rigg v. Parsons, 29 W. Va. 527, 2 S. E. 83, holding that bond given to release an attachment was released by transfer of the cause before judgment, to another court; Tuohy v. Woods, 122 Cal. 668, 55 Pac. 684, holding that burden is on plaintiff to show that variation has been agreed to by surety.

Distinguished in Equitable Surety Co. v. United States, 234 U. S. 457, 58 L. Ed. 1397, 34 Sup. Ct. 803, holding rule did not apply to bond under materialman's acts in District of Columbia where there was no single obligee to consent and alteration did not change general nature of work; Knickerbocker Trust Co. v. Evans, 188 Fed. 561, 110 C. C. A. 347, agreement by members of syndicate to "guarantee" payment of loan to purchase property for syndicate held original agreement, and liability of members not discharged by variance between terms of note and agreement for loan; Mameron v. National Lead Co., 206 Ill. 631, 66 N. E. 506, holding guaranty of all demands and obligations of whatever nature then due or which might thereafter become due, covered sales made on thirty days' credit; Segari v. Mazzei, 116 La. 1030, 41 South. 247, mere change in site of dwelling to be constructed from one place to another in same square does not discharge surety of contractor; People v. Breyfogle, 17 Cal. 508, holding that sureties on bond "joint and several" but naming sum for which each surety would be liable were only bound for their several obligations; Backus v. Archer, 109 Mich. 668, 67 N. W. 914, holding that surety on builder's contract is discharged by advances made without his consent in excess of amount due; Bangs v. Strong, 4 N. Y. 324, real reason for holding surety discharged was not change of contract but that rights of surety against his principal were interfered with; People v. Villas, 36 N. Y. 472, to 93 Am. Dec. 526, surety on bond of public officer not discharged by law imposing on principal new duties of similar nature not affecting original duties; Tremper v. Hemphill, 8 Leigh, 625, 628, 31 Am. Dec. 674, 676, holding that supplemental agreement made by principal, only that interest should run from date, did not release sureties on joint note from their obligation; Loving v. Auditor, 76 Va. 948, change in salary of a public officer is not such a variation of his appointment as will discharge his sureties; Christian v. Keen, 80 Va. 376, holding that if surety charges his property for benefit of another credit on account of principal debtor discharges pro tanto lien on surety's estate; State Savings Bank v. Baker, 93 Va. 515, 25 S. E. 551, holding indorser of note for accommodation is discharged by extension of time of note without his consent.

Qualified in U. S. Glass Co. v. Mathews, 89 Fed. 830, holding sureties not discharged by addition of memorandum to contract guaranteed, in no way affecting it; Stephens v. Elver, 77 N. W. 738, holding alteration must be material.

Explained in Shreffler v. Nadelhoffer, 133 Ill. 551, 25 N. E. 633, as not intended to prevent courts, in order to ascertain precise terms of the contract, from resorting to same means as in other contracts.

When official bond becomes binding on the surety and what irregularities fail to relieve them from liability. Note, 90 Am. St. Rep. 192, 202.

Sureties' contracts are construed with considerable strictness, both at law and in equity.

Approved in United States v. Kauhoe, 147 Fed. 186, where defendants liable on postmaster's bond requested and received extension of time from inspector, who granted it on condition that they execute note for amount to United States, note was unauthorized and void; Manatee County etc. Bank v. Weatherly, 144 Ala. 658, 39 South. 988, where guaranty for payment of oranges was conditioned that bill of lading be certified that oranges sound when loaded and shipped, guarantor not liable on certificate that oranges sound when loaded; Shoup v. Sabin, 3 Alaska, 56, giving judgment on indemnity bond on execution; Ida County Sav. Bank v. Seidensticker, 128 Iowa, 58, 102 N. W. 822, bond given by bank cashier during first year of election not binding on sureties for defalcations subsequent to first year, where he was elected annually; Booth v. Irving Nat. Exch. Bank, 116 Md. 672, 82 Atl. 653, upholding judgment against surety on bond made to induce giving of credit; Wm. J. Lemp Brewing Co. v. Secor, 21 Okl. 545, 96 Pac. 639, holding sureties not bound on bond where assent thereto was procured by representing certain others would sign bond and later falsely stating they had so signed; State v. Friedman, 74 W. Va. 14, 81 S. E. 832, holding surety on bond given on granting temporary injunction not liable for damages arising after injunction was awarded at hearing on merits; United States v. Ulrici, 111 U. S. 42, 28 L. Ed. 346, 4 Sup. Ct. 290, holding sureties on distiller's bond discharged by seizure and sale of spirits and discharge of taxes out of proceeds; United States v. Linn, 2 McLean, 505, Fed. Cas. 15,606, holding sureties not bound to answer for defalcations prior to date of bond; United States v. Cushman, 2 Sumn. 435, Fed. Cas. 14,908, holding that as to sureties' contracts nothing will be presumed beyond what positive facts substantiate; United States v. Cheeseman, 3 Sawy. 429, Fed. Cas. 14,790, refusing to hold assistant treasurer's bondsmen for breaches in performing duties as stamp agent; Davis v. Kingsley, 13 Conn. 298, holding that when liability of surety was brought within terms of his contract, question of hardship should not be considered; Bissell v. Ames, 17 Conn. 128, holding that surety guaranteeing a partner's obligations not liable for any sums found due to other partners; dissenting opinion in Olmstead v. Olmstead, 38 Conn. 337, majority holding that on guardian's bond equity would construe a joint obligation as joint and several as required by law in such cases; Trustees v. Otis, 85 Ill. 181, holding court of chancery will not reform an official bond as against sureties for mistake as to name of payee; Stillman v. Wickham, 106 Iowa, 599, 76 N. W. 1008, holding slight alteration, even for benefit of principal debtor, releases surety; Burns v. Singer Mfg. Co., 87 Ind. 548, holding on construction of bond to an agency contract conditioned for payment of "every indebtedness now existing or which may hereafter be incurred" that no liability attached after agency terminated; Irwin v. Kilburn, 104 Ind. 115, 3 N. E. 651, where bond was given to secure performance of contract they must be read together and if contract is valid sureties are bound; Weir Plow Co. v. Walmsley, 110 Ind. 246, 11 N. E. 233, surety for performance of contract to sell goods on commission not liable for goods

bought by principal prior to execution of contracts; Graves v. Merrill, 67 Minn. 474, 70 N. W. 566, but holding sureties on contractor's bond could not plead payments to him under contract in excess of agreement; Paulison v. Halsey, 37 N. J. L. 210, holding that sureties to bonds of deputy collector of internal revenue could not be held liable for defalcations prior to date of bond; Dunham v. Downer, 31 Vt. 260, holding that extension of time for payment of judgment was ground for a perpetual injunction in equity; Walla Walla Co. v. Ping, 1 Wash. Ter. 347, holding an official bond executed and delivered in blank with no penal sum stated not binding on the sureties though accepted by the proper officer; Borden v. Houston, 2 Tex. 607, following rule; United States v. Amer. Bonding etc. Co., 89 Fed. 929, affirming instruction at trial to that effect.

Injury to credit as element of damages for wrongful attachment. Note, **Ann. Cas. 1915A, 1224.**

Miscellaneous. Cited in Read v. Bowman, 2 Wall. 604, **17 L. Ed. 817,** as to sureties' liability; Crews v. Boss, 44 Ind. 489, as to right of clerk of court to receive in payment of costs anything but legal tender money, as affecting right to new trial involving payment of costs; Collins v. Collins, 51 Miss. 319, 323, **24 Am. Rep. 637, 640,** in general discussion of rules as to effect of alterations in deeds and other documents, collecting authorities; in error on points not touched by the decision in Morgan v. Morgan, 10 Ga. 303, and State v. Crocker, 5 Wyo. 398, 40 Pac. 684.

9 Wheat. 720–738, 6 L. Ed. 199, UNITED STATES v. KIRKPATRICK.

Errors in pleading arising from extreme irregularity and laxity justify reversal of judgment and repleader.

Cited in Garland v. Davis, 4 How. 153, 154, **11 L. Ed. 917, 918,** where the court remanded the case that pleadings might be amended.

Liability of sureties on revenue collector's bond does not cover duties created by subsequent statutes unless so clearly stipulated.

Approved in Bethune v. Dozier, 10 Ga. 239, holding obligations of sureties were always stricti juris; Green v. Brandon, Walk. (Miss.) 372, holding that act granting extension of time for settlement of a tax collector's account passed subsequent to his bond released his sureties if passed without their consent; Schuster v. Weiss, 114 Mo. 167, **19 L. R. A. 185,** 21 S. W. 441, sureties on appeal bond, given when Supreme Court had only jurisdiction of appeals from the St. Louis Court of Appeals, were released by change in law giving direct appellate jurisdiction; People v. Pennock, 60 N. Y. 427, holding sureties only bound for moneys which their principal is authorized by law to receive, not for that he voluntarily receives or which is ordered without legal authority to be paid him; Roth v. Miller, 15 Serg. & R. 107, holding in suit on bond to indemnify against certain described bonds the sureties were bound according to true intent and meaning of the instrument; State v. Keeley, 43 Tex. 669, holding sureties of a

sheriff as collector of taxes liable for his collections of a tax levied after date of the bond.

Distinguished in United States v. Powell, 14 Wall. 502, 20 L. Ed. 728, as applicable only to cases of temporary appointment but not to distiller's bond, which covered all provisions of law relating to duties and business of distillers; Postmaster-general v. Munger, 2 Paine, 199, Fed. Cas. 11,309, as not applicable to general undertaking that postmaster should pay over all receipts for postages where subsequent acts of Congress increased certain rates of postage; United States v. McCartney, 1 Fed. 106, holding that sureties were not released when new duties imposed on officer were ejusdem generis with those which they knew he was to perform; Walker v. Chapman, 22 Ala. 130, holding that a tax collector's bond executed before the act imposing a tax on steamboats covers taxes collected under that act; Davis v. State, 44 Ind. 60, holding that rule did not apply where under State law official bonds were expressly given for performance of all duties by any law then or subsequently in force; Morris Canal v. Van Vorst, 21 N. J. L. 123, holding that laws subsequently passed to better enable a bank to carry on and extend its business did not operate to release sureties of a clerk in the bank; Wylie v. Gallagher, 46 Pa. St. 209, holding sureties to treasurer's bond liable equally with their principal to account for scrip illegally issued by the municipality and treated by him as money.

Criticised and explained in People v. Vilas, 36 N. Y. 470, 93 Am. Dec. 525, and Board v. Clark, 92 N. Y. 396, holding obligation of sureties was for faithful performance of all duties of the office during term of the office, as they might be varied by statute, provided they be of the same general nature; McLean v. State, 8 Heisk. 208, 215, holding sureties on tax collector's bond not released by passage of acts altering date for delivery of tax books and imposing new duties.

Sureties' liability is confined to acts done while appointment and commission of officer, with reference to which it was given, have legal continuance.

Approved in Fidelity & Deposit Co. v. Courtney, 186 U. S. 361, 46 L. Ed. 1201, 22 Sup. Ct. 841, holding under bond to indemnify employer against loss by fraud of employee reciting that immediate notice of default must be given, notice as soon as reasonably practical is sufficient; United States v. Ellis, 4 Sawy. 493, Fed. Cas. 15,047, applying rule to bond of collector of customs appointed by President during recess, followed by new appointment of same person thereafter; In re United States District Attorney, 7 Fed. Cas. 740, holding appointment bad where vacancy had not occurred during recess; United States v. Able, 24 Fed. Cas. 746, holding that officer appointed to succeed himself by President, with consent of Senate, was new appointment, and new sureties not liable for debts or defalcations under former holding; United States v. McCartney, 1 Fed. 109, holding liability of sureties would be discharged if office wholly changed or new and different duties created; United States v. De Visser, 10 Fed. 648, hold-

ing sureties on warehouse bonds governed by the statutes and regulations in force belonging to the warehouse system; In re Marshalship for S. Dist. of Alabama, 20 Fed. 382, holding that temporary appointment of an official by President is not terminated by the refusal of Senate to confirm him for permanent appointment; Brewer v. King, 63 Ala. 515, holding that sureties were not liable on bond of tax collector whose term was for three years but extended by subsequent statute; City Council v. Hughes, 65 Ala. 208, holding that sureties on city clerk's bond not liable after expiration of official term fixed by charter; Lane v. Kolb, 92 Ala. 646, 9 South. 876, construing effect of statute making an office, of which there was appointed incumbent, elective and holding that it did not create immediate vacancy; People v. Mizner, 7 Cal. 526, discussing power of Governor to fill vacancy in an office, holding it must be shown that vacancy existed, and that no other mode of filling it was provided; People v. Cazneau, 20 Cal. 508, holding a person appointed by Governor to fill vacancy in an office is entitled to hold until new appointment is duly made; Welch v. Seymour, 28 Conn. 392, holding that bond of treasurer of corporation appointed to continue in office until next annual meeting and until another should be elected in his stead, lapsed at close of his first year; Mayor of Wilmington v. Horn, 2 Harr. 194, holding bond of high constable whose appointment was annual did not last beyond the year, although by law he continued in office until successor was appointed; Rany v. Governor, 4 Blackf. 5, holding the liability of sureties of sheriff ceased when he received his new commission; Mullikin v. State, 7 Blackf. 80, holding sureties to bond of agent of surplus revenue not liable for his defalcations subsequent to coming into force of statute which continued him in office, that being equivalent to new appointment; State v. Powell, 40 La. Ann. 244, 4 South. 449, holding term of an officer appointed by Governor during recess of Senate cannot extend beyond end of next ensuing legislative session—if subsequently sent to and confirmed by Senate it is a new appointment requiring new bond; Plunkett v. Sewing Machine Co., 84 Md. 533, 36 Atl. 116, where guaranty of an agent's contract was held avoided by material change in agent's responsibility, not made in writing as provided by contract; Missoula Co. v. Edwards, 3 Mont. 64, holding where two bonds are accepted from a person holding office during two successive terms, sureties on one are not liable for default during other; Dover v. Twombly, 42 N. H. 68, holding surety was bound for conduct of office during term to which the appointment extended and not beyond; State v. Crooks and Shaw, 7 Ohio (pt. II), 228, holding that sureties of sheriff are not bound beyond term for which he is elected; Bank of Washington v. Barrington, 2 Penr. & W. 44, limiting obligations of bank cashier's bond to corporate existence of bank under its then existing charter; Cannell v. Crawford Co., 59 Pa. St. 203, where tax collector's warrant was issued to one appointed but who failed to qualify, sureties on bond of acting collector held not to apply to sums wrongfully collected by the unqualified collector; King Co. v. Ferry, 5 Wash. 554, 34 Am. St. Rep. 895, 19 L. R. A. 508, 32 Pac. 544, sureties of officer appointed for limited time

are only liable for his official acts during that term; State v. Hill, 17 W. Va. 463, arguendo.

Distinguished in Westervelt v. Mohrenstecher, 76 Fed. 121, 40 U. S. App. 221, 34 L. R. A. 479, office of cashier of a national bank is not an annual office, and his sureties' liability continues until he resigns or is removed, or successor appointed; Tuly v. State, 1 Ind. 503, as not applicable where under statute school commissioner could have held over indefinitely until the election of his successor; Louisiana State Bank v. Ledoux, 3 La. Ann. 679, holding that director's resolution confirming various corporate officers and clerks in their respective situations is not a reappointment so as to discharge their sureties; Monteith v. Commonwealth, 15 Gratt. 185, holding that sureties to sheriff's bond, given some time after election, but reciting the fact and date and term of election, were liable for the whole term.

Liability of sureties on successive bonds. Note, 10 Am. St. Rep. 857.

Release of sureties on official bond by legislative extension of time. Note, 45 Am. Rep. 408.

Effect on sureties of legislative alteration of duties of officer. Note, 93 Am. Dec. 527.

Liability of surety for default after expiration of term. Note, 1 Ann. Cas. 383.

Liability of surety on official bond not affected by neglect or omission of other officer. Note, 2 Ann. Cas. 170.

Duration of liability of surety on official bond where term of office is extended after bond is executed. Note, 13 Ann. Cas. 1067.

Laches is not imputable to government; so failure to account periodically by government officer does not release his surety.

Approved in United States v. Beebe, 180 U. S. 345, 45 L. Ed. 570, 21 Sup. Ct. 375, holding government is not guilty of laches in waiting five years before moving to set aside compromise judgment; Utah Power etc. Co. v. United States, 230 Fed. 340, holding estoppel did not apply against United States to validate unauthorized appropriation of public lands; United States v. Lee Wilson & Co., 214 Fed. 649, holding knowledge of fraud in obtaining land, acquired incidentally by special agent of land office, not imputable to United States so as to start limitations; United States v. Lisk, 176 Fed. 888, 100 C. C. A. 355, holding United States not responsible for negligence of internal revenue officer in losing spirits seized for nonpayment of tax; United States v. Spohrer, 175 Fed. 448, holding laches could not be pleaded as defense in suit to cancel certificate of naturalization; United States v. Campbell, 170 Fed. 318, 319, 95 C. C. A. 114, applying rule in action on official bond where United States officer continued in office after knowledge by other officers of his defalcations; Lewis Pub. Co. v. Wyman, 168 Fed. 755, holding delay for several years in passing on application to admit publication as second-class mail, while temporary

permit continued, did not prevent refusal of application; United States v. Noojin, 155 Fed. 379, holding right of United States to execution ten years after judgment not barred by laches; American Bonding Co. v. Spokane Building etc. Co., 130 Fed. 740, 65 C. C. A. 121, where application for fidelity insurance by building and loan society stated that secretary derived authority from board of trustees, knowledge on part of president that secretary was indebted to society at time policy issued is not imputable to society without proof of knowledge by board, so as to constitute breach of warranty that secretary was not indebted; Christie Street Com. Co. v. United States, 129 Fed. 509, statements made by departmental officers to claimant for tax alleged to have been paid under duress, to effect that claim had been certified favorably, do not estop government, so as to avoid operation of limitations; Pond v. United States, 111 Fed. 996, holding Code Civ. Proc. Cal., § 1502, providing for presentation of claims against estate of deceased, is not applicable to action by United States in Federal court on bond of an officer; Smith v. United States, 5 Ariz. 64, 65, 45 Pac. 343, 344, applying rule in action on bond of receiver of land district; Stoeckle v. Lewis, 8 Del. Ch. 165, 170, 38 Atl. 1062, 1063, 1064, holding sureties on tax collector's bond not released by failure of court to obey law requiring his removal; Terre Haute etc. R. Co. v. State, 159 Ind. 479, 65 N. E. 415, holding since repeal of 2 Rev. Stats. 1852, p. 78, § 224 (Ind.), providing that limitation shall not bar State, a plea in action commenced sixteen years thereafter that action accrued more than six, fifteen and twenty years prior to commencement of action, is bad; Gross v. Board etc., 158 Ind. 537, 64 N. E. 28, holding the allowance of claim of county treasurer by board of commissioners for fees in addition to salary prohibited by Acts 1891, p. 452, § 135 (Ind.), was not binding on county; Silver v. Indiana State Board, 35 Ind. App. 462, 72 N. E. 838, applying rule in action against school board on contract for school books; Ind. School District v. Hubbard, 110 Iowa, 63, 81 N. W. 243, holding where funds in the hands of a re-elected treasurer of a school district and not produced on settlement with board of directors before approval of his bond, under Code Iowa 1873, § 690, sureties are not estopped from showing defalcation prior to execution of bond; State v. United States Fidelity etc. Co., 81 Kan. 667, 26 L. R. A. (N. S.) 865, 106 Pac. 1043, holding surety of State depositary could not plead there was illegal agreement between State and bank as to term of deposit, or improper action of bank in handling deposits; Ketterer v. Kentucky State Board of Control, 131 Ky. 295, 20 L. R. A. (N. S.) 276, 115 S. W. 202, holding State not liable for torts of employees against inmates of asylum committed outside scope of duties; State v. Jahraus, 117 La. 289, 116 Am. St. Rep. 208, 41 South. 577, holding State not estopped by act of defaulting officer; Meyer v. Bichow, 133 La. 982, 63 South. 489, holding surety on contractor's bond not discharged by loan by owner to contractor independent of contract price; Chippewa Supervisors v. Bennett, 185 Mich. 565, 153 N. W. 814, holding suit by county on treasurer's bond not affected by omissions of other officers;

Board of County Commrs. v. Security Bank, 75 Minn. 181, 77 N. W. 817, holding when bank being indebted to county became insolvent and board of county commissioners neglected to file claim of county, sureties on commissioners' bond were not released; State v. Excelsior Powder Mfg. Co., 259 Mo. 284, 169 S. W. 275, holding laches not imputed to attorney general in not commencing action to abate nuisance; McCarter v. Lehigh Valley R. Co., 78 N. J. Eq. 364, 79 Atl. 101, holding State not barred by laches to sue to avoid grant made by riparian commissioners to railroad company; State v. Portland General Electric Co., 52 Or. 527, 95 Pac. 731, holding State not estopped from collecting tolls under canal franchise by acquiescing in transfer of franchise to transferee who did not question right to tolls; Lake Co. v. Neilon, 44 Or. 20, 74 Pac. 214, failure of tax collector to turn over collections to treasurer every thirty days as required by law, not presumptive of conversion; State v. Chilton, 49 W. Va. 457, 39 S. E. 614, holding practice in office of Secretary of State, of selling State books on credit, gives no warrant for such sales; Myers v. Miller, 45 W. Va. 616, 31 S. E. 983, holding sureties on official bond of sheriff are subrogated to position of State when required to make good default; United States v. Van Zandt, 11 Wheat. 187, **6 L. Ed. 450**, failure to recall paymaster for not rendering his vouchers for more than six months as required by law; Bank of United States v. Dandridge, 12 Wheat. 81, **6 L. Ed. 558**, if a regulation be merely directory, deviation from it cannot be taken advantage of by third persons; United States v. Nicholl, 12 Wheat. 509, **6 L. Ed. 710**, statute requiring treasury officers to give new sureties while allowed to remain in office; Dox v. Postmaster-general, 1 Pet. 325, 326, **7 L. Ed. 163**, failure of postmaster-general to prosecute a defaulting postmaster within time prescribed; Sprigg v. Bank of Mount Pleasant, 14 Pet. 207, **10 L. Ed. 422**, mere delay in enforcing bond, unless some agreement has been made, injurious to the interests of the surety; United States v. Boyd, 15 Pet. 208, **10 L. Ed. 713**, failure of receiver of public moneys to make quarterly payments required by rules; United States v. Buchanan, 8 How. 106, **12 L. Ed. 1006**, holding that government is not responsible for wrong committed by one officer on another; Gibbons v. United States, 8 Wall. 274, **19 L. Ed. 454**, holding government not liable on implied assumpsit for torts of its officer while in its service, and apparently for its benefit; Cooke v. United States, 91 U. S. 398, **23 L. Ed. 243**, holding that where treasury notes were purchased for retirement before maturity, under the act of 1866, they were not deemed retired until order of Secretary of Treasury was, or ought to have been given; Hart v. United States, 95 U. S. 318, **24 L. Ed. 480**, permitting distiller to remove spirits without prepayment of tax; United States v. Thompson, 98 U. S. 489, **25 L. Ed. 195**, holding United States is not bound by statute of limitations of any State; Minturn v. United States, 106 U. S. 444, 445, **27 L. Ed. 210, 211**, 1 Sup. Ct. 408, 409, permitting purchaser to withdraw goods sold in bond without paying duties; Robertson v. Sichel, 127 U. S. 515, **32 L. Ed. 206**, 8 Sup. Ct. 1290, holding that collector of customs is not personally liable for tort committed by his sub-

ordinates when not personally connected with it; United States v. Dalles etc. Road Co., 140 U. S. 632, 35 L. Ed. 571, 11 Sup. Ct. 998, holding that defense of laches cannot be set up against government in suits brought to declare lands forfeited; German Bank v. United States, 148 U. S. 579, 37 L. Ed. 569, 13 Sup. Ct. 705, holding government cannot be held liable for amount of bonds canceled without authority of law by register of treasurer; United States v. Verdier, 164 U. S. 216, 219, 41 L. Ed. 408, 409, 17 Sup. Ct. 43, 44, holding that neglect of postmaster-general to adjust postmaster's account was no bar to right of government to interest on balance found due; United States v. Cutter, 2 Curt. 625, Fed. Cas. 14,911, misappropriation by navy agent of public moneys paid to him contrary to law; Postmaster-general v. Munger, 2 Paine, 197, Fed. Cas. 11,309, omission of postmaster-general to discharge postmaster in arrears; Locke v. Postmaster-general, 3 Mason, 455, Fed. Cas. 8441, neglect of postmaster-general to sue for balances due by postmasters; Postmaster-general v. Reeder, 4 Wash. C. 680, Fed. Cas. 11,311, to same effect; Raymond v. United States, 14 Blatchf. 52, Fed. Cas. 11,596, neglect of Secretary of Navy to arrest and prosecute a paymaster who was squandering the money in his hands; United States v. Barnes, 24 Blatchf. 472, 31 Fed. 709, failure of government to prove claim against bankrupt's estate, held not to discharge assignee from personal liability when he distributed the assets having knowledge of the claim; United States v. City of Alexandria, 4 Hughes, 549, 19 Fed. 611, holding that time was no bar to an action to compel city of Alexandria to specific performance of contract made forty-five years before suit brought; United States v. Southern etc. Coal etc. Co., 5 McCrary, 573, 18 Fed. 279, applying rule in suit to set aside land patents on ground of fraud; United States v. Hosmer, 26 Fed. Cas. 377, failure of assessor to obtain mortgagee's consent prior to use of premises as distillery; United States v. Minturn, 26 Fed. Cas. 1273, surety on importer's bond not discharged because goods are allowed to be withdrawn from warehouse before duties are paid; United States v. Potter, 27 Fed. Cas. 604, holding statute authorizing salary of an officer in arrears to be withheld forms no part of contract with sureties; United States v. Wright, 28 Fed. Cas. 794, extending time of postmaster to settle his accounts; Williams v. Lyman, 88 Fed. 241, holding internal revenue collector's negligence in not examining his deputy's accounts, would not release the deputy's sureties; United States v. Pine etc. Logging Co., 89 Fed. 917, holding government not bound by its timber agent's derelictions; United States v. Little Miami etc. R. R. Co., 1 Fed. 701, holding in action against a corporation for taxes, statute of limitations has no application; United States v. De Visser, 10 Fed. 652, with reference to operation of the warehouse act of 1861, as affecting sureties to bond; United States v. Saylor, 31 Fed. 549, holding that sureties on postmaster's bond were liable for rebate received by him secretly from landlord of office, and for rent of newspaper stand sublet, although no claim had been made by the inspectors; United States v. Adams, 54 Fed. 116, failure of government to present claim against estate

of deceased marshal; Meads v. United States, 81 Fed. 688, 54 U. S. App. 150, holding that department regulations of land office cannot enlarge or restrict liability of an officer on his bond; State v. Brewer, 64 Ala. 298, holding estoppels against State cannot arise from laches of its officers; Hill v. State, 23 Ark. 610, holding that statute of nonclaim barred State as to claim against estate of decedent; Ex parte Christian, 23 Ark. 642, 643, failure to require settlement from collector prior to his becoming insolvent; Woodruff v. Berry, 40 Ark. 260, holding State is not responsible for acts of board of commissioners in letting contract for public printing without proper advertisement; Pickering v. Day, 3 Houst. 536, 95 Am. Dec. 308, s. c., 2 Del. Ch. 377, holding that collector of internal revenue was not bound to discharge deputy collector on discovery of his defalcation, and that his failure to do so did not relieve sureties on deputy's bond, s. c., 2 Del. Ch. 383, holding that provisions in statutes for taking official bonds are not conditions precedent to exercise of office unless expressed to be such; Sparks v. Farmers' Bank, 3 Del. Ch. 303, holding surety on bank cashier's bond continues as long as he holds office by virtue of his appointment, notwithstanding his annual election; State v. Smith, 16 Fla. 188, neglect of Governor to remove collector; Mutual L. & B. Assn. v. Price, 16 Fla. 212, 26 Am. Rep. 705, failure of officers of corporation to have periodical examinations of treasurer's accounts; Bond v. Central Bank, 2 Ga. 108, holding certain provisions in bank charter fixing limit to loans to any one person only directory; Stern v. People, 102 Ill. 550, holding failure of county board to remove county treasurer for refusing to make report of his receipts did not release his sureties; Kindle v. State, 7 Blackf. 589, holding county treasurer's sureties not discharged by change of law extending time of county treasurer for making settlements and payments; Boone Co. v. Jones, 54 Iowa, 703, 2 N. W. 990, holding that lack of record of approval of bond, as required by statute, did not affect its validity; Commonwealth v. Preston, 5 T. B. Mon. 589, neglect of County Court to compel guardian to render inventory and make settlement; Bonta v. Mercer County Court, 7 Bush (Ky.), 579, failure of County Court to appoint commissioner to settle sheriff's accounts; Louisiana State Bank v. Ledoux, 3 La. Ann. 685, refusal of bank to prosecute an official, and defining sureties' duty in such cases; State v. Dunn, 11 La. Ann. 551, delay in giving a sheriff's bond until after the time required by law and failure of the auditor to require proceedings to be instituted for former default; Bass v. State, 34 La. Ann. 502, holding riparian owner cannot make State liable for damages on account of levee over which State has exclusive power by reason of neglect of its board of engineers; Read v. Cutts, 7 Me. 193, 22 Am. Dec. 190, holding that grantee of payment by a time fixed of preexisting debt was not discharged by forbearance in suing; Inhabitants of Farmington v. Stanley, 60 Me. 476, failure of selectmen to examine accounts of town treasurer; Young v. State, 7 Gill & J. 263, in general discussion of variations in bond and its attestations from prescribed forms as immaterial in affecting its validity; dissenting opinion in Milburn v.

State, 1 Md. 19, majority holding that if sureties to bond of collector of taxes which required approval could show it had not been approved they are not bound; McShane v. Howard Bank, 73 Md. 156, 10 L. R. A. 557, 20 Atl. 780, bank failed to notify sureties of cashier's indebtedness; Amherst Bank v. Root, 2 Met. 541, and Lieberman v. First Nat. Bank, 40 Atl. 384, laches of directors in examining into the affairs of the bank as required by the by-laws does not release sureties of bank officer; Tapley v. Martin, 116 Mass. 278, commission of previous frauds by cashier on the bank, if unknown to the officers of the bank; Murdock Grate Co. v. Commonwealth, 152 Mass. 32, 8 L. R. A. 402, 24 N. E. 856, State cannot be held liable for a tort committed by its servants; Detroit v. Weber, 26 Mich. 290, failure to observe the provisions of an ordinance requiring monthly examination of accounts of city treasurer; Ellis v. Board, 107 Mich. 537, 65 N. W. 579, holding that rule of nonrecovery of money paid under mistake of law did not apply to illegal payments by ministerial officers of public money to public officers; Clements v. Anderson, 46 Miss. 598, holding that rule as to laches was confined to government and State, and that statute of limitations ran against county; Board of Commrs. v. Security Bank, 77 N. W. 817, holding sureties on bank's bond to county not released by failure of county to file its claim against the bank after it became insolvent; Parks v. State, 7 Mo. 196, delay in bringing suit on collector's bond for several years after default; State v. Atherton, 40 Mo. 217, negligence of directors and cashier in counting cash; State v. Roberts, 68 Mo. 237, 30 Am. Rep. 791, holding that sureties to county collector's bond were released by statute extending time for his annual settlements and that doctrine of laches did not apply; Chew v. Ellingwood, 86 Mo. 273, 56 Am. Rep. 435, holding sureties of bank bookkeeper responsible for his defalcations though made with consent of cashier and negligence of directors; Morris Canal v. Van Vorst, 21 N. J. L. 117, holding that statutory directions that agents shall account are for security of the government, but constitute no part of the contract with the surety; Newark v. Stout, 52 N. J. L. 49, 18 Atl. 948, holding that statutes, by-laws and ordinances making it duty of certain officers to supervise accounts were not for benefit of sureties to an official's bond; People v. Russell, 4 Wend. 575, holding omission of comptroller for eight years to prosecute bond of commissioner of loans, no defense to surety; Seymour v. Van Slyck, 8 Wend. 422, holding that omission to notify indorsers of nonpayment of note did not discharge their liability; Albany Dutch Church v. Vedder, 14 Wend. 171, failure to observe by-law requiring treasurer of corporation to account every six months; In re Election of Directors, 19 Wend. 143, holding that an election of directors will not be set aside because inspectors were not sworn in form prescribed by statute; Neimcewicz v. Gahn, 3 Paige, 619, holding where wife mortgages her estate for benefit of her husband she is entitled to privilege of surety, and if mortgagee takes husband's note for interest in arrears, the mortgaged property is pro tanto released; Looney v. Hughes, 26 N. Y. 519, 522, holding a statute requiring a county treasurer to issue

a warrant against a delinquent town collector merely directory, and delay did not release the sureties; People v. Stephens, 71 N. Y. 560, construing certain State contracts; State Bank v. Locke and Trotter, 4 Dev. 548, holding that one who is a surety by obligation cannot avail himself of laches by the creditor, certainly at law and probably also in equity; Lee v. Sturges, 46 Ohio St. 176, 2 L. R. A. 564, 19 N. E. 571, one construction by tax officers of tax law does not estop succeeding officers from claiming a different construction; Commonwealth v. Baldwin, 1 Watts, 55, 26 Am. Dec. 34, holding that lien of judgment in favor of State is not lost by lapse of time; Haehnlen v. Commonwealth, 13 Pa. St. 618, 53 Am. Dec. 503, holding that rights of State cannot be lost by failure of State treasurer to deduct certain disallowed contingent expenses from salary of surveyor-general; Commonwealth v. Brice, 22 Pa. St. 214, 60 Am. Dec. 80, holding that rule of laches applies to county as well as State officers; County v. Commonwealth, 36 Pa. St. 536, holding that county is not relieved of its liability for State taxes because of neglect of State treasurer in charging county at proper time; Pittsburg etc. R. R. Co. v. Schaeffer, 59 Pa. St. 356, holding sureties of railway cashier's bond not discharged for failure to notify default in observing rules for three months; Commissioners v. Philadelphia County, 157 Pa. St. 547, 27 Atl. 550, holding commonwealth not entitled to gain and charge interest for the delay of its officers; Commissioners v. Philadelphia, 157 Pa. St. 569, 570, 571, 573, as sustaining ruling that if failure of city treasurer to assess and pay over tax was not same as failure of the city it cannot be held liable; Erwin v. Davenport, 9 Heisk. 47, holding that railroad receivers are not responsible for misfeasance or nonfeasance of subagents properly employed by them; State v. Ward, 9 Heisk. 121, holding that lessees of convict labor had no claim against State for loss by reason of pardon of convicts by the Governor; Strong v. Stewart, 9 Heisk. 148, holding that where by custom of trade an agent is allowed to appoint subagent, he is not responsible for acts or omissions of subagent, who is directly responsible to principal for his neglect; Levasser v. Washburn, 11 Gratt. 577, holding that title by adverse possession, though commenced against true owner, did not run against State, to whom land became forfeited; Commonwealth v. Holmes, 25 Gratt. 775, 776, 778, holding that legislation subsequent to tax collector's bond did not release sureties, being merely directory, and that as to laws attempting to impose new duties on principal, bond should be held good to extent of duties lawfully covered by it; Richmond etc. R. R. Co. v. Kasey, 30 Gratt. 229, 230, holding sureties to bond of general freight and ticket agent bound, notwithstanding he failed to settle his accounts promptly, and gave credit contrary to orders; Loving v. Auditor, 76 Va. 950, holding that failure to certify and countersign drafts drawn by general agent of the penitentiary did not affect liability of sureties of agent's bond; Crawn v. Commonwealth, 84 Va. 286, 287, 10 Am. St. Rep. 842, 843, 4 S. E. 724, holding failure to require prompt settlement of county treasurer's balances did not affect his sureties; Hoge v. Brookover, 28 W. Va. 310, in discussion of question

whether judgment in favor of the State was affected by law requiring judgment to be docketed in order to preserve them as against purchasers of property, no decision; Myers v. Miller, 31 S. E. 983, holding sureties on official bond entitled to be subrogated to the position of the State; Cecil v. Clark, 44 W. Va. 676, 30 S. E. 222, whether State is bound by estoppel.

Distinguished in Chesapeake & Delaware Canal Co. v. United States, 223 Fed. 933, **L. R. A. 1916B, 734**, 139 C. C. A. 406, holding presumption of payment after twenty years applied as against United States; Lieberman v. First Nat. Bank, 8 Del. Ch. 245, 40 Atl. 384, holding neglect of bank officers to examine books and discover defalcations of paying teller did not relieve sureties on teller's bond; Badeau v. United States, 130 U. S. 452, **32 L. Ed. 1001**, 9 Sup. Ct. 583, holding that money paid as salary to officer whose name has been placed on retired list in apparent compliance with provisions of law cannot be recovered back by the United States; Boone Co. v. Burlington etc. R. R. Co., 139 U. S. 693, **35 L. Ed. 323**, 11 Sup. Ct. 690, holding rule did not apply to a county; United States v. Beebe, 4 McCrary, 13, 17 Fed. 38, holding that in equity lapse of time may bar a suit by the government under certain circumstances; United States v. De Visser, 10 Fed. 652, holding that effect of warehouse act of 1861 was not directory merely, but cut off the right of the sureties to pay debt and take possession of goods at the end of three years; s. c., p. 659, holding that postponement of a sale of goods under warehouse act at request of purchaser by order of the Secretary of Treasury, was not merely laches, but discharged sureties; Church of Christ v. Latter Day Saints, 71 Fed. 251, 36 U. S. App. 379, holding that laches was bar to bringing of suit to obtain possession of real estate by rival church sects; McHaney v. Crabtree, 6 T. B. Mon. 107, 108, holding question of laches not really considered in principal case; Mayor v. Blache, 6 La. 517, holding that sureties of new bond could not plead laches in not calling city treasurer to account for defalcations of past year; Hayden v. Agent, 1 Sand. Ch. 197, holding that laches of State officer which occasion loss to an individual, are to be borne by the State; Porter v. Commonwealth, 17 Pa. St. 18, holding doctrine of laches cannot be extended so as to charge county treasurer who has furnished his account in due time with interest; Commonwealth v. Philadelphia, 157 Pa. St. 577, 578, 27 Atl. 558, 559, holding that though rights of commonwealth cannot be lost by neglect of its agent, this does not extend to penalties which cannot in such case be recovered.

The maxim "Nullum tempus occurrit regi." Note, **101 Am. St. Rep. 147, 149, 152.**

Stale claim as defense against State. Note, **2 Am. St. Rep. 798.**

Running of limitations against government. Note, **8 E. R. C. 179.**

Effect on surety's liability of delay in prosecuting official. Note, **5 Am. Dec. 281.**

Discharge of surety on fidelity bond by failure of employer to notify surety of delinquency of employee. Note, **11 Ann. Cas. 1035.**

If debtor omits to make appropriation of payments, creditor may make it; if both omit it, law will apply payments as seems just. In cases of long and running accounts with only occasional balances, payments applied to extinguish debts according to priority.

Approved in Columbia Digger Co. v. Rector, 215 Fed. 629, 632, holding sureties on contractor's bond for public improvements were entitled to have payments for work applied as made to bills for materials, and materialmen who received payments knowing their source were not bona fide purchasers, but bound to apply payments to debt of contractors for materials on that particular work; In re Hawks, 204 Fed. 315, holding payment applied to oldest debt; Estate of Ramsay v. People, 197 Ill. 592, **90 Am. St. Rep. 188**, 64 N. E. 555, holding delay of State in commencing action against bondsmen of warden of State's prison did not bar action; Tolerton etc. Co. v. Roberts, 115 Iowa, 476, **91 Am. St. Rep. 172**, 88 N. W. 966, holding where several notes are secured by chattel mortgage and personal security on note first maturing, mortgagee is not required to first apply proceeds of foreclosure sale to first note; Board of County Commrs. v. Dickey, 86 Minn. 342, 90 N. W. 779, holding fact that county attorney advised board of commissioners that certain fees belonged to the clerk, and that commissioners acquiesced in such advice, did not estop county from collecting same by suit; Jackson v. Moore, 39 Okl. 236, 134 Pac. 1115, disapproving instruction that debtor must apply payment to debt most burdensome to debtor; Carson v. Cook County Liquor Co., 37 Okl. 16, **Ann. Cas. 1915B, 695**, 130 Pac. 304, holding direction made prior to payment determined application when made; Page v. Patton, 5 Pet. 310, **8 L. Ed. 137**, holding administrator having secured claim against estate, not deprived of right to resort to security, by receipt of general assets as administrator; Jones v. United States, 7 How. 691, 692, **12 L. Ed. 874**, holding that running account kept by government with postmaster amounts to election by creditor to apply payments as made to extinguishment of preceding balances; National Bank v. Mechanics' National Bank, 94 U. S. 439, **24 L. Ed. 178**, holding no appropriation by debtor or creditor could be made after controversy had arisen; Boody v. United States, 1 Wood. & M. 168, 169, Fed. Cas. 1636, holding that principle applied to payments on an open and running account of a postmaster; The Pioneer, Deady, 81, Fed. Cas. 11,177, applying rule in action for wages where there was running account; Gass v. Stinson, 3 Sumn. 112, Fed. Cas. 5262, applying rule to settlement of running account between principal and agent; United States v. Kershner, 1 Bond, 438, Fed. Cas. 15,527, applying rule in settlement of a postmaster's account; Leef v. Goodwin, Taney, 462, Fed. Cas. 8207, as rule to be followed in settlement of running account of ships' carpenters for repairs to several vessels; Postmaster-general v. Norvell, Gilp. 133, Fed. Cas. 11,310, holding that law which limits suits against sureties of postmaster to two years after default of principal does not operate in cases of balances unpaid at end of quarter subsequently liquidated by receipts of succeeding one; United States v. Bradbury, 2 Ware, 148, Fed.

Cas. 14,635, applying rule in settlement of a postmaster's account; Maybe v. Strouse, 6 Sawy. 215, 5 Fed. 494, holding that money paid on account may be applied in payment of excess interest over rate allowed to be recovered by law when not actually prohibited by law; Rickerson R. M. Co. v. Farrell F. & M. Co., 75 Fed. 562, 43 U. S. App. 452, holding that burden of proving that payments on an open, running account had not been applied to oldest items, lay strongly on creditor; Callahan v. Boazman, 21 Ala. 249, 251, affirming creditor's right to apply credit of cotton first to unsecured account when cotton was delivered and price ascertained; Lazarus v. Freidheim, 51 Ark. 378, 11 S. W. 521, where creditor appropriates payments to running account, law will apply them to items in order of date; Dunnington v. Kirk, 57 Ark. 598, 22 S. W. 431, holding that a running account, composed of items some secured, some not, is so far one that creditor cannot appropriate payments on general account, they will be applied by law in order of priority; Fairchild v. Holly, 10 Conn. 179, holding application of payments on running account of copartnership not affected by withdrawal of partner; s. c., p. 184, in dissenting opinion, that court would make application according to its own notions of justice; Norton v. Plumb, 14 Conn. 517, in adjudicating rights of indorser of three promissory notes to appropriate note given as collateral security; Stamford Bank v. Benedict, 15 Conn. 443, holding that where both parties had failed to appropriate, the court should direct the application so as to do equity; Chester v. Wheelwright, 15 Conn. 567, holding that where payments were made on account of a debt partly secured by mortgage, they should be appropriated to the unsecured portion; Randall v. Parramore, 1 Fla. 428, adding to ruling that law will distribute the payments, provided there are no other parties interested; Horne v. Planters' Bank, 32 Ga. 12, in discussing equitable rule of appropriation as contrasted with civil law; Russell v. Metzgar, 2 Ind. 352, holding in case of judicial sales proceeds will be applied by court pro rata to the debts for which sales are made; Miller v. County of Macoupin, 2 Gilm. 52, holding that stating of annual balances did not apportion an officer's liabilities among sureties for the respective years of his term of office; Koch v. Roth, 150 Ill. 226, 37 N. E. 321, sustaining vendor's application of payment of purchase money for personal and real property in absence of any direction by the purchaser; Allen v. Brown, 39 Iowa, 332, holding that a credit at bank at any one time wiped out all the debits, according to priority of time; Illsly v. Grayson, 105 Iowa, 687, 75 N. W. 518, applying payments to unsecured indebtedness; King v. Sutton, 42 Kan. 603, 22 Pac. 696, sustaining appropriation of proceeds of realization of security by creditor; Helm v. Commonwealth, 79 Ky. 69, holding in settlement of a sheriff's accounts if no presumption arises, law must make the application and it will be presumed that sheriff did his duty; McKenzie v. Nevius, 22 Me. 148, 38 Am. Dec. 297, holding that when there are frequent settlements of account and balances carried forward, credits will, in absence of special appropriation, go to extinguish oldest charges; Miliken v. Tufts, 31 Me. 500, applying rule of appropriation to oldest debt;

McTavish v. Carroll, 1 Md. Ch. 164, where, in distribution made by the court, payments were applied first to satisfaction of mortgage debt as being most equitable; Neidig v. Whiteford, 29 Md. 187, holding that appropriation of payments, when made by law, were to earliest and usually most onerous debt; Hersey v. Bennett, 28 Minn. 91, 41 Am. Rep. 275, 9 N. W. 593, holding where aggregate of payments on running account exceeded amount due at date of purchase of real estate by debtor in his wife's name, the creditor could not complain; Wooten v. Buchanan, 49 Miss. 389, holding that where several mortgage notes were all due, proceeds of sale should be applied ratably to all; Draffen v. City of Boonville, 8 Mo. 398, holding that payments made by tax collector on general account in his second year, before being charged with taxes for second year, should be applied to extinguish indebtedness on first year's collection; Benny v. Rhodes, 18 Mo. 153, 59 Am. Dec. 297, holding payment on general account by factor for sale on commission, would not, in absence of special appropriation, be applied in payment of consignment of goods tortiously delivered by factor to third party; Goetz v. Piel, 26 Mo. App. 642, discussing varying views as to proper mode of application by court, holding it should be to discharge oldest item of debt; State v. Hill, 47 Neb. 517, 66 N. W. 553, holding, in an action on State treasurer's bond, an instruction that parties were bound by agreement between one of them and bank where funds were deposited as to disposal of withdrawals, not in accordance with rule of principal case; Caldwell v. Wentworth, 14 N. H. 436, holding if payment on account made by a purchasing agent were directed by him to be applied in discharge of any particular item, vendor bound so to apply them; Oliver v. Phelps, 20 N. J. L. 197, sustaining instruction that a creditor to whom other claims besides rent were owing had right to apply check paid generally to other claims; Pattison v. Hull, 9 Cow. 771, 773, exhaustive discussion of rules governing court in appropriating general payments; Seymour v. Van Slyck, 8 Wend. 417, 418, holding payment agreeing in amount with particular debit but placed to general credit was intended in payment of that debit; Web v. Dickinson, 11 Wend. 64, holding where goods were obtained from merchant of greater amount than that for which guaranty was given, a payment on account greater than guaranty discharged guarantor; Stone v. Seymour, 15 Wend. 24, 32, 35, 41, holding intention of debtor might be inferred from circumstances and appropriations made accordingly; Allen v. Culver, 3 Denio, 290, 293, holding, where landlord was also factor, for sale of tenant's goods, and rent was charged in their running account as it fell due, this was an appropriation of credits to payment of rents then due and payable; Thompson v. St. Nicholas National Bank, 113 N. Y. 333, 21 N. E. 58, holding that deposits to bank account could be properly applied to extinguish contra balance on the day of deposit instead of indebtedness created by payment of certified checks; State v. Chadwick, 10 Or. 431, in suit for accounting all payments must be accounted for; Patterson v. Bank, 26 Or. 521, 38 Pac. 820, holding in running account at bank, payments were properly applied in extinguish-

ing oldest debits; Garrett's Appeal, 100 Pa. St. 602, holding where creditor claimed for rent and other debts, and issued warrant of distress for rent, he thereby applied the credits in his hands on other debts; State v. Spartanburg etc. R. R. Co., 8 S. C. 165, applying proceeds of sale of mortgaged property, between holders of coupons past due and owners of bonds though not then due; Blackmore v. Granberry, 98 Tenn. 282, 39 S. W. 230, holding that current of authority was to apply payments in discharge of debts according to priority; Robinson v. Doolittle, 12 Vt. 249, holding, if no application is directed by debtor, its intended application may often be inferred from circumstances; dissenting opinion in Emery v. Tichout, 13 Vt. 20, in majority holding that payments are to be applied according to understanding of parties when that is ascertainable; Shedd v. Wilson, 27 Vt. 482, appropriating payments on current account in order of priority; Morgan v. Tarbell, 28 Vt. 503, where partner was admitted to firm, payments thereafter made by creditor were applicable generally on his current account to items both before and after new partner's admission; Smith v. Lloyd, 11 Leigh, 517, **37 Am. Dec. 622**, court will distribute payments according to justice of each case; Norris v. Beaty, 6 W. Va. 482, 483, 484, restating principles by which court should be governed in appropriating payments.

Distinguished in In re A. O. Brown & Co., 189 Fed. 434, holding where trustee deposits trust funds with his own, there was no presumption that first funds drawn out were first deposited; First Nat. Bank v. National Surety Co., 130 Fed. 405, **66 L. R. A. 777**, 64 C. C. A. 601, where surety company gave bank bond against loss by dishonest employees for one year, and bookkeeper falsely increased depositor's balance, so that he overdrew, where before bookkeeper's employment deposits exceeded checks, surety not liable; Myers v. United States, 1 McLean, 497, Fed. Cas. 9996, and United States v. Linn, 2 McLean, 504, Fed. Cas. 15,606, holding that as between different sets of sureties the government could not appropriate moneys received and paid over by a receiver subsequent to date of bond in discharge of a balance due from him before date of that bond; Schuelenburg v. Martin, 1 McCrary, 351, 2 Fed. 750, where earlier items are secured and later unsecured, general payments might be applied to unsecured debt; Pickering v. Day, 3 Houst. 538, **95 Am. Dec. 310**, as to appropriations when not made by parties, they should be made as the law directs, not according to the law's own notions of justice; s. c., 2 Del. Ch. 366, as not applicable as between sureties on different and successive official bonds of the same officer; Randall v. Pettes, 12 Fla. 535, holding deposits in a bank to account of depositor cannot be considered as appropriated to pay notes owing to the bank; Seymour v. Van Slyck, 8 Wend. 420, holding that rule of appropriation to oldest item should not apply when there had been a change of the payer's sureties in the interval.

Application of payments. Note, **96 Am. St. Rep. 55, 63, 73.**

Appropriation of payments cannot be made by either party after controversy has arisen.

Approved in American Woolen Co. v. Maaget, 86 Conn. 245, **Ann. Cas. 1913E, 889**, 85 Atl. 587, and Stone Co. v. Rich, 160 N. C. 164, **Ann. Cas. 1914C, 244**, 75 S. E. 1079, both following rule; Applegate v. Koons, 74 Ind. 248, applying rule where, after suit commenced, defendant attempted to make appropriation of certain payments; State to the Use etc. v. Smith, 26 Mo. 233, **72 Am. Dec. 207**, as authority for holding that there was limit of time, after which debtor could not appropriate; Stone v. Seymour, 15 Wend. 31, in general discussion as to the limit of time when appropriation by parties could be made; Moss v. Adams, 4 Ired. Eq. 53, holding that an appropriation of payments made by a creditor could not be varied subsequently by the court.

Criticised in Gaston v. Barney, 11 Ohio St. 511, where an appropriation by creditor at request of debtor, after suit brought, of collections assigned to the former in favor of certain notes, was sustained by the court.

Limited in Haynes v. Waite, 14 Cal. 450, holding rule only correct to extent that creditor cannot, after controversy has arisen, vary an election already made.

Time when creditor may make application of payment. Note, **Ann. Cas. 1913E, 897.**

The government does not undertake to guarantee to any person the fidelity of its officers or agents.

Approved in Board of Improvement etc. v. Moreland, 94 Ark. 383, **21 Ann. Cas. 957**, 127 S. W. 470, holding member of sewer district board not liable for injury through negligence in constructing sewer; Claussen v. City of Luverne, 103 Minn. 495, **14 Ann. Cas. 673, 15 L. R. A. (N. S.) 698**, 115 N. W. 644, holding municipality not liable in tort for mistaken action of officials in attempting to revoke liquor license; Riddoch v. State, 68 Wash. 333, **Ann. Cas. 1913E, 1033, 42 L. R. A. (N. S.) 251**, 123 Pac. 452, holding State not liable for injury to spectator caused by giving way of railing of State armory.

Estoppel of county or municipal corporation to contest illegal claims or expenditures. Note, **137 Am. St. Rep. 363.**

Abandonment of highway by nonuser, or otherwise than by act of authorities. Note, **26 L. R. A. 451.**

Miscellaneous. Cited in Columbia Digger Co. v. Rector, 215 Fed. 625, to point that under plea of payment evidence of misapplication of payments was admissible at law; State v. Young, 137 La. 111, 68 South. 244, on meaning of term of office; Bank of United States v. Dandridge, 12 Wheat. 89, **6 L. Ed. 561**, by way of illustration of language of statutes merely directory; Soule v. United States, 100 U. S. 12, **25 L. Ed. 538**, but not in point; Jackson v. Simonton, 4 Cr. C. C. 261, Fed. Cas. 7147, to no apparent point; Borden v. Houston, 2 Tex. 607, as to strict construction of sureties' contract.

9 Wheat. 738–903, 6 L. Ed. 204, OSBORNE v. THE UNITED STATES BANK.

Question of jurisdiction of court should be disposed of before actually exercised, by deciding on rights of parties.

Cited in Ex parte Crane, 5 Pet. 200, **8 L. Ed. 96**, as to the right of Supreme Court to grant a writ of mandamus.

Denial of jurisdiction forbids all inquiry into nature of the case.

Cited in dissenting opinion in Livingston v. Story, 11 Pet. 397, **9 L. Ed. 764**, as to necessity of ascertaining jurisdiction in deciding case under Louisiana law founded on civil law.

Where Constitution confers original jurisdiction on Supreme Court, appellate jurisdiction is forbidden. In every other case power is to be exercised as original or appellate, as Congress directs.

Approved in Redmond v. Smith, 22 Tex. Civ. 324, 54 S. W. 636, holding under Constitution and Rev. Stats. U. S. 1878 (2d ed.), §§ 563, 687, jurisdiction of actions by or against consuls is not alone in Federal courts; Ex parte Crane, 5 Pet. 202, **8 L. Ed. 97**, as to power of Supreme Court to issue mandamus to Circuit Court; In re Kaine, 14 How. 119, **14 L. Ed. 351**, holding that writ of habeas corpus could only be issued in exercise of appellate jurisdiction; Mayor v. Cooper, 6 Wall. 253, **18 L. Ed. 853**, holding that Federal courts cannot refuse to entertain case removed from State court, depending on right construction of statute of removal; Baker v. Biddle, Bald. 403, 406, Fed. Cas. 764, holding exercise of equitable jurisdiction by Circuit Court is limited by organic law; State v. Trustees etc., 1 Hughes, 134, 135, 137, Fed. Cas. 10,318, s. c., 65 N. C. 716, 719, holding Circuit Court has no jurisdiction of a suit by State against its own citizens; Gettings v. Crawford, Taney, 4, Fed. Cas. 5465, holding that judiciary act of 1789, giving jurisdiction to District Court in civil cases against consuls and vice-consuls, did not conflict with Constitution; United States v. Shaw, 39 Fed. 434, **3 L. R. A. 232**, limitation as to amount in dispute does not apply to suits in which the United States is plaintiff or defendant; Nashville etc. R. A. Co. v. Taylor, 86 Fed. 172, holding that jurisdiction, as dependent on subject or character of the litigation, cannot be extended to cases not Federal in their character; Ex parte Henderson, 6 Fla. 295, 296, holding that State Circuit Court has jurisdiction of appeal from Justice's Court; Territory v. Ortiz, 1 N. M. 13, holding Congress cannot extend original jurisdiction of the Supreme Court of territory beyond limits of the law of September 9, 1850, and that mandamus does not lie from Supreme to Probate Court; Delafield v. State, 2 Hill, 168, upholding State court's jurisdiction where another State was party; State v. Hoskins, 77 N. C. 543, upholding constitutionality of removal of causes act; Martin v. Worth, 91 N. C. 47, holding State was necessary interested party in suit demanding return of State bonds and that Supreme Court had exclusive jurisdiction; dissenting opinion in Piqua Bank v. Knoup,

6 Ohio St. 423, majority holding that on questions of conflict of State law with national Constitution, Supreme Court had appellate jurisdiction.

Jurisdiction may be conferred by Congress over all cases involving questions to which Constitution extends judicial power, although other questions of law or fact may be involved therein.

Approved in Tift v. Southern Ry. Co., 123 Fed. 793, holding jurisdiction to enjoin unreasonable rates is based on fact that subject matter is under the control of Congress; Overholser v. Nat. Home for Disabled Soldiers, 68 Ohio St. 247, 96 **Am. St. Rep. 658**, 67 N. E. 489, holding National Home for Disabled Volunteer Soldiers is a corporation created by Congress for purpose of performing constitutional function and cannot be sued in tort; Tennessee v. Davis, 100 U. S. 264, **25 L. Ed. 650**, trial of revenue officer for murder, defended as done while in discharge of official duty; Roberts v. Northern Pacific R. R. Co., 158 U. S. 22, **39 L. Ed. 880**, 15 Sup. Ct. 763, suit involving rights of railroad as corporation of United States; Fisk v. Union Pacific R. R. Co., 8 Blatchf. 248, Fed. Cas. 4828, holding jurisdiction is not ousted because other questions besides those under acts of Congress may arise; Connor v. Scott, 4 Dill. 247, Fed. Cas. 3119, case involving construction of the bankruptcy law, although requiring settlement of other questions of law depending on general principles; Toledo etc. R. R. Co. v. Pennsylvania Co., 54 Fed. 749, **19 L. R. A. 397**, suit to enforce Interstate Commerce Act, and restrain a railway from refusing equal traffic facilities; Nashville etc. R. R. Co. v. Taylor, 86 Fed. 177, 184, discussing limit of jurisdiction of Federal courts and holding that once attached it extends to all the issues raised; dissenting opinion in California v. Southern Pacific Co., 157 U. S. 270, **39 L. Ed. 698**, 15 Sup. Ct. 607, majority denying Federal jurisdiction of a suit between a State and citizens of same, and of another State; Ex parte Crane, 5 Pet. 202, **8 L. Ed. 97**, holding that legislation was necessary to give effect to a power and set in motion the constitutional jurisdiction of Federal courts.

Distinguished in Gableman v. Peoria, D. & E. Ry. Co., 101 Fed. 5, holding action in State court against receiver of railroad for damages for personal injuries is not removable to Federal courts solely on ground that receiver was appointed by Federal court.

When any question respecting Federal laws or treaties is submitted to judicial department by party who asserts his rights in form prescribed by law, it becomes "a case" of which Federal courts have cognizance.

Approved in Male v. Atchison etc. Ry. Co., 240 U. S. 102, **60 L. Ed. 546**, 36 Sup. Ct. 353, holding asserted right to judgment on bonds of corporation created by act of Congress involved Federal question; Muskrat v. United States, 219 U. S. 358, **55 L. Ed. 250**, 31 Sup. Ct. 250, holding appeal to Supreme Court from Court of Claims in suit brought by authority of act of Congress providing for such appeal for purpose of determining validity

of prior act of Congress presented no case for the court; Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 246, 49 L. Ed. 465, 25 Sup. Ct. 251, proceeding for taking land by eminent domain authorized by Ky. Stats., §§ 835–839, is, when requisite diversity of citizenship exists, removable to Federal court; Pacific Whaling Co. v. United States, 187 U. S. 451, 47 L. Ed. 255, 23 Sup. Ct. 155, holding proceedings in District Court of Alaska to obtain license for ocean and coastwise vessels plying in Alaskan waters under act of Congress, March 3, 1889, § 460 (30 Stats. at Large, 1253, 1336, c. 429), is not an "action"; Smith v. Reeves, 178 U. S. 446, 44 L. Ed. 1145, 20 Sup. Ct. 923, holding action against State by corporation created by Congress is not authorized by United States Const., art. III, § 2; Blackburn v. Portland Gold Min. Co., 175 U. S. 580, 44 L. Ed. 281, 20 Sup. Ct. 226, holding suit brought in support of protest and adverse claim under United States Rev. Stats., §§ 2325, 2376, is not suit under United States laws so as to confer jurisdiction on Federal court; La Abra Silver Min. Co. v. United States, 175 U. S. 456, 44 L. Ed. 235, 20 Sup. Ct. 179, holding suit by United States to determine question of fraud in obtaining award against Mexico brought under act of Congress, December 28, 1892, is a "case" within meaning of Const., art. III, § 2; United States v. Lenore, 207 Fed. 870, and In re Hartman, 232 Fed. 799, both holding naturalization proceeding was "a case"; Alabama etc. Ry. Co. v. American Cotton Oil Co., 229 Fed. 19, holding action for nondelivery of shipment made through connecting carriers was removable to Federal court as arising under Federal laws; McGoon v. Northern Pac. Ry. Co., 204 Fed. 1004, holding suit by shipper to recover for damage to interstate shipment arose under Federal law; United States v. Dolla, 177 Fed. 104, 21 Ann. Cas. 665, 100 C. C. A. 521, holding naturalization proceeding not "a case" under act of March 3, 1891, relating to appeals to Circuit Court of Appeals; Larabee v. Dolley, 175 Fed. 384, 392, 393, holding suit by stockholder in bank to enjoin acceptance by bank of provisions of bank guaranty law of Kansas, on ground law was void as impairing obligations of contracts of stockholders, was case arising under Constitution of United States; Frank v. Leopold, 169 Fed. 924, holding suit to enjoin United States marshal from levying execution was case arising under laws of United States; State of Oregon v. Three Sisters Irr. Co., 158 Fed. 350, holding suit relating to contract between State and defendants for reclamation of desert lands, which depended for validity on Federal statute, was within Federal jurisdiction; Low Foon Yin v. United States etc. Commr., 145 Fed. 796, proceeding for deportation of Chinese laborer not having certificate is not criminal proceeding, and government may swear such Chinese as witness against himself; Chow Loy v. United States, 112 Fed. 359, holding under Chinese Exclusion Act, September 13, 1888, § 13, relating to appeals to judges of District Court from judgment of conviction, appeal is to judge as special tribunal; Patterson v. People, 23 Colo. App. 491, 130 Pac. 623, holding "cause," as used in Constitution, article VI, section 11, fixing jurisdiction of courts, was synonymous with "case"; In re Macfarland, 30 App.

D. C. 386, holding act of Congress of June 6, 1896, requiring Supreme Court of District of Columbia to ascertain value of plant of gas company, was void as requiring legislative act; Calhoun v. Central of Georgia Ry. Co., 7 Ga. App. 531, 67 S. E. 275, holding where petition showed plaintiff's right arose under act of Congress, cause must, on petition, be removed to Federal court; Nichols v. Chesapeake etc. Ry. Co., 127 Ky. 317, 319, 320, **17 L. R. A. (N. S.) 861**, 105 S. W. 483, holding where complaint showed violation of safety appliance act as basis of action it was removable to Federal court; McCrea v. Roberts, 89 Md. 253, 43 Atl. 42, holding Acts 1894, c. 6, § 7 (Md.), providing that when objections are filed for liquor license application and objections shall be referred to circuit judge, imposes judicial functions on judge; St. Louis v. United Rys. Co., 263 Mo. 429, 174 S. W. 86, holding Federal court had jurisdiction where claim was made in good faith that ordinance violated Federal Constitution; Shellenbarger v. Fewel, 34 Okl. 83, 124 Pac. 619, holding whether action involved Federal question must be determined from complaint; Cherokee Nation v. Georgia, 5 Pet. 69, **8 L. Ed. 49**, suit by Cherokee Nation as foreign State against State of Georgia; Smith v. Adams, 130 U. S. 174, **32 L. Ed. 898**, 9 Sup. Ct. 568, suit to try validity of an election to determine county seat of territorial county under territorial laws; Fong Yue Ting v. United States, 149 U. S. 729, **37 L. Ed. 918**, 13 Sup. Ct. 1028, trial of right of a Chinese laborer to remain in the country under the Chinese exclusion act; Interstate Com. Commn. v. Brimson, 154 U. S. 475, 485, **38 L. Ed. 1056, 1061**, 14 Sup. Ct. 1132, 1137, reversing s. c., 53 Fed. 479, suit by interstate commerce commission to compel attendance and testimony of witnesses and production of papers; Cadle v. Tracy, 11 Blatchf. 113, Fed. Cas. 2279, holding a national bank incorporated under act of 1864 could only be sued in courts designated in that act; Union Pacific R. R. Co. v. McComb, 17 Blatchf. 511, 1 Fed. 800, suit by corporation created under act of Congress; State Lottery Co. v. Fitzpatrick, 3 Wood, 240, Fed. Cas. 8541, holding statute repealing company's charter raised Federal question; Connor v. Scott, 4 Dill. 246, Fed. Cas. 3119, bill involving effect of sale by assignee in bankruptcy; Magee v. U. P. R. R. Co., 2 Sawy. 449, Fed. Cas. 8945, actions to which the railroad was party, but holding that this alone did not warrant removal from State court; In re Oregon Bulletin Co., 3 Sawy. 531, Fed. Cas. 10,560, holding proceeding by creditor to have debtor adjudged bankrupt is a case; In re Metzger, 17 Fed. Cas. 234, extradition of fugitive from justice under treaty with foreign government; Nashville etc. R. R. Co. v. Taylor, 86 Fed. 172, suit to enjoin State board of equalizers from certifying railroad property for taxation; Davison v. Champlin, 7 Conn. 247, suits under penal laws of United States, exclusive jurisdiction; Edwards v. Ward, 2 Bush. (Ky.), 607, where defense showed it would involve legal powers of President of United States and questions arising under act of Congress; Lake v. Lake, 17 Nev. 238, 30 Pac. 880, on an appeal from decree in divorce proceedings, court could order counsel's fees; United States v. New Bedford Bridge, 1 Wood. & M. 434, Fed. Cas. 15,867, holding that

act charged as crime for obstructing navigation of rivers and ports within limits of State could only be punished by further legislation by Congress; Dowell v. Griswold, 5 Sawy. 44, Fed. Cas. 4041, holding that Congress had not provided for original proceedings in Circuit Courts in actions arising out of contract or dealings between parties; In re Pacific R. R. Commn., 12 Sawy. 582, 32 Fed. 256, petition to aid railway commissioners in their investigations; State v. Atchison, T. & S. F. R. R. Co., 77 Fed. 344, holding anticipated defense of United States statutes not sufficient to justify removal from State court; State v. Trustees, 65 N. C. 715, suit by State against its own citizens; Ex parte Towles, 48 Tex. 433, holding that ex parte proceeding by voter to review commissioners' decision on contested election for change of county seat was neither suit nor case of which court had jurisdiction; Fisk v. Union Pacific R. R. Co., 6 Blatchf. 366, 370, 371, Fed. Cas. 4827, sustaining constitutionality of removal of causes act where jurisdiction depended on the subject matter; Cobb v. Stallings, 34 Ga. 77, as having construed article IV of the Constitution, and that as between laws of Confederate Congress and of Georgia, former were supreme; Coleman v. Newby, 7 Kan. 93, holding courts can only act in decision of cases having parties plaintiff and defendant; Chumassero v. Potts, 2 Mont. 260, holding term "case at common law" in act of 1874 was not broader than in principal case; North. Pac. R. R. Co. v. Carland, 5 Mont. 156, 3 Pac. 149, holding jurisdiction of Territorial District Court and Federal, District and Circuits were same in causes under Federal Constitution and laws; Shollenberger v. Brinton, 52 Pa. St. 36, sustaining power of Congress to issue treasury notes and make them legal tender; Taylor v. Place, 4 R. I. 336, 357, as to limit of judicial power under Constitution, showing that under State Constitution the general assembly was prohibited from acting judicially.

Distinguished in Shulthis v. McDougal, 225 U. S. 571, **56 L. Ed. 1211**, 32 Sup. Ct. 704, holding corporation formed in Indian Territory while Arkansas laws were in force was not Federal corporation, but for jurisdictional purposes is one of Oklahoma; dissenting opinion in In re Macfarland, 30 App. D. C. 400, majority holding act of Congress of June 6, 1896, requiring Supreme Court of District of Columbia to ascertain value of plant of gas company was void as requiring legislative act; Ft. Smith etc. R. Co. v. Awbrey, 39 Okl. 275, 134 Pac. 1119, holding State court had jurisdiction of action for damages caused by delay in shipment by connecting carrier though right of action was given by Federal statute; Texas etc. Ry. Co. v. Huber, 100 Tex. 8, 92 S. W. 835, holding action for personal injuries not removable to Federal court on request of both parties on ground that defendant was corporation existing under act of Congress; Provident etc. Soc. v. Ford, 114 U. S. 642, **29 L. Ed. 264**, 5 Sup. Ct. 1108, holding that a suit on a judgment recovered in a Federal court does not raise question under laws of the United States; dissenting opinion in Pacific R. R. Removal Cases, 115 U. S. 24, **29 L. Ed. 327**, 5 Sup. Ct. 1124, removal act of 1875 did not authorize removal of all causes when charter

made no such provision; Manhattan R. R. Co. v. New York, 18 Fed. 199, holding case involving only construction of State assessment law and general principles of law and equity did not give jurisdiction to Federal courts.

Meaning of word "case" as used in sense of "action" or "proceeding." Note, 21 Ann. Cas. 668.

Administration of Federal laws in State courts. Note, 48 L. R. A. 35.

Extent of Supreme Court's original jurisdiction.

Cited in United States v. Rhodes, 1 Abb. 33, Fed. Cas. 16,151, criminal jurisdiction under section 3 of Civil Rights Bill, is not confined to offenses committed by colored persons.

Jurisdiction of Federal courts is established if title or right set up may be defeated by one construction of Federal Constitution or laws and sustained by opposite.

Approved in Macon Grocery Co. v. Atlanta Coast Line R. Co., 215 U. S. 506, 507, 54 L. Ed. 303, 30 Sup. Ct. 184, holding under jurisdictional act of 1875 as amended in 1887 and 1888, Circuit Court of district where plaintiff resides has no jurisdiction of Federal cause if defendant be not citizen of district; Carroll v. Greenwich Ins. Co., 199 U. S. 409, 50 L. Ed. 249, 26 Sup. Ct. 66, upholding Iowa Code 1897, § 1754, prohibiting combinations among insurance companies as to rates, commissions or manner of doing business; Swafford v. Templeton, 185 U. S. 494, 46 L. Ed. 1008, 22 Sup. Ct. 786, holding action for damages from State election officers for wrongful refusal to allow plaintiff to vote for member of house of representatives is properly brought in Circuit Court; Patton v. Brady, Exrx., 184 U. S. 611, 46 L. Ed. 716, 22 Sup. Ct. 494, holding where plaintiff's right of recovery depended on unconstitutionality of tax on tobacco under act June 13, 1898, Circuit Court had jurisdiction; McGoon v. Northern Pac. Ry. Co., 204 Fed. 1000, holding suit by shipper to recover damages for injury to shipment in interstate commerce arose under Federal law; Beck v. Johnson, 169 Fed. 159, holding action for wrongful death did not involve Federal statute, and was not removable to Federal court; Columbia Valley R. Co. v. Portland etc. Ry. Co., 162 Fed. 605, 89 C. C. A. 361, holding bill by railroad to recover possession of lands claimed under grant of government for right of way, but claimed by defendant to be forfeited for failure to complete road in time limited, presented question of construction of statute; Arkansas v. Kansas & T. Coal Co., 96 Fed. 357, holding bill alleging that a corporation was about to import into Arkansas a large number of armed, low and lawless men, to the great danger of the community, stated a cause for the Federal court; Dewey Min. Co. v. Miller, 96 Fed. 2, holding where bill involving mining locations shows that facts and not construction of mining law is involved, Federal court has no jurisdiction; Börs v. Reston, 111 U. S. 258, 256, 28 L. Ed. 421, 4 Sup. Ct. 410, suit by

citizen against alien who is a consul of a foreign government; Kansas Pac. v. Atchison R. R. Co., 112 U. S. 416, **28 L. Ed. 795**, 5 Sup. Ct. 209, controversy between companies incorporated under territorial statutes relating to land claimed under grants from the United States; Pacific R. R. Co. Removal Cases, 115 U. S. 11, 14, 15, **29 L. Ed. 323, 324**, 5 Sup. Ct. 1118, 1119, 1120, suits by or against a corporation of the United States to which class the Union Pacific R. R. Co. belongs; United States v. Old Settlers, 148 U. S. 468, **37 L. Ed. 524**, 13 Sup. Ct. 667, review of decision of the Court of Claims in a suit of which it had jurisdiction; Sonnentheil v. Moerlein Brewing Co., 172 U. S. 405, **43 L. Ed. 494**, suit against a marshal for acts done in his official capacity; Stanley v. Board of Supervisors, 19 Blatchf. 147, 6 Fed. 561, action to enforce right conferred by Revised Statutes regarding taxation of property of a national bank; Cruikshank v. Fourth Nat. Bk., 21 Blatchf. 323, 16 Fed. 889, suit against national bank irrespective of citizenship; Hendee v. Connecticut etc. R. R. Co., 23 Blatchf. 456, 26 Fed. 678, suit against corporation created by act of Congress although founded on common law or other statutes; Sawyer v. Parish of Concordia, 4 Woods, 278, 12 Fed. 759, suit in which plaintiff alleged that State law impaired obligation of contract; Orner v. Saunders, 3 Dill. 285, Fed. Cas. 10,584, action by collector of internal revenue on official bond of his deputy; San Mateo Co. v. S. P. R. R. Co., 7 Sawy. 521, 13 Fed. 148, suit to recover taxes involving conflict between State Constitution and Fourteenth Amendment of Federal Constitution; Hughes v. Northern Pac. R. R. Co., 9 Sawy. 320, 18 Fed. 111, suit by riparian proprietor to enjoin construction of bridge claimed to be in building under authority of act of Congress; In re Brinkman, 7 N. B. R. 426, 4 Fed. Cas. 147, holding that District Court would enjoin foreclosure on bankrupt's property in State court; Leonard v. City of Shreveport, 28 Fed. 257, holding that since removal of causes act of 1875 Federal court had original jurisdiction of all cases involving United States law, whether constitutional or congressional; State v. Illinois Cent. R. R. Co., 33 Fed. 725, action to try company's title to land derived under act of Congress; Briscoe v. Southern Kan. R. R. Co., 40 Fed. 277, suits by or against railway company; Jones v. Florida, C. & G. R. R. Co., 41 Fed. 71, suit to restrain railway company from building across land belonging to the government; Smith v. Bivens, 56 Fed. 355, holding that injunction will lie to restrain a trespass committed under color of a State law which violated national Constitution; Pacific Gas Co. v. Ellert, 64 Fed. 429, suit by riparian proprietor to restrain construction of street on tide lands by which its access to tide water would be destroyed; Nat. Bk. of Commerce v. Wade, 84 Fed. 12, suit by national bank, charging its former officers with breach of the national banking laws; Johnson v. New Orleans Nat. Bk., 33 La. Ann. 480, suit to set aside sale under decree of Federal Circuit Court.

The following cases have held that Federal courts had no jurisdiction: Starin v. New York, 115 U. S. 257, **29 L. Ed. 390**, 6 Sup. Ct. 31, where question was as to exclusive right of city to establish ferries; State v.

Bradley, 26 Fed. 289, suit alleging violation of New York prohibition laws; Wise v. Nixon, 76 Fed. 5, suit to quiet title to mining claims against relocators who alleged failure to do proper assessment work; Crystal Springs etc. Co. v. Los Angeles, 76 Fed. 151, suit to quiet title where both parties claimed under Mexican grant duly confirmed in accordance with treaty; King v. Lawson, 84 Fed. 210, bill to protect homestead entryman by enjoining interference by town-site claimant, held not to present any Federal question; McCain v. City of Des Moines, 84 Fed. 729, suit to enjoin city officials from exercising any authority over annexed territory, claiming annexation law was void; Home Ins. Co. v. N. W. Packet Co., 32 Iowa, 237, 7 Am. Rep. 185, action for damages on bill of lading, and defining "cases" as contested questions before courts of justice; Setzer v. Douglass, 91 N. C. 429, action for breach of contract between United States marshal and his deputy; Applegate v. Dowell, 15 Or. 527, 16 Pac. 659, suit between citizens of same State to set aside a deed as fraudulent for alleged failure to affix revenue stamps.

Other cases which cite the rule are: Gold Washing etc. Co. v. Keyes, 96 U. S. 201, 24 L. Ed. 658, in deciding right of removal of cause arising under Constitution or laws of United States; Murray v. Patrie, 5 Blatchf. 345, Fed. Cas. 9967, holding that after removal of cause from State court objections to jurisdiction may be raised at the trial; Levy v. City of Shreveport, 28 Fed. 213, holding that in order to give Circuit Court jurisdiction the case must show that question under Constitution or laws of United States did or would necessarily arise; Nashville etc. R. Co. v. Taylor, 86 Fed. 181, 182, showing that there is no distinction in character of Federal question involved in cases of appellate and original jurisdiction.

Eleventh amendment has full effect if Constitution be construed as it would have been had jurisdiction never been extended to suits therein restrained.

Approved in Minnesota v. Hitchcock, 185 U. S. 386, 46 L. Ed. 962, 22 Sup. Ct. 655, holding in suit by State to enjoin Secretary of Interior and commissioners of land office from selling school lands in Red Lake Indian reservation, Supreme Court has original jurisdiction under 31 Stats. at Large, 950, c. 808; South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 728, holding action by State against foreign corporation to collect penalties imposed by State in pursuance of police powers, where neither complaint or statute refers to Federal laws or Constitution is not removable to Federal court; Ex parte Poulson, 19 Fed. Cas. 1207, holding same effect must be given to act of March 7, 1831, limiting power of Federal courts to punish in cases of contempt; dissenting opinion in Livingston v. Story, 11 Pet. 397, 9 L. Ed. 764, Railroad Co. v. Mississippi, 102 U. S. 140, 26 L. Ed. 98, arguendo.

What is suit against State within eleventh amendment.

Approved in Missouri etc. Ry. Co. v. Missouri R. R. etc. Commrs., 183 U. S. 59, 46 L. Ed. 83, 22 Sup. Ct. 20, holding under Mo. Rev. Stats. 1899,

§ 1150, State is not party in action brought by railroad commissioners to restrain railroad company from violating law as to rates; Illinois Cent. R. R. Co. v. Adams, 180 U. S. 37, **45 L. Ed. 413**, 21 Sup. Ct. 254, holding question whether action against State officer is action against State will not be tried to dismiss appeal; Laubscher v. Fay, 197 Fed. 880, holding in action for death under Ohio statute, administrator was real party in interest and could compromise suit; Western Union Telegraph Co. v. Julian, 169 Fed. 169, and Kansas Natural Gas Co. v. Haskell, 172 Fed. 555, both holding suit against State officer to enjoin enforcement of void State statute was not against State; Miocene Ditch Co. v. Moore, 150 Fed. 493, upholding right to vacate decree during term; Morenci Copper Co. v. Freer, 127 Fed. 203, 204, holding suit by West Virginia corporation to restrain attorney general of that State from instituting suit in name of State to forfeit corporation's charter, being suit against State, is not within Federal jurisdiction; South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 730, holding State court has jurisdiction to try action imposing penalty on foreign corporation; Starr v. Chicago, R. I. & P. Ry. Co., 110 Fed. 7, holding suit against State officers enjoining them from enforcing schedule of railroad rates is not against State; Minneapolis Brewing Co. v. M'Gillivray, 104 Fed. 270, holding suit to enjoin State officer from enforcing unconstitutional statute which subjects complainant's property to seizure for failure to pay license is not an action against State; Marrs v. Felton, 102 Fed. 779, holding action against two defendants jointly for negligence cannot be removed to Federal court by one defendant when co-defendant has no right of removal; Gableman v. Peoria, D. & E. Ry. Co., 101 Fed. 2, 4, holding suit brought for damages for personal injury against receiver appointed by Federal court must be tried in State court; Popp v. Cincinnati, H. & D. Ry. Co., 96 Fed. 467, holding under Rev. Stats. Ohio, § 6133, providing for prosecution of suits by foreign administrators, he may maintain action for wrongful death of decedent; Goldsmith v. Valentine, 36 App. D. C. 66, holding in habeas corpus proceeding power of court was limited to contesting parties, and it could not award child whose custody was sought to one not party to proceeding; Burke v. Snively, 208 Ill. 337, 70 N. E. 329, upholding suit to restrain canal commissioners from applying sum appropriated to maintenance of canal, as not suit against state; Sanders v. Saxton, 182 N. Y. 479, 481, **108 Am. St. Rep. 826**, 75 N. E. 529, 530, in action against land commissioner and comptroller to set aside tax deed to State, State is necessary party, and action cannot be maintained; State v. Southern Ry. Co., 145 N. C. 525, 526, **13 L. R. A. (N. S.) 966**, 59 S. E. 580, 581, holding suit against corporation commission and attorney general to enjoin enforcement of statute fixing maximum passenger fares was suit against State; Cincinnati Board of Education v. Volk, 72 Ohio St. 486, 74 N. E. 650, board of education not liable in tort in its corporate capacity; Ware Shoals Mfg. Co. v. Jones, 78 S. C. 217, 58 S. E. 813, holding suit to restrain controller general from collecting tax under alleged void statute was not suit against State; Redmond v. Smith,

22 Tex. Civ. 324; 54 S. W. 636, holding jurisdiction of action by or against consuls under Rev. Stats. U. S., 1878, §§ 563–687, is not exclusive; Sheltman v. Taylor's Committee, 116 Va. 764, 82 S. E. 699, holding residence of committee of lunatic governed jurisdiction of attachment suit against lunatic's estate; General Board of State Hospitals etc. v. Robertson, 115 Va. 533, 79 S. E. 1067, holding suit against State hospital in its public capacity was suit against State; Coal & Coke Ry. Co. v. Conley, 67 W. Va. 145, 67 S. E. 620, holding injunction lay against State officer to restrain enforcement of alleged void statute threatening irreparable injury to plaintiff; dissenting opinion in Pitcock v. State, 91 Ark. 544, 548, **134 Am. St. Rep. 88**, 121 S. W. 749, 751, majority holding suit to restrain penitentiary board from violating convict labor contract was suit against State; dissenting opinion in White v. Auditor, 126 N. C. 605, 36 S. E. 143, majority holding office of chief inspector under Laws N. C. 1897, c. 13, relating to oyster industry is entitled to salary, and mandamus would issue to State auditor and treasurer to pay it; Coyle v. Smith, 28 Okl. 154, 113 Pac. 958, and Smith v. State, 28 Okl. 251, 113 Pac. 939, both arguendo.

The following other cases sustain jurisdiction of Federal courts, notwithstanding eleventh constitutional amendment: Charles River Bridge v. Warren Bridge, 11 Pet. 572, 585, **9 L. Ed. 834, 839**, in action against a corporation acting as agent collecting tolls under an unconstitutional law, holding jurisdiction not taken away because State not a party on the record; dissenting opinion in McNutt v. Bland, 2 How. 22, 25, **11 L. Ed. 164, 165**, majority holding court had jurisdiction of a suit by Governor of a State, on a sheriff's bond, provided the party for whose use suit was brought was citizen of another State; Louisville R. R. Co. v. Letson, 2 How. 551, **11 L. Ed. 375**, suit against a railroad corporation of which State was member but not party of record; dissenting opinion in Florida v. Georgia, 17 How. 500, **15 L. Ed. 197**, majority holding that United States could appear in case of disputed boundary without becoming a party; Davis v. Gray, 16 Wall. 220, **21 L. Ed. 453**, affirming Gray v. Davis, 1 Woods, 426, Fed. Cas. 5715, bill by receiver of railway to enjoin State officers from destroying the company's property by granting it to other parties on claim of forfeiture; United States v. Lee, 106 U. S. 212, 213, 215, **27 L. Ed. 179, 180**, 1 Sup. Ct. 254, 256, holding that officers and agents of the United States may be sued, although the government cannot be sued; s. c., pp. 217, 244, **27 L. Ed. 181, 190**, 1 Sup. Ct. 258, 280, holding that claim that property sued for was devoted to public use, does not bar the right of action; Pennoyer v. McConnaughy, 140 U. S. 10, **35 L. Ed. 365**, 11 Sup. Ct. 702, affirming s. c., 14 Sawy. 588, 43 Fed. 199, holding that suit in equity by a purchaser against State board of land commissioners was not a suit against the State; Swasey v. N. C. R. R. Co., 1 Hughes, 20, Fed. Cas. 13,679, holding that since principal case, Federal courts invariably took jurisdiction of cases affecting State property in the hands of its agents without making State party; The Arlington Case, 8 Hughes, 122, 124, Fed. Cas. 8191, holding the government may be sued indirectly for

personal property when not seized out of the hands of its officers on mesne process, although on final process seizure and dispossession would result; McComb v. Board, 2 Wood, 53, Fed. Cas. 8707, suit by holders of State consolidated bonds to enjoin State officers from issuing similar bonds to general creditors, in violation of State's contract with bondholders; Tyler v. Walker, 24 Fed. Cas. 471, action by marine officer against paymaster of corps, on claim for double rations; Chaffraix v. Board, 11 Fed. 644, petition to enjoin State officers from diverting funds set apart for special purpose, until the rights of the parties were ascertained; State v. Lewis, 12 Fed. 5, s. c., 14 Fed. 67, suit by State against aliens, who had right of removal into Federal courts; Head v. Porter, 48 Fed. 485, suit against United States officer for infringement of a patent, acting under orders of the government; Western Union Tel. Co. v. Henderson, 68 Fed. 590, 592, 596, holding that suit to restrain State auditor from transmitting property valuations to county auditors for taxation under alleged void statute, was not suit against State; In re Stutsman Co., 88 Fed. 342, holding that objection that there might be other parties entitled to defend will not avail to defeat jurisdiction; Nougues v. Douglas, 7 Cal. 74, showing that State is not formal party of record in action by citizen claiming to be damaged by State officer; Polack v. Mansfield, 44 Cal. 42, and King v. La Grange, 61 Cal. 228, holding ejectment will lie against officer of United States in possession of demanded premises on behalf of government; Sharp's Rifle Mfg. Co. v. Rowan, 34 Conn. 332, 333, **91 Am. Dec. 729, 730**, suit to compel conveyance of real estate where it was claimed foreign government was real party in interest, holding the court would not look beyond the record; Budd v. Houston, 36 La. Ann. 961, review of tax sale proceedings, where property was struck off to State as purchaser; Michigan State Bk. v. Hastings, 1 Doug. (Mich.) 241, 249, **41 Am. Dec. 556, 562**, bill to compel State officers to sell property and apply proceeds in pursuance of an agreement with State; Lynn v. Polk, 8 Lea, 235, 259, bill to enjoin funding board from funding bonded debt of State, holding it was not suit against State; Blanton v. Southern Fert. Co., 77 Va. 337, suit against State officer is not necessarily against State and commission will be enjoined from levying tax on manufactures in guise of charge for tags on packages; McClanahan v. Western Lunatic Asylum, 88 Va. 469, 13 S. E. 978, holding corporation can sue and be sued, though incorporated by the State; Slack v. Jacob, 8 W. Va. 663, holding Governor could not be enjoined from moving State records to new capital before validity of the statute was ascertained.

The same principle has been extended by analogy to other cases in which Federal jurisdiction has been sustained: Dodge v. Woolsey, 18 How. 345, **15 L. Ed. 406**, bill by stockholder resident of another State to prevent a bank committing a breach of trust by failing to contest an invalid State tax; Coal Co. v. Blatchford, 11 Wall. 175, **20 L. Ed. 180**, and Rice v. Houston, 13 Wall. 67, **20 L. Ed. 484**, holding that if executors or trustees sue for others' benefit, jurisdiction depends on their own citizenship, not that of the parties they represent; Lincoln Co. v. Luning, 133 U. S. 530,

33 L. Ed. 767, 10 Sup. Ct. 363, holding Federal courts have jurisdiction of suits against counties; Weed Sewing Mach. Co. v. Wicks, 3 Dill. 266, Fed. Cas. 17,348, holding that where State law directs all suits to be brought in name of real party in interest, that party may sue in Federal courts, if case otherwise is within their jurisdiction; Harper v. Norfolk & W. R. R. Co., 36 Fed. 104, action by administrator against citizen of another State without regard to citizenship of deceased; Reinach v. Atlantic & G. W. R. R. Co., 58 Fed. 38, foreclosure suit by an alien bondholder in his own right, though mortgage trustee is of same State with some of defendants; Robb v. Parker, 3 S. C. 71, holding in suit by assignees of bond in their own name, jurisdiction depends on their citizenship, not on that of their assignor.

In the following cases Federal courts have been held not to have jurisdiction: Governor of Georgia v. Madrazo, 1 Pet. 122, 7 L. Ed. 79, information filed by the Governor on behalf of the State which was held to be the party interested; Newton v. Commissioners, 100 U. S. 560, 25 L. Ed. 711, holding that no injunction would lie to prevent removal of a State capital under a State law; dissenting opinion in Louisiana v. Jumel, 107 U. S. 756, 27 L. Ed. 464, 2 Sup. Ct. 165, majority holding that mandamus would not issue to compel State officers to apply funds in treasury in manner forbidden by State; dissenting opinion in Cunningham v. Macon & B. R. R. Co., 109 U. S. 462, 463, 27 L. Ed. 998, 3 Sup. Ct. 612, 613, majority holding court had no jurisdiction where it was seen State was an indispensable party; Hagood v. Southern, 117 U. S. 70, 29 L. Ed. 811, 6 Sup. Ct. 616, suit against State officers to compel performance of an obligation which belonged to the State in its political capacity would not lie; Hans v. Louisiana, 134 U. S. 16, 33 L. Ed. 847, 10 Sup. Ct. 507, holding State cannot be sued in Federal court without its consent; Wisconsin v. Duluth, 2 Dill. 411, Fed. Cas. 17,902, holding State cannot sue in Federal Circuit Court; Board v. Gannt, 76 Va. 463, suit to compel State board to pay public moneys into sinking fund for the benefit of State creditors, as being in effect suit against State; and by analogy in Barney v. Baltimore City, 6 Wall. 285, 18 L. Ed. 826, it was held that Circuit Court could not render a decree in a partition suit unless all joint owners are subjected to its jurisdiction.

Other cases in which rule has been cited are: Vattier v. Hinde, 7 Pet. 263, 8 L. Ed. 679, holding if a case could be decided on its merits between those parties regularly before court, it should be decided though others might be interested; Irwin v. Dixon, 9 How. 29, 13 L. Ed. 34, temporary injunction should not be made perpetual until title, if disputed, is settled; Shields v. Barrow, 17 How. 140, 141, 15 L. Ed. 160, 161, discussing effect of act of February 28, 1829, as to nonjoinder of parties who could not be served with process; dissenting opinion in Virginia Coupon Cases, 114 U. S. 336, 29 L. Ed. 209, 5 Sup. Ct. 965, pointing out that all cases in which redress had been afforded to individuals against State action had

been cases of State aggression, not of refusal to fulfill an obligation; Gill v. Stebbins, 2 Paine, 419, Fed. Cas. 5431, holding that jurisdiction depended on the situation of the parties to the record; McWhorter v. Pensacola & A. R. R. Co., 24 Fla. 460, **12 Am. St. Rep. 223, 2 L. R. A. 506,** 5 South. 131, holding rule only applied where State was interested under contract or property right, or as real plaintiff in suit by State officers.

The following cases distinguish rule and hold that suits were not in fact suits against State: Hancock v. Walsh, 3 Wood, 360, Fed. Cas. 6012, bill to restrain commissioner of general land office from allowing locations within limits of complainant's grant; Chicago & N. W. R. R. Co. v. Dey, 35 Fed. 869, 1 L. R. A. 747, suit against railroad commissioners of another State; Tuchman v. Welch, 42 Fed. 550, suit to restrain county attorney in proceeding under liquor law; Butler v. Ellerbe, 44 S. C. 261, 22 S. E. 429, action to restrain controller general and State treasurer from paying salaries; dissenting opinion in United States v. Lee, 106 U. S. 242, **27 L. Ed. 189,** 1 Sup. Ct. 279, arguing that in principal case property involved remained in possession of the defendants; In re Ayers, 123 U. S. 487, 488, 511, **31 L. Ed. 223, 231,** 8 Sup. Ct. 173, 186, holding that question of jurisdiction under eleventh amendment was not always determined by the nominal parties to the record and the court would look beyond it; Wood v. Mann, 1 Sumn. 584, Fed. Cas. 17,952, arguing that question in principal case was not one of jurisdiction but of proper parties to lead to final decree; McCauley v. Kellogg, 2 Wood, 21, Fed. Cas. 8688, as not applicable when parties defendant had no real interest, but were sued as officers to compel them to execute the laws of the State; State v. Burke, 33 La. Ann. 504, as one of long list of authorities holding that State could not be sued; Michigan State Bank v. Hammond, 1 Doug. (Mich.) 533, 539, 540, contrasting rule with Bank v. Hastings, Walk. Ch. 13, as having been founded on tort, while that of Bank v. Hastings was founded on contract; Lowry v. Thompson, 25 S. C. 419, 429, 430, 431, 432, 1 S. E. 143, 151, 152, 153, as having been overruled by Louisiana v. Jumel, 107 U. S. 711, **27 L. Ed. 448,** 2 Sup Ct. 128, and stating rule to be that an action in form against an officer could not be maintained if, in fact, it was against State; Water-Power Co. v. Electric Street etc. Co., 43 S. C. 168, 20 S. E. 1007, holding State was an indispensable party in an action to enjoin a purchaser of water-power from the State, and equity had no jurisdiction; State v. Doyle, 40 Wis. 204, 206, 210, 211, 212, 213, 214, 215, as not applicable to suit in Federal court by private party against State officer who had no personal interest or liability, it being really suit against the State.

Distinguished also in State v. Board of Liquidation, 136 La. 581, 67 South. 373, holding injunction did not lie to restrain board of liquidation of State debt from depositing funds in bank selected as depository at suit of competing bank claiming illegal selection, such suit being against State; McDowell v. Fuller, 169 Mich. 336, 135 N. W. 266, holding action against defendant "as warden of Michigan Reformatory" for breach of contract

made and breached in official character was suit against State; dissenting opinion in South Dakota v. North Carolina, 192 U. S. 331, **48 L. Ed. 466**, 24 Sup. Ct. 281, majority holding Supreme Court has jurisdiction over action brought by one State against another to enforce payment of bonds of other State, which are specifically secured by shares of stock belonging to debtor State.

Disapproved in Western Union Tel. Co. v. Andrews, 154 Fed. 98, holding suit against officers of State could not be maintained when State, though not party of record, was real party against which relief was asked.

Remedy against government or its agents for infringement of patent rights. Note, **15 Ann. Cas. 1110.**

Suit to enjoin enforcement of statute by State officer as suit against State within constitutional prohibition. Note, **14 Ann. Cas. 792.**

When action against officers deemed against State. Note, **44 L. R. A. (N. S.) 193, 206, 208, 213, 214, 226.**

Judicial power is only exercised for the purpose of giving effect to the will of the legislature, not that of the judge.

Approved in State v. Osborne, 14 Ariz. 189, 125 Pac. 886, holding constitutionality of statute strictly judicial question; Cargnani v. Cargnani, 16 Cal. App. 102, 116 Pac. 309, holding discretion of court to allow wife costs on appeal in divorce must be guided by law and inspired by desire to promote justice; People v. Pfanschmidt, 262 Ill. 440, **Ann. Cas. 1915A, 1171**, 104 N. E. 816, holding "judicial discretion" meant sound discretion guided by law; Boales v. Ferguson, 55 Neb. 569, 76 N. W. 19, holding act of 1895 (Neb.), (Laws 1895, c. 32), legalized proceedings under Laws 1889, c. 57, and did not apply to proceedings valid independent of the act; State v. Dickerson, 33 Nev. 568, 113 Pac. 113, holding court could not compel Governor to perform act in conflict with his constitutional power and prerogative; Hensley v. McDowell Furniture Co., 164 N. C. 150, 80 S. E. 155, holding discretion of court to grant continuance should be exercised to protect rights of parties; Jarrett v. High Point Truck & Bag Co., 142 N. C. 469, 55 S. E. 339, holding discretion of court to set aside verdict must not be exercised arbitrarily, capriciously or willfully; Chicago etc. Ry. Co. v. Moore, 34 Okl. 205, 124 Pac. 992, holding County Court erred in exercise of discretion in denying amendment of appeal bond; Riverside Portland Cement Co. v. Masson, 69 Or. 510, **Ann. Cas. 1916A, 127**, 139 Pac. 726, holding court on reopening case to permit plaintiff to prove its incorporation abused discretion in refusing defendant leave to introduce evidence not offered at first hearing because plaintiff had not shown right to do business in State; Johnson v. Trustees of Hampton Inst., 105 Va. 323, 54 S. E. 32, bill does not lie to enjoin county treasurer and commissioner to enjoin collection of taxes assessed; Miller v. Board of Agriculture, 46 W. Va. 193, **76 Am. St. Rep. 813**, 32 S. E. 1008, holding mandamus will not lie to compel State officers to execute an executory contract be-

tween individual and State; Nash v. Fries, 129 Wis. 124, 108 N. W. 211, holding "discretion" as used in Statute empowering court to make order creating territory into town was mere legal discretion to determine whether statute had been complied with; State ex rel. Rose v. Superior Court of Milwaukee County, 105 Wis. 675, 81 N. W. 1053, holding under Rev. Stats. Wis., § 1862, providing for granting to street railway use of street by city council upon such terms as authorities shall determine, court has no authority to enjoin passage of such ordinance; In re Barry, 42 Fed. 122, Fed. Cas. 1059, holding Circuit Courts have no common-law jurisdiction to issue habeas corpus their power is limited to commitment under process or authority of the United States; Ex parte Chase, 43 Ala. 311, holding that courts must grant a motion for change of venue on the ground of prejudice, if properly made; Robertson v. State, 109 Ind. 82, 10 N. E. 583, holding courts cannot adjudicate claim to office of Lieutenant-governor when jurisdiction is vested exclusively in the general assembly; Board of Commrs. v. Gwin, 136 Ind. 576, **22 L. R. A. 410**, 36 N. E. 242, court may not reconstruct courtrooms under name of repairs, that power being in the board by statute; Dennis v. Dennis, 68 Conn. 198, **57 Am. St. Rep. 101, 34 L. R. A. 459**, 36 Atl. 38, courts will exercise discretion in administering divorce jurisdiction to prevent abuse of the laws; dissenting opinion in Boody v. Watson, 64 N. H. 197, 9 Atl. 820, majority holding court could order an assessment of property after assessors had ceased to hold office; State v. Cunningham, 83 Wis. 137, **35 Am. St. Rep. 45, 17 L. R. A. 166**, 53 N. W. 53, court may take jurisdiction of suit on relation of private citizen in the name of State, notwithstanding attorney general had refused to bring suit; Matter of Barry, 136 U. S. 610, **34 L. Ed. 509**, holding the Federal court had no jurisdiction to issue habeas corpus in suit of an alien against a citizen; Coleman v. Newby, 7 Kan. 87, 92, stating province of legislature was to make laws, of judiciary to construe them, and of executive to enforce them; dissenting opinion in Gage v. Gage, 66 N. H. 299, **28 L. R. A. 864**, 29 Atl. 552, tenant in common was liable to account to his cotenants for an excessive use of the common property.

Suit in equity against agent.

Approved in Murray v. Wilson Distilling Co., 164 Fed. 18, 92 C. C. A. 1, holding State Dispensary Commissioners of South Carolina suable by creditors as agents of State; Mackay v. Gabel, 117 Fed. 878, holding grantee in deed is not indispensable party in suit by third party claiming to be equitable owner, to set deed aside where deed conveyed to complainant all of defendant's right, title and interest; Montgomery v. City Council, 99 Fed. 832, 833, holding one voluntarily paying city tax for which he is not liable cannot be subrogated to rights of city against owner; Virginia Coupon Cases, 114 U. S. 289, 294, 296, **29 L. Ed. 192, 194, 195**, 5 Sup. Ct. 913, 916, 917, holding tax collector refusing to accept coupons on State bonds for taxes must produce a valid State law to justify his refusal; dissenting opinion in In re Ayers, 123 U. S. 512, 513, **31 L. Ed. 232**, 8 Sup. Ct. 186,

187, majority holding that in certain events the court would proceed against an officer as if State were party; Bonaparte v. Camden etc. R. R. Co., 1 Bald. 218, Fed. Cas. 1617, holding that injunction would lie against person assuming to act under an unconstitutional law, though not against principal; Adams v. Bradley, 5 Sawy. 222, 223, Fed. Cas. 48, as an illustration of case where a State officer could be sued in his individual capacity; Tyler v. Walker, 24 Fed. Cas. 470, action by army officer against regimental paymaster for double rations; Baring v. Erdman, 2 Fed. Cas. 786, injunction to restrain agents of State board of canal commissioners from entering on lands for diverting a stream, without authority of law; Head v. Porter, 48 Fed. 482, 483, suit against government officer for infringement of patent, although acting under government orders; Webster v. French, 11 Ill. 272, suit to compel specific performance of sale of government property where State not a party; Herr v. Central etc. Asylum, 97 Ky. 462, 53 Am. St. Rep. 416, 30 S. W. 972, grant of injunction to restrain asylum from creating nuisance by constructing dams across creek; Anderson v. State, 23 Miss. 474, suit against county tax collector to restrain sale of debts and claims for void assessment where there was no provision for making county party; Swasey v. North Carolina R. R. Co., 71 N. C. 574, suit by holders of State bonds issued in aid of a railroad grant to enforce their lien on railroad; C. & O. R. R. Co. v. Miller, 19 W. Va. 416, upholding right to sue State officer, when State cannot be sued, either to require or inhibit the performance of purely ministerial duty; Young v. Montgomery etc. R. R. Co., 2 Wood, 612, Fed. Cas. 18,166, holding, where State is concerned, it should be made party, if possible; Tobin v. Walkinshaw, McAll. 46, Fed. Cas. 14,068, and United States v. Parrott, McAll. 281, 282, Fed. Cas. 15,998, in discussion as to necessary and indispensable parties; Connolly v. Wells, 33 Fed. 208, in suit against executors, all must be bound; State v. Curran, 12 Ark. 350, holding the right of a citizen to sue State was not restricted to money demands; Moore v. School Trustees, 19 Ill. 86, holding suit to set aside sale of school lands properly brought by township school trustees; In re City of Mount Vernon, 147 Ill. 365, 35 N. E. 534, holding State cannot be made a party to suit to confirm special tax for public improvement; Francis v. Porter, 7 Ind. 217, holding in foreclosure suit, where State was a necessary party on account of a loan from sinking fund, commissioners should have been made parties; Dreux v. Kennedy, 12 Rob. (La.) 504, holding a party in possession of land is bound to defend action to recover possession, if owner cannot be found; Polack v. Mansfield, 44 Cal. 42, 13 Am. Rep. 156, allowing ejectment to be maintained against United States officer, holding for the government.

Distinguished in McConnell v. Dennis, 153 Fed. 550, 82 C. C. A. 501, where decree entered for complainant in cause in which because of absence of indispensable parties court could not grant any relief, defect of parties cannot be waived by parties before court; Divine v. Harvie, 7 T. B. Mon. 441, 18 Am. Dec. 196, holding that State cannot be made garnishee, nor

can its auditor or treasurer, in respect of moneys due by the State; dissenting opinion in Louisiana v. Jumel, 107 U. S. 735, 736, 27 L. Ed. 456, 457, 2 Sup. Ct. 147, 148, majority holding that State officials could not be compelled by mandamus to perform official duty.

Foreign sovereign cannot be sued, but if right is in plaintiff, and possession in defendant, inquiry cannot be estopped by suggestion of sovereignty.

Cited in dissenting opinion in United States v. Lee, 106 U. S. 243, 27 L. Ed. 190, 1 Sup. Ct. 280, majority holding that United States can only be sued in the cases provided by Congress; Briggs v. Lightboats, 11 Allen, 185, holding that liens for labor and materials on vessel built and paid for by United States cannot, after title has vested in United States, be enforced in State courts.

Equity will interfere to prevent the transfer of a specific article which, if transferred, would be irretrievably lost to the owner.

Approved in Farnsworth v. Whiting, 106 Me. 435, 76 Atl. 911, holding suit for restitution of bonds, stocks and safe deposit key was equity suit and jury not matter of right; Yount v. Setzer, 155 N. C. 218, 71 S. E. 211, holding injunction lay to restrain trustee from disposing of note in fraud of beneficiary; Currie v. Jones, 138 N. C. 190, 50 S. E. 561, upholding restraining order to prevent disposal of corporate shares in action to recover them; Virginia Coupon Cases, 114 U. S. 295, 29 L. Ed. 194, 5 Sup. Ct. 916, sustaining action in detinue to recover articles wrongfully seized for taxes as analogous to injunction to prevent wrongful seizure; Orr v. Littlefield, 1 Wood. & M. 15, Fed. Cas. 10,590, enjoining continued sales of patented article; Bell v. Ohio Life etc. Co., 1 Biss. 269, Fed. Cas. 1260, ordering return by State officers of subject matter of an injunction issued by Federal court taken possession of after issue of injunction; Tyler v. Walker, 24 Fed. Cas. 472, holding that an army paymaster, as government officer, was suable for money in his hands; Blindell v. Hagan, 54 Fed. 42, enjoining combination to prevent ship owners from shipping crew; Crescent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Ann. 143, enjoining assertion of alleged right to extended franchise which would destroy plaintiff's franchise; Ryan v. Brown, 18 Mich. 212, 100 Am. Dec. 161, enjoining removal by State officials of private dock without legal authority; dissenting opinion in Commercial Bank v. State, 4 Smedes & M. 497, 498, majority holding equity would restrain collection of bank debts on proceeding by district attorney against the bank for violating its charter; Barr v. Essex Trades Council, 53 N. J. Eq. 134, 30 Atl. 893, enjoining boycott of business; Delafield v. State, 26 Wend. 221, s. c., 2 Hill, 177, restraining transfer of certificates of State stock improperly issued by State agents; Scudder v. Trenton-Delaware Falls Co., 1 N. J. Eq. 717, 23 Am. Dec. 761, enjoining trespass which would destroy estate; Tyack v. Brumley, 1 Barb. Ch. 534, s. c., 4 Edw. Ch. 273, restraining interference by chamber of commerce with port wardens of New York; R. H.

etc. R. R. Co. v. N. Y. etc. R. R. Co., 110 N. Y. 134, 17 N. E. 682, injunction to prevent rival railway company taking land over which petitioner had acquired vested rights; Flood v. Van Wormer, 147 N. Y. 289, 41 N. E. 570, restraining highway commissioners from removing house as alleged encroachment; Secor v. Witter, 39 Ohio St. 236, preventing indorsee of a note attached before maturity and having actual notice, from transferring note so as to defeat the attachment; Attorney General v. Railroad Companies, 35 Wis. 533, restraining corporations from abuse of franchise or violation of public law; Brent v. Bank of Washington, 10 Pet. 613, 9 L. Ed. 554, court refusing to compel a bank having a lien on stock of deceased stockholder to transfer stock before satisfaction of statute barred debt; English v. Smock, 34 Ind. 125, 7 Am. Rep. 224, refusing to enjoin issue of bonds for public improvements, when issue rests in discretion of county commissioners and there is no fraud; Butler v. Ellerbe, 44 S. C. 264, 22 S. E. 430, refusing to enjoin State officials from paying certain salaries on the allegation of unconstitutionality of the salary statute; Baker v. Biddle, Bald. 408, 409, Fed. Cas. 764, discussing cases for proper interference of equity; dissenting opinion in State v. Dubuclet, 28 La. Ann. 708, majority holding there is no jurisdiction in equity to try right to an office.

Distinguished in Louisiana v. Jumel, 107 U. S. 724, 27 L. Ed. 452, 2 Sup. Ct. 138, holding that State officers could not be compelled to pay out to bondholders money which lawfully belonged to the State; Shelton v. Platt, 139 U. S. 598, 599, 35 L. Ed. 277, 11 Sup. Ct. 648, 649, showing that decision rested on grounds of irreparable injury, and was no authority for holding that equity could restrain collection of tax merely because it was void; Buchanan v. Marsh, 17 Iowa, 498, holding that there must be judgment creating lien before creditor can enjoin sale by debtor; dissenting opinion in Bouldin v. Alexander, 7 T. B. Mon. 433, 436, majority holding that remedy of owner of property, seized under execution against another, is at law not in equity; Cronan v. Peters, 9 La. Ann. 476, holding government officer not liable in equity for error in construing a contract afterward ratified by government and resulting in loss to contractor; State v. Burke, 35 La. Ann. 193, the court will not, during pendency of a supersedeas, render any decree which would practically destroy its effect.

Injunction against negotiation of note. Note, 28 L. R. A. 578.

When State is not party and court has jurisdiction of parties on record, decree should be made in equity against State officers assuming to act under unconstitutional law.

Approved in Scully v. Bird, 209 U. S. 486, 52 L. Ed. 902, 28 Sup. Ct. 597, holding suit by citizen of another State to restrain State officer from enforcing statute was not action against State under eleventh amendment; Ex parte Young, 209 U. S. 150, 14 Ann. Cas. 764, 13 L. R. A. (N. S.) 932,

of United States patents for field-guns to restrain chief of ordnance of United States Army from infringing patents by manufacture of guns for use of United States; United States v. Kimball, 7 App. D. C. 506, holding telegraph company could sue to enjoin enforcement of ordinance prohibiting use of streets and squares by private persons; Paulk v. Mayor of Sycamore, 104 Ga. 28, **69 Am. St. Rep. 132**, 30 S. E. 418, holding court will not prevent institution of criminal prosecution by injunction; Ellingham v. Dye, 178 Ind. 405, 407, **Ann. Cas. 1915C**, 200, 99 N. E. 26, 27, holding injunction lay to restrain State board of election commissioners from submitting proposed State Constitution to vote under void statute; Clark v. Harford Agricultural etc. Assn., 118 Md. 615, 85 Atl. 506, holding injunction lay to restrain sheriff from interfering with racing commission acting in pursuance of statute; C. & P. Telephone Co. v. Baltimore City, 89 Md. 717, 43 Atl. 789, holding mandamus will lie to prevent city from violating contract with company to lay underground telephone conduits; Bartles Northern Oil Co. v. Jackman, 29 N. D. 247, 150 N. W. 579, holding injunction lay to prevent State oil inspector from holding up oil in transit to State for nonpayment of excessive inspection fees; State v. Huston, 27 Okl. 615, **34 L. R. A. (N. S.) 380**, 113 Pac. 193, upholding injunction to restrain State officers from using public funds contrary to law; Davis v. Gray, 16 Wall. 220, **21 L. Ed. 453**, respecting forfeiture of a railway company's land grant; dissenting opinion in Louisiana v. Jumel, 107 U. S. 758, **27 L. Ed. 465**, 2 Sup. Ct. 167, majority holding mandamus will not lie to compel State officer to apply funds in manner forbidden by State; Lowry v. Thompson, 25 S. C. 422, 1 S. E. 145, action against sinking fund commissioners to recover property in possession of Secretary of State was action against State; Virginia Coupon Cases, 114 U. S. 314, **29 L. Ed. 201**, 5 Sup. Ct. 927, and Baltimore & O. R. R. Co. v. Allen, 17 Fed. 176, preventing collection of taxes by sale of railroad, after tender of tax receivable coupons; Pennoyer v. McConnaughty, 140 U. S. 10, 12, 18, **35 L. Ed. 265, 366, 368**, 11 Sup. Ct. 701, 702, 704, affirming s. c., 14 Sawy. 588, 43 Fed. 199, as instance of action which was not against State within eleventh amendment; In re Tyler, 149 U. S. 188, 190, **37 L. Ed. 697, 698**, 13 Sup. Ct. 792, 793, sustaining grant of injunction against collection of State tax on property in hands of receiver appointed by Federal court; Reagan v. Farmers' Loan etc. Co., 154 U. S. 389, **38 L. Ed. 1020**, 14 Sup. Ct. 1051, holding that suit against State railroad commission was not against State; Belknap v. Schild, 161 U. S. 18, **40 L. Ed. 602**, 16 Sup. Ct. 445, holding that officers or agents of United States, acting under government orders, are personally liable to suit for infringing patent; Scott v. McDonald, 165 U. S. 112, 114, **41 L. Ed. 653**, 17 Sup. Ct. 263, 264, restraining State officers from seizing liquor imported for private use under unconstitutional law; Tindal v. Wesley, 167 U. S. 220, **42 L. Ed. 142**, 17 Sup. Ct. 776, sustaining action to recover possession of real estate from State officers claiming to hold it because title and possession was in State; Bonaparte v. Camden etc. R. R. Co., Bald. 217, 231, 232, Fed. Cas.

1617, restraining corporation agents where the corporation could not be sued; State Lottery Co. v. Fitzpatrick, 3 Wood, 256, 258, 261, 261, Fed. Cas. 8541, restraining State officers, acting under statute, from invading franchises of a corporation; Spooner v. McConnell, 1 McLean, 355, Fed. Cas. 13,245, restraining individuals assuming to act on behalf of a State; Murdock v. Woodson, 2 Dill. 204, Fed. Cas. 9942, restraining Governor, acting as State's special agent, in foreclosing mortgage for benefit of State; Georgia v. Atkins, 1 Abb. 25, Fed. Cas. 5350, 35 Ga. 317, enjoining threatened proceedings of collector of internal revenue to collect unauthorized tax; dissenting opinion in Chaffraix v. Board, 11 Fed. 647, majority sustaining injunction against State officers from diverting fund collected and set apart for specific purpose; Claybrook v. City of Owensboro, 16 Fed. 304, restraining board of school trustees from discriminating in distributing school taxes under unconstitutional law; President etc. of Yale v. Sanger, 62 Fed. 180, restraining State treasurer from threatened diversion of funds appropriated for the college, under authority of unconstitutional law; Gregg v. Sanford, 65 Fed. 155, 28 U. S. App. 313, holding suit to restrain State assessor from assessing for unauthorized tax was not against State; Cuban Steamship Co. v. Fitzpatrick, 66 Fed. 68, restraining mayor and chief of police from interfering with loading of ship under unconstitutional statute; Mills v. Green, 67 Fed. 824, restraining supervisor of registration from carrying out State laws restricting right of suffrage; Western Union Tel. Co. v. Henderson, 68 Fed. 597, 598, holding that State officer would be enjoined only if statute under which he was claiming to act was void; Grether v. Wright, 75 Fed. 749, 43 U. S. App. 770, holding that, where State law expressly gave remedy by injunction, Federal courts in equity would apply same remedy; Third Nat. Bk. v. Mylin, 76 Fed. 386, restraining State officers from collecting tax on shares in national banks under statute alleged to be in violation of Fourteenth Amendment; Mutual Life Ins. Co. v. Boyle, 82 Fed. 710, enjoining State superintendent of insurance from refusing license to insurance company to do business in State when law allowed him no discretion; Cobb v. Clough, 83 Fed. 609, restraining sale, as school lands, of lands claimed under prior railroad grant; Bank of Kentucky v. Stone, 88 Fed. 392, suit to enjoin certification of municipal tax on bank organized under State law; Mayor etc. of Columbus v. Rodgers, 10 Ala. 46, restraining collection of bridge tolls in violation of franchise in which there was penal clause; Bruner v. Bryan, 50 Ala. 528, sustaining bill by lawful sheriff whose office had been erroneously declared vacant to enjoin an appointee from exercising duties of office; Port of Mobile v. Louisville etc. R. R. Co., 84 Ala. 124, 5 Am. St. Rep. 351, 4 South. 111, restraining municipality from enforcing ordinance which would destroy street railroad franchise; Parker v. Garrison, 61 Ill. 254, sustaining bill for injunction in nature of specific performance of agreement respecting personal chattels; North Pac. R. R. Co. v. Carland, 5 Mont. 196, 197, 3 Pac. 161, restraining collection of tax on exempt property; Burnet v. Cincinnati, 3

Ohio, 88, 17 Am. Dec. 584, restraining sale of lots for city taxes; Masson's Appeal, 70 Pa. St. 31, restraining adjoining owner from using party-wall before paying his share of the cost; dissenting opinion in Lynn v. Polk, 8 Lea, 285, majority sustaining bill quia timet by citizen taxpayers to restrain State officers from proceeding under void act; Kerr v. Woolley, 3 Utah, 464, 24 Pac. 834, restraining collection of void tax; Bull v. Read, 13 Gratt. 87, sustaining bill to test validity of a statute providing for system of free schools and the propriety of commissioners' proceedings under it; Bettman v. Harness, 42 W. Va. 438, 36 L. R. A. 570, 26 S. E. 272, enjoining unlawful extraction of petroleum from land as part of the land while title was in dispute; State v. Cunningham, 81 Wis. 481, 15 L. R. A. 567, 51 N. W. 729, enjoining Governor from carrying out unconstitutional law; Kendall v. United States, 12 Pet. 615, 9 L. Ed. 1217, affirming s. c., 5 Cr. C. C. 276, Fed. Cas. 15,517, holding that Circuit Court had power to issue mandate to compel postmaster-general to credit a sum awarded on an account; Barber v. Barber, 21 How. 592, 16 L. Ed. 229, holding that Federal courts have jurisdiction of a suit in equity for alimony by a wife divorced by a State court; dissenting opinion in United States v. Lee, 106 U. S. 245, 246, 27 L. Ed. 190, 191, 1 Sup. Ct. 281, 282, defining ground on which ruling rested; Poor v. Carleton, 3 Sumn. 77, Fed. Cas. 11,272, holding that continuance or dissolution of special injunction after coming in of answer was in discretion of court; Baker v. Biddle, Bald. 408, Fed. Cas. 764, discussing cases proper for exercise of equitable jurisdiction, as where remedy at law is doubtful, difficult, inadequate or incomplete; Western Assur. Co. v. Ward, 75 Fed. 342, holding, in action to reform a policy, that, before application to equity can be defeated on ground of adequate remedy at law, its equal sufficiency must be shown; dissenting opinion in Cherokee Nation v. Georgia, 5 Pet. 78, 8 L. Ed. 53, majority refusing to restrain a State from forcible exercise of legislative power over Cherokee Nation, as not being foreign State within the Constitution; Irwin v. Dixion, 9 How. 27, 13 L. Ed. 33, as not proper remedy to prevent injury to private rights by public nuisance, unless damage was greater than to anyone else, and irreparable; dissenting opinion in Antoni v. Greenhow, 107 U. S. 809, 27 L. Ed. 483, 2 Sup. Ct. 125, majority holding that statute which provided for payment of taxes with bond coupons, only after their validity was ascertained, did not impair validity of any contract with the holder; In re Ayers, 123 U. S. 498, 499, 500, 31 L. Ed. 227, 228, 8 Sup. Ct. 179, 180, holding bill to restrain threatened official acts, where the decree was limited to one specific act, was in effect against the State and would not lie; Fitts v. McGhee, 172 U. S. 527, holding injunction would not lie to restrain attorney general of State from enforcing provisions of State law requiring tolls; Cutting v. Gilbert, 5 Blatchf. 263, Fed. Cas. 3519, refusing to restrain illegal assessment, where remedy at law was adequate; Carroll v. Perry, 4 McLean, 28, Fed. Cas. 2456, refusing to revise irregularities of State officers, unless State courts had no jurisdiction; La Mothe v. Fink, 8 Biss. 498, Fed. Cas. 8032, refusing to restrain marshal from levying

on mortgaged chattels in mortgagee's possession under an execution against mortgagor; Bancroft v. Thayer, 5 Sawy. 504, Fed. Cas. 835, refusing to enjoin officers of State board of education from adopting new series of school books; Atkinson v. Philadelphia & T. R. R. Co., 2 Fed. Cas. 107, refusing to enjoin obstruction of navigable stream by bridge at suit of ship owner, where compensation was obtainable at law; Jones v. Black, 48 Ala. 544, refusing to enjoin holding of election, when no injury to person, property or rights shown; American U. Tel. Co. v. Western Union Tel. Co., 67 Ala. 33, 42 **Am. Rep.** 94, refusing to enjoin erection of poles and wires, at suit of foreign company, not showing it had any business or interest in State; Clayton v. Lafargue, 23 Ark. 143, refusing to restrain collection of taxes on alleged erroneous assessment; Coulson v. Harris, 43 Miss. 746, 770, refusing to restrain collection of tax greater than assessed, specifying what is required to found equitable jurisdiction; McCoy v. Corporation, 3 Ohio, 379, **17 Am. Dec. 608**, refusing to restrain collection of tax properly assessed, but under unconstitutional law; Mechanics' etc. Bank v. Debolt, 1 Ohio St. 594, to same effect; and holding the decision applied equally, whether plaintiff was an individual or corporation, unless the enforcement of the tax would destroy bank's franchise.

Distinguished in Coulter v. Weir, 127 Fed. 905, holding where, under Kentucky statute, valuation of corporation's franchise had been made by State board, and auditor had given final notice thereof before suit was brought against him in his official capacity to restrain collection of such tax, bill not maintainable as to part of tax due State; People v. District Court, 29 Colo. 233, 68 Pac. 253, holding District Court cannot enjoin State board of assessors from valuing property of transportation companies for taxation under Colo. Sess. Laws 1901, p. 299; Hagood v. Southern, 117 U. S. 69, **29 L. Ed. 811**, 6 Sup. Ct. 616, holding distinction to be between cases where relief sought was performance of plain official duty or State officers had violated property rights, and those seeking affirmative official action in performing an obligation incumbent on State in its political capacity; Cunningham v. Macon etc. R. R. Co., 109 U. S. 455, **27 L. Ed. 995**, denying Federal jurisdiction over foreclosure where State held legal title and possession of property involved; McCauley v. Kellogg, 2 Wood, 22, 23, Fed. Cas. 8688, holding that State officers could not be compelled by mandamus to execute laws of State; Branch v. Macon & B. R. R. Co., 2 Wood, 388, Fed. Cas. 1808, holding courts had never assumed to interfere with property rightfully in possession of State; Tobin v. Walkinshaw, McAll. 31, 41, 42, Fed. Cas. 14,068, holding rule did not justify arrest, by injunction, of profits of mine from absent persons for the purpose of obtaining account; Comer v. Bankhead, 70 Ala. 497, refusing to specifically enforce contract for hire of convict labor against warden's successor in office; Michigan State Bank v. Hastings, Walk. Ch. (Mich.) 13, showing rule not applicable to bill to enjoin delivery of property to State trustees, and compel sale for petitioner's

benefit; Youngblood v. Sexton, 32 Mich. 410, **20 Am. Rep. 656**, rule did not apply to case of taxation under liquor tax law; American Dock etc. Co. v. Trustees, 32 N. J. Eq. 439, holding rule did not apply to suit to quiet title and enjoin sale by State agents when title was in dispute.

Disapproved in Grant v. Cooke, 7 D. C. 193, holding bill to enjoin enforcement of law not maintainable by private citizen without showing of injury peculiar to himself.

What is "irreparable injury," warranting injunction against trespass. Note, **11 Am. Dec. 501.**

Injunctions to restrain collection of taxes and assessments. Note, **69 Am. Dec. 202, 203.**

Injunction against collection of illegal taxes. Note, **22 L. R. A. 704.**

Charter of Bank of United States is law from which it derives all its faculties; it can bring no suit not authorized by law of United States.

Cited in The Commercial Nat. Bank of Cleveland v. Simmons, 1 Flipp. 452, 455, Fed. Cas. 3062, holding that suits by national banks are brought under banking act of 1864, and limitations in section 11 of judiciary act do not apply to them; State v. Southern Pacific Co., 23 Or. 431, 31 Pac. 962, holding that petition to remove cause to Federal court, which shows that Southern Pacific Company is corporation organized under State law, does not, on that ground, authorize removal.

Clause in act of incorporation of Bank of United States enabling it to sue in United States courts is valid.

Approved in Bank v. Planters' Bank, 9 Wheat. 905, 910, **6 L. Ed. 244**, 245, as having decided the question of jurisdiction in case where United States Bank brought suit against bank incorporated under State law, stockholders in both banks being citizens of same State; dissenting opinion in Veazie Bank v. Fenno, 8 Wall. 551, **19 L. Ed. 488**, majority holding Congress could tax notes of any State bank paid out by national bank; Claflin v. Houseman, 93 U. S. 135, **23 L. Ed. 838**, holding that assignee in bankruptcy might sue in State courts to recover assets of bankrupt; Foss v. First Nat. Bank, 1 McCrary, 476, 3 Fed. 187, and Third Nat. Bank v. Harrison, 3 McCrary, 165, 8 Fed. 723, applying same rule to provisions of Revised Statutes, section 629, as to suits against national banks; First Nat. Bank v. Garlinghouse, 22 Ohio St. 504, **10 Am. Rep. 759**, saying that power of Congress to establish national banks must be considered as settled.

Distinguished in Myers v. Union Pacific R. R. Co., 3 McCrary, 579, 580, 16 Fed. 293, showing that ruling did not apply to cases of removal from State courts, and that suit to recover damages, caused by defendant's negligence, did not arise under Federal laws.

Limited in Adams Express Co. v. Denver & R. G. R. R. Co., 4 McCrary, 82, 16 Fed. 716, holding that case could not be said to arise under Federal

law simply because it was suit by or against corporation organized under Federal statute.

Right of bank of United States to sue in Federal courts rests on its charter, which is law of United States, and independent of question involved.

Approved in Bankers' Trust Co. v. Texas etc. Ry. Co., 241 U. S. 304, 305, **60 L. Ed.** 1014, 36 Sup. Ct. 569, denying Federal court's jurisdiction over suit to foreclose mortgage given by railroad organized under Federal law; Shoshone Min. Co. v. Rutter, 177 U. S. 509, 44 **L. Ed. 866,** 20 Sup. Ct. 727, holding suit on a diverse claim to mine under United States Rev. Stats., §§ 2325, 2326, is not one arising under the laws of the United States; State v. Frost, 113 Wis. 648, 89 N. W. 920, holding Federal court has jurisdiction over suit against corporation formed under United States laws; Petri v. Commercial Bank, 142 U. S. 648, **35 L. Ed. 1145,** 12 Sup. Ct. 326, holding national bank may sue citizen of another State in Federal court of defendant's district by reason alone of diverse citizenship; Ex parte Jones, 164 U. S. 692, **41 L. Ed. 601,** 17 Sup. Ct. 223, showing that, since act of March 3, 1887, bank's right of suit in Federal courts depended on citizenship alone; The Manufacturers' Nat. Bank v. Baack, 8 Blatchf. 145, 2 Abb. 241, Fed. Cas. 9052, sustaining right of national bank at Chicago, to sue citizen of New York in Federal court; dissenting opinion in Florida v. Georgia, 17 How. 499, **15 L. Ed. 196,** majority holding that United States may appear in boundary suit between States without becoming party subject to judgment; Ames v. Kansas, 111 U. S. 462, 467, **28 L. Ed. 487, 489,** 4 Sup. Ct. 443, 446, holding validity of Kansas Pacific Railroad Company consolidation, resting on acts of Congress, was triable in Federal court; Hughes v. Northern Pacific R. R. Co., 9 Sawy. 321, 18 Fed. 112, holding effect of acts of Congress equivalent to special clause in company's charter, authorizing it to sue and be sued in Federal courts in all cases; United States v. Kendall, 5 Cr. C. C. 251, Fed. Cas. 15,517, jurisdiction of Federal courts in suits concerning patents, United States Bank and postmaster-general could only have been given by Congress as arising under United States laws; Middlebrook v. Broadbent, 47 N. Y. 446, **7 Am. Rep. 458,** holding State court had jurisdiction of action on contract, although involving validity of patent.

Distinguished in Pettilon v. Noble, 7 Biss. 453, Fed. Cas. 11,044, holding that it did not follow that because Congress had created bank, therefore it could sue or be sued in Federal courts; Robinson v. National Bank, 81 N. Y. 391, **37 Am. Rep. 518,** holding State Supreme Court has jurisdiction of an action ex contractu by citizens of the State against national bank located in another State.

Limited in Cooke v. State Nat. Bank, 52 N. Y. 107, **11 Am. Rep. 673,** holding that Federal courts had jurisdiction of suits only when questions of Federal law or Constitution were actually involved.

Banks, whether carried on by a private corporation or an individual, are equally subjects of State taxation.

Approved in United States v. Rickert, 188 U. S. 439, 47 L. Ed. 537, 23 Sup. Ct. 481, holding State cannot tax land allotted to Indians under 24 Stats. at Large, 389, c. 119, providing for the holding of land by the United States in trust for the allottees; Williams v. City of Talladega, 164 Ala. 642, 643, 51 South. 332, holding foreign telegraph company accepting provisions of Federal statute authorizing such companies to operate lines along post-roads was subject to State license tax on intrastate business; Providence Bank v. Billings, 4 Pet. 563, 564, 7 L. Ed. 956, 957, holding that the Providence Bank incorporated by State was subject to State taxation, under subsequent act; Society for Savings v. Coite, 6 Wall. 607, 18 L. Ed. 902, applying rule to savings societies; Insurance Co. of N. Amer. v. Commonwealth, 87 Pa. St. 183, 30 Am. Rep. 355, holding that State tax on entire business of insurance companies, whether within or without State, was constitutional.

State taxation of Bank of United States.

Approved in Easton v. Iowa, 188 U. S. 229, 47 L. Ed. 456, 23 Sup. Ct. 290, holding Iowa Code, §§ 1884, 1885, prohibiting national banks from receiving deposits when insolvent, and prescribing punishment for its violation, is invalid; Home Title Ins. Co. v. Keith, 230 Fed. 909, holding stamp tax on deeds as applied to deed executed by referee on mortgage foreclosure not void as imposing tax on State's exercise of governmental function; Mercantile Trust Co. v. Texas etc. Ry. Co., 216 Fed. 231, holding interstate railroad incorporated by Federal law was agency of government and not subject to State regulations for foreign corporations; Haeussler v. City of St. Louis, 205 Mo. 686, 103 S. W. 1042, holding Congress had power to authorize city of St. Louis to construct bridge across boundary river; Ford v. Great Falls, 46 Mont. 307, 127 Pac. 1008, holding street assessments could not be levied on Federal property; State v. Thos. Cruse Sav. Bank, 21 Mont. 52, 57, 52 Pac. 734, 736, holding Mont. Pol. Code, § 4061, imposing license on bank, is not in conflict with Const., art. XV, § 11; State v. Texas etc. Ry. Co., 100 Tex. 281, 98 S. W. 834, holding State tax on gross receipts of railroads not enforceable against railroad incorporated under act of Congress; Western Union Tel. Co. v. Lakin, 53 Wash. 334, 17 Ann. Cas. 718, 101 Pac. 1097, holding franchise given by United States to telegraph company to operate on post-roads not subject to State tax; dissenting opinion in South Carolina v. United States, 199 U. S. 452, 466, 50 L. Ed. 266, 271, 26 Sup. Ct. 110, United States may exact revenue license from dispensing agent of State which has taken charge of liquor business; dissenting opinion in Schlesinger v. Gilhooly, 189 N. Y. 30, 12 Ann. Cas. 1138, 81 N. E. 630, majority holding act of Congress limiting interest chargeable by national banks superseded State legislation on that subject; Passenger Cases, 7 How. 538, 12 L. Ed. 809, as an example of an exception to the power of a State to tax all property within its borders; dissenting opinion in Van Allen v. Assessors, 3 Wall. 591, 18 L. Ed. 237, majority affirming right to tax their shares

in the hands of the shareholders; Farmers' Nat. Bank v. Dearing, 91 U. S. 33, **23 L. Ed. 199**, arguing that national banks were free from State control, except as allowed by act of Congress, holding that interest on note at rate not lawful by State law, did not bar recovery of principal; People v. Weaver, 100 U. S. 543, **25 L. Ed. 706**, holding a State could only tax national bank shares under Rev. Stats., § 5219, and a State law was invalid which attempted to impose higher rate; Owensboro Nat. Bank v. Owensboro, 173 U. S. 667, **43 L. Ed. 852**, holding under Rev. Stats., § 5219, States may tax only bank shares and real estate; Second Nat. Bank v. Caldwell, 13 Fed. 433, holding city ordinance imposing license tax on a national bank is invalid; Mercantile Nat. Bank v. Shields, 59 Fed. 954, national bank shares only taxable under Rev. Stats., § 5219; Stapylton v. Thaggard, 91 Fed. 95, holding a State cannot tax a bank chartered by Congress, exempt as to real property; National Com. Bank v. Mayor etc. of Mobile, 62 Ala. 292, **34 Am. Rep. 17**, and McHenry v. Downer, 116 Cal. 25, 47 Pac. 780, holding that bank's real estate and shares were liable to State and municipal taxation, but bank, as a bank, could not be taxed; People v. Bradley, 39 Ill. 133, to same effect as to shares in national banks, although funds were invested in government bonds; Wasson v. First Nat. Bank, 107 Ind. 213, 8 N. E. 100, and Bressler v. Wayne Co., 25 Neb. 472, 41 N. W. 357, holding an individual taxpayer may deduct his bona fide debts from assessed value of his shares in national bank, if he have no other money, capital or credits; Bank of Albia v. City Council, 86 Iowa, 37, 52 N. W. 336, on question of taxation of national bank stock, when part of its capital is invested in real estate; Stetson v. City of Bangor, 56 Me. 279, sustaining tax on national bank shares, if levied as and to same extent as on similar property; Commercial Bank etc. v. Nolan, 7 How. (Miss.) 526, holding that rate of interest which bank could charge was governed by State law; State v. Bank, 4 Nev. 352, 353, defining the property of national banks subject to State taxation, and method of taxation provided by Congress; City of Utica v. Churchill, 33 N. Y. 231, sustaining validity of tax on national bank shares in hands of holder, without regard to investment of bank capital in government securities; City of Pittsburg v. First Nat. Bank, 55 Pa. St. 48, holding national banks could only be taxed by State, as provided by act of June, 1864.

Taxation of national banks held invalid in First Nat. Bank v. Fisher, 45 Kan. 728, 26 Pac. 483, as to an assessment of entire stock of a national bank "in solido" against bank itself; Central Nat. Bank v. Pratt, 115 Mass. 546, **15 Am. Rep. 145**, holding New York law imposing penalty for taking usury does not apply to national banks within its limits.

By analogy principle has been applied to other than national banks in following cases: Union Pacific R. R. Co. v. Peniston, 18 Wall. 34, **21 L. Ed. 793**, sustaining validity of tax on real and personal property of Union Pacific R. R. Co., as distinguished from its franchises; California v. Central Pac. R. R. Co., 127 U. S. 41, **32 L. Ed. 158**, 8 Sup. Ct. 1081, and Central Pac.

R. R. Co. v. California, 162 U. S. 125, 128, 148, **40 L. Ed. 914, 916, 922,** 16 Sup. Ct. 778, 780, 787, holding franchises granted by Congress cannot, without its assent, be taxed by State; Sweatt v. Boston, H. & R. R. R. Co., 3 Cliff. 352, 5 N. B. R. 248, Fed. Cas. 13,684, holding railroad corporations were subject to bankruptcy act; San Benito Co. v. S. P. R. R. Co., 77 Cal. 521, 522, 19 Pac. 828, 829, holding county tax on Federal franchise of the company was illegal; North. Pac. R. R. Co. v. Carland, 5 Mont. 187, 3 Pac. 155, holding State could not tax lands given by government as railroad right of way; Van Brocklin v. Tennessee, 117 U. S. 156, 177, **29 L. Ed. 847, 854,** 6 Sup. Ct. 673, 684, holding that United States property is, under Constitution, exempt from State taxation; Luxton v. North R. Bridge, 153 U. S. 529, **38 L. Ed. 810,** 14 Sup. Ct. 892, act incorporating North River Bridge Company is constitutional; Day v. Buffington, 3 Cliff. 389, Fed. Cas. 3675, holding salary of judge of court of record is not taxable as income under internal revenue law of Congress; Pullman's Pal. Car Co. v. Twombly, 29 Fed. 663, 664, holding that property is not exempt from taxation, because used for interstate commerce, and that cars used on single run acquire situs for taxation, irrespective of owner's domicile; Spring Valley W. W. v. Schottler, 62 Cal. 112, holding franchise of water company is subject to State taxation; New Orleans v. Lea, 14 La. Ann. 194, holding salaries of State judges of supreme and inferior courts are exempt from taxation; Fifield v. Close, 15 Mich. 508, and Jones v. Estate of Keep, 19 Wis. 375, holding internal revenue law requiring process in State courts to be stamped is void; Lenawee Co. Bank v. City of Adrian, 66 Mich. 276, 33 N. W. 306, holding savings bank not liable to State taxation, except for its real estate; People v. Hoffman, 37 N. Y. 15, holding that United States certificates under act of 1st of March, 1862, was subject to State taxation (reversed by Supreme Court, see The Banks v. Mayor, 7 Wall. 16, **19 L. Ed. 57**); First Nat. Bank v. Lamb, 50 N. Y. 105, **10 Am. Rep. 446,** holding national banks were amenable to State usury laws; First Nat. Bank v. Garlinghouse, 22 Ohio St. 505, **10 Am. Rep. 760,** holding that discounting note at usurious rate of interest does not avoid note except as to interest; Commonwealth v. Westinghouse Mfg. Co., 151 Pa. St. 271, 24 Atl. 1110, holding a corporation cannot be taxed by State on its capital invested in patents; Western Union Tel. Co. v. City of Richmond, 26 Gratt. 30, holding foreign telegraph company having an agency and doing business in city, liable to city license tax examining authorities as to power of State to tax government agencies.

Cited generally in dissenting opinion in Railroad Co. v. Peniston, 18 Wall. 42, 47, **21 L. Ed. 794, 797,** arguing that government corporation whose property is wholly in United States territory could not be subjected to taxation by State subsequently carved out of such territory; Legal Tender Cases, 110 U. S. 445, **28 L. Ed. 213,** 4 Sup. Ct. 128, Congress had power to issue obligations of United States; Talbott v. Silver Bow Co., 139 U. S. 440, **35 L. Ed. 210,** 11 Sup. Ct. 595, holding that under Rev. Stats., § 5219, States and territories had same power of taxing

national banks; dissenting opinion in Leavenworth Co. v. Miller, 7 Kan. 522, 12 **Am. Rep.** 451, and State v. Nemaha Co., 7 Kan. 560, majority holding legislatures may authorize counties to subscribe for stock in railroads and issue bonds in payment; dissenting opinion in Metropolitan Bank v. Van Dyck, 27 N. Y. 537, majority holding the legal tender act was constitutional.

Distinguished in People v. Brady, 271 Ill. 107, 110 N. E. 867, holding void provisions of Federal reserve act of 1913 for grant to national banks of right to act as trustee, executor, etc., as such functions belong exclusively to States; Union Pac. Co. v. Lincoln Co., 1 Dill. 320, Fed. Cas. 14,378, holding railroad not exempt from State taxation, though chartered and aided by Congress; De Witt v. Hays, 2 Cal. 469, 56 **Am. Dec.** 354, held not applicable when tax could be satisfied aliunde; People v. Central Pacific R. R. Co., 43 Cal. 427, holding that subsequent adoption by Federal government of corporation created by State would not exempt it from State revenue laws, and in no case was corporation's real property exempt; People v. Commissioners, 23 N. Y. 204, holding that stock in public debt of United States, whether owned by individuals or corporations, is taxable by States; Debolt v. Ohio Life Ins. etc. Co., 1 Ohio St. 589, holding State could not surrender its taxing power, and tax under statute of 1851 is valid; Knoup v. The Piqua Bank, 1 Ohio St. 611, holding that a tax regularly assessed under statute of 1851 is not remitted by the repealing clause of act of April 13, 1852.

Taxation and assessment of public property. Note, **33 Am. St. Rep. 401.**

Exemption from taxation or assessment of lands owned by governmental bodies or in which they have an interest. Note, **132 Am. St. Rep. 307.**

Powers of State to tax shares, capital stock, real estate or other property of national banks. Note, **96 Am. Dec. 291, 297.**

State taxation of national banks. Note, **69 Am. St. Rep. 39; 45 L. R. A. 737.**

Taxation of corporate franchises. Note, **57 L. R. A. 55, 57.**

Instrumentalities created by Congress, necessary for carrying into effect powers vested in national government, are free from State control.

Approved in Farmers & Mechanics' Savings Bank v. State of Minnesota, 232 U. S. 521, **58 L. Ed. 709**, 34 Sup. Ct. 354, holding State could not tax bonds of municipality of territory of United States; Williams v. City of Talladega, 226 U. S. 419, **57 L. Ed. 281**, 33 Sup. Ct. 116, holding void municipal tax on telegraph company as tax on Federal agency; Flint v. Stone Tracy Co., 220 U. S. 152, **Ann. Cas. 1912B, 1312, 55 L. Ed. 414**, 31 Sup. Ct. 342, holding corporation tax of 1909 not void as levying tax on exclusive right of State to grant corporate franchises; In re Dunn, 212 U. S. 384, **53 L. Ed. 562**, 29 Sup. Ct. 299, holding railway corporation

organized under act of Congress suable in Federal court; Purnell v. Page, 128 Fed. 496, holding State cannot tax salary of Federal judge; In re Fair, 100 Fed. 151, violation of army regulations is not cognizable in State courts; Linton v. Childs, 105 Ga. 572, 32 S. E. 619, holding under statute imposing tax on presidents "of each of the banks of the State" presidents of national banks are exempt; Schlesinger v. Gilhooly, 189 N. Y. 15, 12 Ann. Cas. 1138, 81 N. E. 624, holding act of Congress limiting rate of interest for national banks superseded State legislation on same subject; Bank of Commerce v. New York, 2 Black, 632, 17 L. Ed. 455, as to stock of United States and tax under State law; Grether v. Wright, 75 Fed. 753, 43 U. S. App. 770, bonds of District of Columbia, as to any taxation, Federal, State or municipal; Williams v. Creswell, 51 Miss. 822, as to District of Columbia, Congress has exclusive power of legislation; dissenting opinion in Coite v. Society for Savings, 32 Conn. 191, majority holding a State tax on savings banks equal to a per centum on total of deposits was a tax on the corporation, not on its property; Fagan v. City of Chicago, 84 Ill. 233, as to United States custom-house and taxation for public improvements; Northern Pacific R. R. Co. v. Carland, 5 Mont. 176, 3 Pac. 149, as to right of way of railroads chartered by government and State taxation; Barker v. Bank, 59 N. H. 311, as to national banks and State law of usury; Andrews v. Auditor, 28 Gratt. 121, as to United States buildings for workmen employed on government buildings and State taxation.

Limited in State v. Strawbridge, 39 Ala. 387, as not intended to apply to persons or property remaining within jurisdiction of State and protected by its laws and government.

Right to sue cannot depend on defense the defendant may elect to set up.

Approved in Filhiol v. Torney, 194 U. S. 360, 48 L. Ed. 1017, 24 Sup. Ct. 698, averments in complaint in ejectment that defendant's possession rests upon infraction by United States of treaty, and upon a taking of private property without compensation, do not give Circuit Court jurisdiction where averments respecting plaintiff's title do not show case within Federal jurisdiction; Boyd v. Great Western Coal & Coke Co., 189 Fed. 122, 123, holding case not removable to Federal court when defense set up Federal question appearing only from facts alleged in petition for removal; Huff v. Union Nat. Bank, 173 Fed. 336, holding existence of Federal question appeared in complaint; Central of Georgia Ry. Co. v. Wright, 166 Fed. 157, holding bill to enjoin collection of tax by State on personal property having situs in another State for purposes of taxation showed Federal question involved; People's United States Bank v. Goodwin, 160 Fed. 730, holding pleadings of plaintiff anticipating defense involving Federal question did not confer jurisdiction on Federal court; Pittsburg etc. Ry. Co. v. Mitchell, 175 Ind. 203, 91 N. E. 738, holding where complaint declared on State statute, State court had jurisdiction, though answer set up defense under Interstate Commerce Act; Robison

v. Fishback, 175 Ind. 136, **Ann. Cas. 1913B, 1271**, 93 N. E. 668, holding State courts had jurisdiction of suit between city officers and city to determine right to patentable card index system, since complaint did not set up right under patent laws as ground for recovery; Cooke v. Avery, 147 U. S. 385, **37 L. Ed. 212**, 13 Sup. Ct. 344, holding defendant who, on first trial, relies for defense on a Federal question, cannot subsequently claim no such question is in controversy; Tennessee v. Union etc. Bank, 152 U. S. 459, **38 L. Ed. 513**, 14 Sup. Ct. 656, holding that plaintiff's statement of his own claim must show the case arises under Federal Constitution or laws in order to give jurisdiction to Federal courts, original or by removal; Sawyer v. Parish of Concordia, 4 Wood, 277, 12 Fed. 758, holding that if jurisdiction is shown on face of petition, it cannot be taken away by defense set up; Dowell v. Griswold, 5 Sawy. 43, Fed. Cas. 4041, holding that, irrespective of citizenship, Federal courts cannot take jurisdiction unless plaintiff's right arises out of a United States law; St. Paul etc. R. R. Co. v. St. Paul & N. P. R. R. Co., 68 Fed. 10, 32 U. S. App. 372, holding a reference in complaint to a Federal statute will not give jurisdiction when case, in fact, depends on local or Federal law; Florida etc. R. R. Co. v. Bell, 87 Fed. 374, motion to file additional pleas intended to affect the jurisdiction rightly denied; Grand Gulf Bank v. Archer, 8 Smedes & M. 195, dissenting opinion, arguing the bank had no right of suit on a usurious illegal contract.

In general, one defendant's answer cannot be evidence against another; contra, when one defendant succeeds to another.

Approved in Moore v. Hubbard, 4 Ala. 192, in partition suit excluding answer of two defendants, former partners of plaintiff, to prove purchase of their interests as against other defendants; Julian v. Reynolds, 8 Ala. 684, excluding answer offered in evidence when confession would be with respect to others "res inter alios"; Whiting v. Beebee, 12 Ark. 563, 564, holding purchaser pendente lite could not assert his acquired title to prejudice of rights of the litigants.

In following cases it was shown that exception to rule was too narrow: McKinn v. Thompson, 1 Bland, 160, it was shown it did not embrace case where supplemental answer sought to be put in made no reference to and did not admit anything in answer sought to be read in aid by another defendant; Jones v. Magill, 1 Bland, 198, holding answer of a guardian as to loan, secured by note, would bind ward; Luigan v. Henderson, 1 Bland, 267, discussing exceptions to rule; Fitch v. Stamps, 6 How. (Miss.) 496, where answer of defendant was admitted as evidence against co-defendant claiming as his assignee; Balchen v. Crawford, 1 Sand. Ch. 383, holding that in an interpleader suit answers were, in fact, proofs for deciding title; dissenting opinion in Tilton v. Corfield, 2 Colo. 409, majority holding purchaser pendente lite not bound by amended proceedings after purchase increasing the liens.

Modified in Blakeney v. Ferguson, 14 Ark. 654, 655, 656, 657, 659, 664, specifying cases in which answer of a codefendant might be read.

Distinguished in Dick v. Hamilton, Deady, 328, Fed. Cas. 3890, holding that default of two defendants could not be used as admission of the facts against third defendant; De France v. Howard, 4 Iowa, 529, holding pleadings of alleged fraudulent grantor, in another action, not competent to show fraud against grantee; Jones v. Hardesty, 10 Gill & J. 415, 32 Am. Dec. 185, and Winn v. Albert, 2 Md. Ch. 176, excluding answer of trustee as against cestui que trust, after the former had assigned all his interest in chose in action sued on; Christie v. Bishop, 1 Barb. Ch. 116, 117, 118, 121, stating correct rule as to admission of separate answer of one defendant as evidence against codefendant.

Denied but apparently misunderstood in Glenn v. Baker, 1 Md. Ch. 77, as not rule in Maryland.

Appearance in cause of attorney is presumptive evidence of his authority. Record need not show authority.

Approved in Underfeed Stoker Co. v. American Ship Windlass Co., 165 Fed. 67, and Aaron v. United States, 155 Fed. 836, 84 C. C. A. 67, both following rule; Hatfield v. King, 131 Fed. 794, applying rule in contempt proceeding against attorneys who colluded in representing parties in feigned suit; In re Gasser, 104 Fed. 538, holding under bankruptcy act of 1898, subd. 9, § 1, attorney admitted to practice in United States District Court will be presumed to have authority to appear for creditor he assumes to represent; Rutledge v. Waldo, 94 Fed. 265, holding in defense of action to revive suit which abated by death of complainant, defendant may show attorney who represented them had no authority; Mason v. Intercolonial Ry., 197 Mass. 350, 125 Am. St. Rep. 371, 14 Ann. Cas. 574, 16 L. R. A. (N. S.) 276, 83 N. E. 876, holding attorney could appear as volunteer on behalf of party not appearing and suggest dismissal as to such party; Munhall v. Mitchell, 178 Mo. App. 499, 163 S. W. 913, holding where authority of attorney was challenged and he failed to produce evidence of authority, court properly found against him; Seattle v. McDonald, 26 Wash. 106, 66 Pac. 147, holding in an action by city, devisee in a will, an allegation that its counsel was authorized to commence suit is unnecessary; dissenting opinion in Blowpipe Co. v. Spencer, 46 W. Va. 599, 33 S. E. 345, majority holding summons upon president of defendant corporation who is attorney for plaintiff is not void, yet voidable, on proper exception; Washington v. Young, 10 Wheat. 409, 6 L. Ed. 353, when suit is not ordered dismissed, consent will be presumed after verdict; Ritchie v. McMullen, 159 U. S. 241, 40 L. Ed. 135, 16 Sup. Ct. 173, where answer admits entry of appearance with no allegation of lack of authority; Penobscot Boom Co. v. Lamson, 16 Me. 229, 33 Am. Dec. 658, statement of admitted attorney that he represents person or body corporate is sufficient; Farmers' & M. Bk. v. Troy etc. Bk., 1 Doug. (Mich.) 464, indorse-

ment of attorney on declaration; Leavitt v. Wallace, 12 N. H. 492, appearance by an attorney after party has been duly summoned.

The following cases deal with method in which attorneys may be engaged: Davis v. Memphis City R. R. Co., 22 Fed. 886, holding a company's president can employ an attorney without any contract under seal or formal action of directory; Vance v. Bank of Indiana, 1 Blackf. 80, and State Bank v. Bell, 5 Blackf. 128, holding declaration of plaintiff corporation need not aver appointment of their attorney under corporate seal.

The extent of the attorney's authority is shown in the following: Curry v. Bank of Mobile, 8 Port. 374, that attorney for bank may give statutory notice to bank debtor previous to motion for judgment; Harshey v. Blackmarr, 20 Iowa, 171, **89 Am. Dec. 522**, defining settled rule as to power to admit service; Jenney v. Delesdernier, 20 Me. 188, he may approve receipt for personal property taken by attaching officer, relieving him from his obligation to retain and produce it; Coler v. Board of Co. Commrs., 6 N. M. 116, 118, 27 Pac. 624, 625, he may stipulate for amendment of pleadings; Attorney General v. Guard. Mutual Life Ins. Co., 77 N. Y. 275, holding that voluntary appearance by corporation's attorney dispenses with actual service of process.

Cited and relied on as to manner in which an attorney's authority should be questioned, in Bonnifield v. Thorp, 71 Fed. 927, holding burden of proving no authority is on party attacking it, and it must be positive; Tally v. Reynolds, 1 Ark. 103, **31 Am. Dec. 739**, holding that before judgment party may, on showing by affidavit sufficient to raise a reasonable doubt, require attorney to prove his authority; Price v. Ward, 25 N. J. L. 229, holding weight of authority was in favor of allowing authority to be disputed.

The rule has also been applied to cases of agents other than attorneys in the following cases: Savings Bank v. Davis, 8 Conn. 202, appointment of an agent or attorney to convey real estate of bank may be made by resolution of board without corporate seal; Stamford Bank v. Benedict, 15 Conn. 445, bank cashier may apply money received from debtor in specific manner without authority of corporate vote; Garrison v. Combs, 7 J. J. Marsh. 85, **22 Am. Dec. 121**, holding assignment of note by admitted agent of corporation valid without corporate seal; Quarrier v. Peabody Ins. Co., 10 W. Va. 518, a corporation may appear in plea to jurisdiction by its president, instead of in person or by its attorney.

Limited in Adams v. Bradley, 5 Sawy. 222, Fed. Cas. 48, holding voluntary appearance of State attorney to contest case would not confer jurisdiction.

Distinguished in Sperry v. Reynolds, 65 N. Y. 184, as not applicable to an appearance in a Justice's Court, where authority of the agent appearing must appear of record.

Confession of judgment by an attorney, without authority. Note, **5 Am. Dec. 245.**

Right of attorney to appear for party whom he assumes to represent, presumption of such authority, and methods of questioning it. Note, **126 Am. St. Rep. 33, 34, 39.**

Effect of judgment on unauthorized appearance. Note, **21 L. R. A. 848, 859.**

A naturalized citizen is made such by act of Congress, but derives his rights as a citizen from the Constitution.

Approved in Mackenzie v. Hare, 239 U. S. 310, **60 L. Ed. 301**, 36 Sup. Ct. 108, under act of 1908, on marriage of American woman to alien she becomes expatriated; Luria v. United States, 231 U. S. 22, **58 L. Ed. 105**, 34 Sup. Ct. 10, holding naturalized citizen had equal footing with native citizen except as to eligibility to presidency; United States v. Wong Kim Ark, 169 U. S. 703, **42 L. Ed. 910**, 18 Sup. Ct. 477, holding child born in United States of Chinese parents, permanently domiciled here, is citizen.

A legislative act may involve consequences which are not expressed in it.

Cited in Buckner v. Street, 1 Dill. 256, Fed. Cas. 2098, 7 N. B. R. 264, as being still more true of constitutional provision operating as repealing statute; San Benito Co. v. S. P. R. R. Co., 77 Cal. 523, 19 Pac. 829, holding that license tax for use of government franchise was same as tax on franchise, and void; N. P. R. R. Co. v. Carland, 5 Mont. 188, 3 Pac. 156, holding that law absolutely repugnant to another as entirely repeals it as if express terms of repeal were used.

Interest will not be decreed against party upon money which he is enjoined from using.

Approved in Mayor v. Reed, 37 Ga. 486, holding that under law of nations, interest does not run on debts between citizens of hostile powers; Norris v. Massachusetts Ins. Co., 131 Mass. 296, holding insurance company, having been restrained from paying policy, is not liable for interest while proceedings are pending; Stevens v. Barringer, 13 Wend. 641, holding, when indorsee of note enjoins maker from paying it to anyone, he cannot, in subsequent action on note, recover interest subsequent to service of injunction.

Distinguished in Candee v. Webster, 9 Ohio St. 458, holding that garnishee is not, during pendency of attachment, exempted from an existing liability to pay interest to defendant in attachment.

Right to recover interest on fund in litigation or deposited in court. Note, **Ann. Cas. 1912B, 1006.**

Maxim "Nullum tempus occurrit regi." Note, **101 Am. St. Rep. 164.**

Miscellaneous. Cited in Wilson v. Shaw, 204 U. S. 34, **51 L. Ed. 357**, 27 Sup. Ct. 233, to point that Congress had power to create interstate highways including Panama Canal; Minnesota v. Northern Securities Co., 184 U. S. 236, **46 L. Ed. 516**, 22 Sup. Ct. 322, holding act of Congress, Febru-

ary 28, 1839 (5 Stats. at Large, 321, c. 36), and 47th rule in equity practice, relating to nonjoinder of parties, does not affect case where joining the parties would defeat the jurisdiction; The principal case has been miscellaneously cited upon various jurisdictional matters in the following: Postmaster-General v. Early, 12 Wheat. 149, **6 L. Ed. 582**, Ex parte Crane, 5 Pet. 204, **8 L. Ed. 98**, dissenting opinion in In re Sawyer, 124 U. S. 224, **31 L. Ed. 410**, 8 Sup. Ct. 495, Baker v. Biddle, Bald. 416, Fed. Cas. 764, Crocker v. Marine Nat. Bank, 101 Mass. 241, **3 Am. Rep. 337**, First Nat. Bank v. Hubbard, 49 Vt. 2, **24 Am. Rep. 98**, Smith v. Odell, 1 Pinn. 455. As to enjoining State agents: Board of Liquidation v. McComb, 92 U. S. 541, **23 L. Ed. 628**, Virginia Coupon Cases, 114 U. S. 315, **29 L. Ed. 201**, 5 Sup. Ct. 927, Pennoyer v. McConnaughy, 140 U. S. 14, 15, **35 L. Ed. 366, 367**, 11 Sup. Ct. 703, South Carolina v. Wesley, 155 U. S. 544, **39 L. Ed. 254**, 15 Sup. Ct. 231, Bains v. The Schooner James, Bald. 561, Fed. Cas. 756, United States v. Beebe, 4 McCrary, 19, 17 Fed. 41. The following pertain to taxation: Passenger Cases, 7 How. 571, **12 L. Ed. 823**; State Bank of Ohio v. Knoop, 16 How. 409, **14 L. Ed. 994**, holding that sovereignty of a State extends to all subjects of taxation. The principal case is cited also in The Haytian Republic, 154 U. S. 128, **38 L. Ed. 934**, 14 Sup. Ct. 995, to point that a judgment concludes not only matters in controversy, but all those which might have been adjudged; Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 207, Fed. Cas. 9449, as to bank cashier's powers; Foote v. Linck, 5 McLean, 618, Fed. Cas. 4913, as having been used in the course of argument; United States v. Parrott, McAll. 296, Fed. Cas. 15,998, holding that new case does not necessarily create new principle; Lafayette etc. R. R. Co. v. Geiger, 34 Ind. 213, in discussion of power of Congress to legislate concerning municipal subscriptions to railroad companies; Fesler v. Brayton, 145 Ind. 73, **32 L. R. A. 394**, 44 N. E. 37, fictitious suit is a contempt of court; Norris v. Doniphan, 4 Met. (Ky.) 431, arguing as to extent of power of Federal government to confiscate property of an enemy on land; Succession of Colwell, 34 La. Ann. 270, by reference to 9 Wheat. 751, **6 L. Ed. 207**, on question of naturalization law.

9 Wheat. 904–914, 6 L. Ed. 244, BANK OF UNITED STATES v. PLANTERS' BANK.

Suit against bank in which a State is a corporator is not suit against a State.

Cited in Bank of Kentucky v. Wister, 2 Pet. 323, **7 L. Ed. 438**, where entire stock of the bank belonged to State, but by State law the State was excluded from character of corporator; Bank of United States v. M'Kenzie, 2 Brock. 401, Fed. Cas. 927, holding that statute of limitations could be pleaded in bar of an action by the bank; Sweatt v. Boston etc. R. R. Co., 3 Cliff. 346, 354, Fed. Cas. 13,684, holding that railroads are private corporations within meaning of bankruptcy act; Western Union Tel. Co. v. Henderson, 68 Fed. 591, holding suit against State auditor to restrain

him from proceeding under act alleged unconstitutional is not a suit against a State; Talcott v. Pine Grove, 1 Flipp. 149, Fed. Cas. 13,735, arguendo.

Nature of incorporated State institutions. Note, **29 L. R. A. 380.**

When action against officers deemed against State. Note, **44 L. R. A. (N. S.) 226.**

A government becoming a partner in a trading company divests itself of its sovereign character, and takes that of a private citizen.

Approved in Phoenix Lumber v. Regents of the University of Idaho, 197 Fed. 429, holding regents of State University of Idaho had implied power to sue and be sued; State v. Holcomb, 85 Kan. 185, **Ann. Cas. 1912D, 800, 50 L. R. A. (N. S.) 243,** 116 Pac. 253, holding water plant owned by municipality in Missouri and located in Kansas was subject to tax laws of Kansas; Shelby County v. Bickford, 102 Tenn. 402, 52 S. W. 774, holding where county sues its grantor on covenant against encumbrances, it is subject to ordinary statute of limitations; dissenting opinion in Corcoran v. Chesapeake etc. Canal Co., 1 McAr. (D. C.) 373, to point that in action to foreclose bonds, State holding subsequent lien could be joined as party; Briscoe v. Bank of Kentucky, 11 Pet. 324, 325, **9 L. Ed. 735, 736,** holding that whether State owned whole or part of stock in bank, notes issued by it were not bills of credit under Federal Constitution; Louisville R. R. Co. v. Letson, 2 How. 550, 551, **11 L. Ed. 375,** holding fact that South Carolina was member of certain railroad did not oust jurisdiction of the Federal courts; Curran v. State, 15 How. 309, **14 L. Ed. 708,** holding fact that State owned all capital stock in the bank, did not affect rights of creditor to be paid out of its property; The Arlington Case, 3 Hughes, 123, Fed. Cas. 8191, holding that ejectment will lie to test title to lands claimed by United States and in possession of government by its officer; Southern Ry. Co. v. North Carolina R. R. Co., 81 Fed. 599, holding the transactions of corporation in which a State is stockholder bind the State to same extent as every other private stockholder; Owen v. Branch Bank, 3 Ala. 264, holding that notes of the bank of Alabama and its branches are not "bills of credit"; Bank v. Gibson, 6 Ala. 816, holding a State bank must present its claim to administrator of deceased debtor within time provided by law; Calloway v. Cossart, 45 Ark. 88, holding statute of limitations runs against State aided bank and against receiver appointed by the court in a suit by State; Winona etc. R. R. Co. v. Deuel Co., 3 Dak. Ter. 22, 12 N. W. 568, and First Div. etc. R. R. Co. v. Parcher, 14 Minn. 304, both holding that railroad lands exempted by statute from taxation until sold which were, on foreclosure, bought in by State expressly without intent to merge or extinguish exemption, could be regranted with same exemption attaching; Central Bank of Georgia v. Little, 11 Ga. 348, holding that although State was sole corporator and owner of capital stock debt of deceased debtor was not due to public nor entitled to priority of payment; City Council v.

Hudson, 88 Ga. 605, 15 S. E. 679, holding council as owners of bridge connecting the city with adjoining State, were liable for failing to provide suitable railing; dissenting opinion in Trustees v. Brainard, 12 Ill. 510, majority holding that improvements made on canal lands with assent of State, became property of State on land being sold; Governor v. Woodworth, 63 Ill. 258, holding statute of limitations runs against corporation in which State is partner; Moore v. Board, 7 Ind. 465, holding the Wabash and Erie canal, of which State was member, were not protected thereby from suits and damages; Binney's Case, 2 Bland, 142, holding suit by one stockholder to restrain corporation from making an expenditure of corporate property, cannot be supported on sole plea that State is a stockholder; Brady v. State, 26 Md. 302, holding Chesapeake and Ohio Canal Company is not entitled, by reason of State being shareholder, to exercise any larger rights than given by its charter; Hale v. County Commrs., 137 Mass. 115, deciding that holder of bonds of railroad established by act of Congress is entitled to deduct his indebtedness for assessment purposes; Mayor of New York v. Bailey, 2 Denio, 447, holding municipal corporation is responsible for negligence of its agents employed in construction of public works; Bank v. Gibbs, 3 McCord, 377, holding that debt due to the Bank of South Carolina is not debt to State; State v. Bank, 1 S. C. 77, holding so much of statute to close operations of bank owned by State as authorized Governor to take possession of and sell bank assets and apply proceeds, is void as impairing obligation of its contracts with creditors; Fields v. Creditors, 1 Sneed, 354, holding debts due to a bank wholly owned by State, not entitled to priority under insolvency law; Western etc. R. R. Co. v. Taylor, 6 Heisk. 414, holding company could be sued though owned wholly by State, on bills issued on security of railroad; White v. Nashville etc. R. R. Co., 7 Heisk. 547, holding injunction would issue to enjoin use of railroad over land not paid for, although road had been seized by the State for arrearage on bonds and leased to another company; M'Clanahan v. Western Lunatic Asylum, 88 Va. 468, 13 S. E. 978, holding asylum, a State corporation, is bound by statute of limitations in recovery of debts. Cited also in Putnam v. Ruch, 56 Fed. 418, in support of ruling that where corporation shares are held by individuals it is private corporation; Tuskaloosa etc. Assn. v. Green, 48 Ala. 350, and Cleaveland v. Stewart, 3 Ga. 292, to support ruling that certain eleemosynary corporations were private, although aided by the State. Dickson v. People, 17 Ill. 198, Lucas v. Board of Commrs., 44 Ind. 572, Bailey v. Mayor etc. of New York, 3 Hill, 540, **38 Am. Dec. 672**, Louisville etc. R. R. Co. v. County Court, 1 Sneed, 687, **62 Am. Dec. 449**, Burhop v. Milwaukee, 21 Wis. 260, discussing difference between private and public corporations; Downing v. Indiana etc. Bd. of Agr., 129 Ind. 443, **12 L. R. A. 665**, defendant corporation held private.

Distinguished in United States v. Chesapeake & D. Canal Co., 206 Fed. 967, 968, holding statute of limitations did not run against suit of United States to recover dividends on corporate stock owned by it; Central Hos-

pital v. Adams, 134 Tenn. 432, 183 S. W. 1033, holding limitations did not run against suit by State hospital to recover from guardian for maintenance of insane ward; dissenting opinion in Briscoe v. Bank of Kentucky, 11 Pet. 341, 349, 9 L. Ed. 742, 745, majority holding that the charter of bank was not in violation of Federal Constitution; State v. Lagrange etc. R. R. Co., 4 Humph. 489, holding State may by enactment declare lien on the property of company for its advances good as against other creditors or stockholders.

Limited in Delafield v. State, 2 Hill, 176, holding injunction would issue to restrain sale of securities by unauthorized contract of State agent.

Maxim "Nullum tempus occurrit regi." Note, 101 Am. St. Rep. 164, 183.

Limitation of actions against agencies of State. Note, 3 L. R. A. (N. S.) 747.

States which have an interest in banks cannot be sued, even in their own courts, but this does not exempt the banks from suit.

Approved in Board of Directors v. Bodkin Bros., 108 Tenn. 711, 69 S. W. 272, holding levee district board engaged in exercise of public duties cannot be sued outside the State of its domicile.

A bank in which a State is a corporator is not thereby exempt from suit in Federal courts.

Approved in Hopkins v. Clemson Agricultural College, 221 U. S. 644, 35 L. R. A. (N. S.) 243, 55 L. Ed. 895, 31 Sup. Ct. 654, holding agricultural college of State not such agent of State as to be immune under eleventh amendment from suit for damages; Murray v. Wilson Distilling Co., 164 Fed. 17, 92 C. C. A. 1, holding District Court had jurisdiction of suit by creditors against state dispensary commission of South Carolina to enforce trust in moneys collected by it; dissenting opinion in Veazie Bank v. Fenno, 8 Wall. 551, 19 L. Ed. 489, Circuit Courts had jurisdiction of a suit by the United States Bank against bank in which State was stockholder.

Distinguished in Lowry v. Thompson, 25 S. C. 426, 1 S. E. 148, holding that an action against corporation can never be regarded as action against individuals who hold its stock.

Bank of United States, as indorsee of note payable to citizen of same State, with certain of its members, may sue maker in Federal court.

Cited in Commercial etc. Bank v. Simmons, 1 Flipp. 453, 455, Fed. Cas. 3062, holding that national banks denied right to sue in Federal courts from national bank legislation of Congress; In the Matter of Kip, 1 Paige Ch. 613, holding in suit by or against corporation, one of corporators was not party, so as to be excused from testifying; Hall v. Bank of Virginia, 14 W. Va. 619, holding that bank incorporated in another State without authority to establish a branch in State was nonresident corporation; Louisville etc. R. R. Co. v. Letson, 2 How. 555, 11 L. Ed. 376, holding cor-

poration to be deemed citizen of State of its creation, and citizenship of its members immaterial; Wood v. Hartford Fire Ins. Co., 13 Conn. 212, **33 Am. Dec. 399**, and Binney's Case, 2 Bland, 148, as authority for rule that corporation can only sue in Federal courts by virtue of the national character and citizenship of its members; Baltimore & O. R. R. Co. v. Cary, 28 Ohio St. 218, holding that a corporation in respect to jurisdiction of Federal courts was to be regarded as citizen of State of creation.

Judiciary act, section 11, was adopted to obviate inconvenience of liability to suit in Federal courts, of makers of notes or bonds given by citizens of same State, to each other by reason of assignment to citizens of another State.

Approved in Bolles v. Lehigh Valley R. R., 127 Fed. 885, holding Federal court has jurisdiction though cause of action assigned to one who is also citizen of different State from defendant, though effect of assignment is to change venue to another district; Bushnell v. Kennedy, 9 Wall. 322, **19 L. Ed. 738**, holding restriction applied only to rights of action founded on contracts, not torts; Commercial etc. Bk. v. Simmons, 1 Flipp. 453, 455, Fed. Cas. 3062, arguendo.

Distinguished in Brown v. Fletcher, 235 U. S. 595, **59 L. Ed. 377**, 35 Sup. Ct. 154, holding District Court had jurisdiction of suit to enforce interest under assignment by beneficiary of interest in estate to which latter had fixed right in future.

Priority of State of United States in payment. Note, **29 L. R. A. 247.**

How rights of bankers are affected by forgery. Note, **3 E. R. C. 745.**

Miscellaneous. Cited in Comptoir Nat. D'Escompte de Paris v. Board of Assessors, 52 La. Ann. 1329, 27 South. 805, holding non-negotiable notes representing loans in Louisiana, made by agent of corporation doing business therein, when kept by agent in State are taxable there; In re Metzger, 17 Fed. Cas. 234, as instance of rule that after court is established and its jurisdiction designated it takes cognizance of all matters then or thereafter within scope of its powers.

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IN FEBRUARY TERM, 1825.

BY HENRY WHEATON.

Counselor at law.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, Chief Justice.
The Hon. BUSHROD WASHINGTON, Associate Justice.
The Hon. WILLIAM JOHNSON, Associate Justice.
The Hon. THOMAS TODD, Associate Justice.
The Hon. GABRIEL DUVALL, Associate Justice.
The Hon. JOSEPH STORY, Associate Justice.
The Hon. SMITH THOMPSON, Associate Justice.
WILLIAM WIRT, Esq., Attorney-General.

MEMORANDUM.—Mr. Justice TODD was absent during the whole of the present term, from indisposition.

MEMORANDUM

The case of Ogden v. Saunders, and the other causes involving the question of the validity of the state bankrupt or insolvent laws, argued at February term, 1824, by Mr. Clay, Mr. D. B. Ogden and Mr. Haines for the validity, and by Mr. Webster and Mr. Wheaton against it, and continued for advisement to the present term, were again continued for advisement to the next term.

REPORTS OF THE DECISIONS

OF THE

Supreme Court of the United States.

FEBRUARY TERM, 1825.

1*] [*Constitutional Law. Practice.]

WAYMAN et al.
v.
SOUTHARD et al.

Congress has, by the constitution, exclusive authority to regulate the proceedings in the courts of the United States; and the states have no authority to control those proceedings, except so far as the state process acts are adopted by Congress, or by the courts of the United States under the authority of Congress.

The proceedings on executions, and other process, in the courts of the United States, in suits at common law, are to be the same in each state, respectively, as were used in the Supreme Court of the state in September, 1789, subject to such alterations and additions as the said courts of the United States may make, or as the Supreme Court of the United States shall prescribe by rule to the other courts.

A state law regulating executions, enacted subsequent to September, 1789, is not applicable to executions issuing on judgments rendered by the courts of the United States, unless expressly adopted by the regulations and rules of those courts.

The 34th section of the judiciary act of 1789, c. 20, which provides, "that the laws of the several states, except," etc., "shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," does not apply to the process and practice of the courts.

2*] It is a mere legislative recognition *of the principles of universal jurisprudence, as to the operation of the lex loci.

The statutes of Kentucky concerning executions, which require the plaintiff to indorse on the execution that bank notes of the Bank of Kentucky, or notes of the bank of the commonwealth of Kentucky will be received in payment, and, on his refusal, authorize the defendant to give a replevin bond for the debt, payable in two years, are not applicable to executions issuing on judgments rendered by the courts of the United States.

The case of Palmer v. Allen, 7 Cranch, 550, reviewed and reconciled with the present decision.

THIS cause was certified from the Circuit Court for the District of Kentucky, upon a certificate of a division of opinion between the judges of that court, on several motions, which occurred on a motion made by the plaintiffs to quash the marshal's return on an execution issued on a judgment obtained in that court, and also to quash the replevin bond taken on the said execution, for the following causes:

1. Because the marshal, in taking the replevin bond, and making said return, has proceeded under the statutes of Kentucky, in relation to executions; which statutes are not applicable to executions issuing on judgments in this court, but the marshal is to proceed with such executions according to the rules of the common law, as modified by acts of Congress, and the rules of this court, and of the Supreme Court of the United States.

2. That if the statutes of Kentucky, in relation to executions, are binding on this court, viz., the statute which requires the plaintiff to indorse on the execution, that bank notes of the Bank of Kentucky, or notes of the bank of the commonwealth *of Kentucky, will be re- [*3 ceived in payment, or that the defendant may replevy the debt for two years, are in violation of the constitution of the United States, and of the state of Kentucky, and void.

3. That all the statutes of Kentucky which authorize a defendant to give a replevin bond in satisfaction of a judgment or execution, are unconstitutional and void.

4. Because there is no law obligatory on the said marshal, which authorized or justified him in taking the said replevin bond, or in making the said return on the said execution.

The court below being divided in opinion on the points stated in the motion, at the request of the plaintiffs, the same were ordered to be certified to this court.

The cause was argued by Mr. Cheves and Mr. Sergeant for the plaintiffs, and by Mr. Bibb and Mr. Monroe for the defendants, at the last term.

On the part of the plaintiffs it was insisted, that the executions issued by the courts of the United States for the District of Kentucky, are to be regulated and governed by the laws of the United States, and not by the laws of the state of Kentucky.

It was not necessary to analyze the provisions of the state laws, because the questions that would arise were of a general nature, and rendered any such statement unnecessary. These questions were,

1. Whether, by the constitution of the United *States, Congress has the power to regu- [*4 late the proceedings of the federal courts.

2. Whether Congress has regulated those proceedings, and in what manner.

1. That Congress has the power, was too plain to admit of a doubt. If they have not, they have no power at all, and the whole of that interesting portion of the constitution is inoperative. The clause in question is the third article of the constitution, which establishes and regulates the judicial power. It is a simple text, but it is a very comprehensive one, or it is nothing. It does nothing more, in terms,

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1825.

BY HENRY WHEATON.

Counselor at law.

VOL. X.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, Chief Justice.
The Hon. BUSHROD WASHINGTON, Associate Justice.
The Hon. WILLIAM JOHNSON, Associate Justice.
The Hon. THOMAS TODD, Associate Justice.
The Hon. GABRIEL DUVALL, Associate Justice.
The Hon. JOSEPH STORY, Associate Justice.
The Hon. SMITH THOMPSON, Associate Justice.
WILLIAM WIRT, Esq., Attorney-General.

MEMORANDUM.—Mr. Justice TODD was absent during the whole of the present term, from indisposition.

MEMORANDUM

The case of Ogden v. Saunders, and the other causes involving the question of the validity of the state bankrupt or insolvent laws, argued at February term, 1824. by Mr. Clay, Mr. D. B. Ogden and Mr. Haines for the validity. and by Mr. Webster and Mr. Wheaton against it, and continued for advisement to the present term, were again continued for advisement to the next term.

REPORTS OF THE DECISIONS

OF THE

Supreme Court of the United States.

FEBRUARY TERM, 1825.

1*] [*Constitutional Law. Practice.]

WAYMAN et al.
v.
SOUTHARD et al.

Congress has, by the constitution, exclusive authority to regulate the proceedings in the courts of the United States; and the states have no authority to control those proceedings, except so far as the state process acts are adopted by Congress, or by the courts of the United States under the authority of Congress.

The proceedings on executions, and other process, in the courts of the United States, in suits at common law, are to be the same in each state, respectively, as were used in the Supreme Court of the state in September, 1789, subject to such alterations and additions as the said courts of the United States may make, or as the Supreme Court of the United States shall prescribe by rule to the other courts.

A state law regulating executions, enacted subsequent to September, 1789, is not applicable to executions issuing on judgments rendered by the courts of the United States, unless expressly adopted by the regulations and rules of those courts.

The 34th section of the judiciary act of 1789, c. 20, which provides, "that the laws of the several states, except," etc., "shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," does not apply to the process and practice of the courts.

2*] It is a mere legislative recognition *of the principles of universal jurisprudence, as to the operation of the lex loci.

The statutes of Kentucky concerning executions, which require the plaintiff to indorse on the execution that bank notes of the Bank of Kentucky, or notes of the bank of the commonwealth of Kentucky will be received in payment, and, on his refusal, authorize the defendant to give a replevin bond for the debt, payable in two years, are not applicable to executions issuing on judgments rendered by the courts of the United States.

The case of Palmer v. Allen, 7 Cranch, 550, reviewed and reconciled with the present decision.

THIS cause was certified from the Circuit Court for the District of Kentucky, upon a certificate of a division of opinion between the judges of that court, on several motions, which occurred on a motion made by the plaintiffs to quash the marshal's return on an execution issued on a judgment obtained in that court, and also to quash the replevin bond taken on the said execution, for the following causes:

1. Because the marshal, in taking the replevin bond, and making said return, has proceeded under the statutes of Kentucky, in relation to executions; which statutes are not applicable to executions issuing on judgments in this court, but the marshal is to proceed with such executions according to the rules of the common law, as modified by acts of Congress, and the rules of this court, and of the Supreme Court of the United States.

2. That if the statutes of Kentucky, in relation to executions, are binding on this court, viz., the statute which requires the plaintiff to indorse on the execution, that bank notes of the Bank of Kentucky, or notes of the bank of the commonwealth *of Kentucky, will be re- [*3
ceived in payment, or that the defendant may replevy the debt for two years, are in violation of the constitution of the United States, and of the state of Kentucky, and void.

3. That all the statutes of Kentucky which authorize a defendant to give a replevin bond in satisfaction of a judgment or execution, are unconstitutional and void.

4. Because there is no law obligatory on the said marshal, which authorized or justified him in taking the said replevin bond, or in making the said return on the said execution.

The court below being divided in opinion on the points stated in the motion, at the request of the plaintiffs, the same were ordered to be certified to this court.

The cause was argued by Mr. Cheves and Mr. Sergeant for the plaintiffs, and by Mr. Bibb and Mr. Monroe for the defendants, at the last term.

On the part of the plaintiffs it was insisted, that the executions issued by the courts of the United States for the District of Kentucky, are to be regulated and governed by the laws of the United States, and not by the laws of the state of Kentucky.

It was not necessary to analyze the provisions of the state laws, because the questions that would arise were of a general nature, and rendered any such statement unnecessary. These questions were,

1. Whether, by the constitution of the United *States, Congress has the power to regu- [*4
late the proceedings of the federal courts.

2. Whether Congress has regulated those proceedings, and in what manner.

1. That Congress has the power, was too plain to admit of a doubt. If they have not, they have no power at all, and the whole of that interesting portion of the constitution is inoperative. The clause in question is the third article of the constitution, which establishes and regulates the judicial power. It is a simple text, but it is a very comprehensive one, or it is nothing. It does nothing more, in terms,

than autl.orize Congress to establish courts, and declare the cases over which they shall have jurisdiction. The grounds of decision are, of course, comprehended. They are to be according to the law of the case. The means for arriving at the decision, or for giving it effect, are not expressly provided. But as the means are indispensable to the attainment of the end, which is the administration of justice, they are necessarily included in the grant; and the power to provide them is, of course, implied in the power to establish judicial tribunals. A court is a place where justice is judicially administered.[1] To say merely that courts should be established, would be entirely idle. To say, therefore, that courts shall be established, means that all the needful and usual incidents to courts shall be established.

This proposition was so completely self-evi-5*] dent *as not to admit of any support from argument or illustration, nor to require any aid from the clause in the first article, giving Congress power to make all laws necessary and proper for carrying into execution the other power expressly granted, or vested in the government of the United States, or in any department or officer thereof. That it was so understood, is plain from the fifth, sixth and seventh articles of the original amendments, which are limitations of the generality of a power otherwise unlimited.

That it was not the design of the constitution finally and irrevocably to adopt any existing system of state legislation as to process, by reference thereto, is quite certain, because there is no such reference. It could not refer by implication to the means employed in the state courts, because they were many, and no one could say which was referred to. It would have been unwise, because it would have made the system invariable, and capable of no amendment. It could not have meant to refer to the varying forms adopted by the state courts, for it was impossible to anticipate how they would be distributed; these are subjects of jurisdiction, for which the state institutions could afford no example, because they had no such tribunals, the jurisdiction being exclusive; and it would have made the existence of the national judiciary dependent upon state legislation.

It must, therefore, be taken for granted, that the power of Congress in arranging the federal judicial tribunals, and the means to be employ-6*] ed *by them for effectuating the design of their establishment, was plenary, and subject to no exceptions but those which the constitutions itself has made. The acts of Congress to be referred to, would show that this had been the uniform understanding. Nor is the power of Congress on this subject greater in cases where the United States are a party, than in other cases, where the controversy is between individuals.

2. The next question was, what had been done by Congress.

The act of the 24th of September, 1789, c. 20, established the judicial tribunals. The 34th section enacts, that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." But this merely gives the ground of decision; it does not give the means of attaining the decision, or of giving it effect.

The powers of the courts are conferred by the sections from 13 to 17 inclusive. The courts being thus established, their jurisdiction defined, or to be defined, and the nature of their proceedings distinguished, the power to issue the common law writs of mandamus and prohibition, is vested in the Supreme Court by the latter part of the 13th section. The 14th section, then, gives them power to issue "writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for *the exercise of their [*7 respective jurisdictions, and agreeable to the usages and principles of law." This is to be taken ad referendum, according to the function they were to perform. They were to be common law courts, proceeding according to the course of the common law, with power to issue writs agreeably to the principles and usages of that law. The common law remedies were therefore adopted by the judiciary act of 1789, c. 20, and it has been judicially determined that these remedies are to be not according to the varying practice of the state courts, but according to the principles of the common law, as settled in England.[2] This, of course, is to be understood with the exception of such modifications as have been made by acts of Congress, the rules of court made under those acts, and the state laws in force in 1789.

The 18th section, considering that there would be an immediate right of execution by the previous provisions, gave a limited stay. There are further provisions to the same effect in the 23d, 24th and 25th sections. There are various other provisions, but the result is, in all but the excepted cases, to give an immediate right of execution, or after a limited delay.

This act was followed immediately by the process act of the 29th of September, 1789, c. 21. The second section enacts, "that the forms of writs, except their style, and modes of process," etc., "in the circuit and district courts, in suits *at common law, shall be the same [*8 in each state respectively as are now used or allowed in the Supreme Courts of the same." The act was limited to the end of the next session. It was continued by an act of the 26th of May, 1790; and, by the act of the 8th of May, 1792, c. 137 (XXXVI.), its provisions were made permanent.

Whether these acts, in their terms, are to be understood as embracing the forms of process only, or also as describing the effect, was not, perhaps, very material to inquire. The words, understood in their natural sense, comprehend the whole. The proviso as to executions, shows that they were so understood. But it is entirely certain, that by the conjoint operation of the judiciary act, and the process act, the means to be used in the administration of justice, as to their nature, form and effect, were fixed upon a permanent basis; subject to alteration by no other legislative power than that of Congress, and by the power given to the courts of the United States in the second section of the act of the 8th of May, 1792, c. 137 (XXXVI.). With the exception of changes since made by

1.—Co. Litt. 58.

2.—See Robinson v. Campbell, 3 Wheat. Rep. 221.

Congress, and by the court, the remedies now to be used are the same as were used in September, 1789. Whoever would know what are the remedies in a given case, must inquire what they were in the particular state at that time. And these remedies are of exactly the same efficacy, and have the same power and operation now as then. Anything short of this would be inadequate to the end to be accomplished. The 9*] process is nothing *but for the effect. The court is nothing without its process.' To leave this dependent upon state legislation, would be to leave the administration of justice in the federal courts at the mercy of the states. Congress has made many changes, and many more are wanting. The courts of the United States have made rules for regulating the practice. But in no case have changes in any of these particulars been introduced into the courts of the Union, either by the legislation of the states, or the rules of the state courts.

But, independent of these general considerations, the question has been repeatedly subjected to judicial determination both in the circuit courts and in this court. Thus, in The United States v. Worson,[1] it was held, that the provision in the 34th section of the judiciary act of 1789, c. 20, making the state laws rules of decision in the courts of the Union, did not apply to the process and practice of the federal courts. In Campbell v. Robinson,[2] this court held that the remedies in the courts of the United States, both at common law and in equity, are to be, not according to the fluctuating practice of the state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derive our knowledge of those princi- 10*] ples. The case of Palmer *v. Allen[3] also confirms the principle for which the plaintiffs insisted.

The value of the process of execution depends upon the time when it may be had, and the manner in which it may be executed, and the subjects upon which it may be levied. If it should be asked, whether a state may not withdraw certain kinds of property from execution, the answer would be, that this was not the question here, and it was not necessary to go out of the case. If the power to establish a judiciary necessarily include the power to confer upon it the authority to use the needful remedies, it must certainly be allowed that the states cannot hinder and destroy the process of execution. Such a right is wholly incompatible with the power of the Union in Congress assembled. If it may withhold one process, it may withhold all. If it can modify, i. e., impair, or weaken, the efficacy of the process, the consequence is the same. The courts would be then left with the power to adjudicate, but without the power to enforce their decisions. But here the property sought to be reached is subject to execution by the laws of the state; and where the end is permitted, the means of attaining it must be left free.

It was also insisted, that the statutes of Kentucky in question were repugnant to the constitution of the United States, as impairing the obligation of contracts, and as being tender laws. But as the court intimated that the cause might *be upon the other points, [*11 the argument upon the constitutionality of the act was not pressed.

On the part of the defendants it was insisted,

1. That Congress has no power, under the constitution, to enact an execution law, governing the substance of the proceedings on execution from the federal courts, in suits between private individuals.

2. That, supposing Congress to possess such a power, it could not delegate its authority to the Supreme and other courts of the United States.

3. That the acts of Congress applicable to this subject, do not attempt to delegate that authority to the courts of the Union.

4. That congress has not attempted to establish a uniform execution law throughout the United States, nor adopted the laws of the states in force at any particular period, but left the process of execution to be regulated from time to time by the local state laws.

In support of the first point, a distinction was drawn betweeen cases arising from the character of the parties, such as citizens of different states, aliens, etc., and cases arising from the nature of the controversy, as involving the constitution, laws, and treaties of the Union, and over which the federal courts had either an original or appellate jurisdiction. The first class of cases arose either under foreign or municipal law, which must be applied as the rule of decision. The remedy followed as a part of the local law of the state where the suit was brought. It was not necessary for Congress to exercise any legislative *power over this class of cases, as it was [*12 over the other, depending upon the constitution, laws, and treaties of the Union. The grant of judicial power was here more extensive than the legislative. It was not necessary that Congress should have the power of establishing a civil code for the decision of this class of cases. Neither was it necessary that Congress should regulate the substance of the remedies, which might safely be left to the state legislatures, so long as they made no laws prohibited by the constitution respecting contracts. The power delegated in the third article of the constitution was exclusively judicial, and, therefore, Congress, whose powers are legislative only, are necessarily excluded. The power given to Congress in the first article "to constitute tribunals inferior to the Supreme Court," does not include the power of regulating the remedies as to this class of cases. In making these regulations, Congress must either have the power to authorize the selling of all property under the process of the federal courts, or it is restricted to such as the state legislatures think fit to subject to execution. If the former, the power includes an extensive control over the civil legislation of the states as to property and contracts, which the constitution never contemplated. If the latter, it is an illusory power, since, if the states may exempt from, or subject to, execution, in their discretion, they may also regulate the manner of levying it in all other respects. As to the power to make all laws

1.—1 Gallis. Rep. 5, 18; see also 1 Peters' Rep. Circ. Ct. 484.

2.—3 Wheat. Rep. 212, 221.

3.—7 Cranch's Rep. 550.

necessary and proper to carry into effect the 13*] other powers, etc., it applied *only to those conferred for national purposes, and not to mere judicial power, which must be exercised according to the municipal law applicable to the case. Congress had so determined, in the 34th section of the judiciary act, by which the state laws were made "rules of decision in trials at common law in the courts of the United States, in cases where they apply." They do apply in the decision of all controversies between citizens of different states, or between aliens and citizens.

2. In support of the second point, that Congress could not delegate its authority of regulating process (whatever might be the extent of it) to the courts of the Union, it was argued, that by the general principles of all free and limited government, as well as the particular provisions of the federal constitution, the legislative, executive, and judicial powers, are vested in separate bodies of magistracy. All the legislative power is vested exclusively in Congress. Supposing Congress to have power, under the clause, for making all laws necessary and proper, etc., to make laws for executing the judicial power of the Union, it cannot delegate such power to the judiciary. The rules by which the citizen shall be deprived of his liberty or property, to enforce a judicial sentence, ought to be prescribed and known; and the power to prescribe such rules belongs exclusively to the legislative department. Congress could not delegate this power to the judiciary, or to any other department of the government. The right to liberty and prop- 14*] erty is a *sacred vested right under the constitution and laws of the Union and States. The regulations by which it is to be devested, for the purpose of enforcing the performance of contracts, are of vital importance to the citizen. The power of making such regulations is exclusively vested in the legislative department, by all our constitutions, and by the general spirit and principles of all free government. It is the office of the legislator to prescribe the rule, and of the judge to apply it; and it is immaterial whether it respects the right in controversy, or the remedy by which it is to be enforced. The mere forms and style of writs, and other process, may, indeed, be regulated by the courts, but the regulation of the substantive part of the remedy belongs to the legislature. The power to establish courts, with the jurisdiction defined by the constitution, does not involve, by necessary implication, the authority of delegating any portion or incident of that power to the courts themselves. That authority is not expressly given; consequently it does not exist.

3. Congress has not, in fact, delegated this authority to the court. The several process acts passed by Congress, regulate the forms only; they give to the courts the power to regulate the forms only. The expressions in the 2d section of the act of 1792, c. 137 (XXXVI.), "subject, however, to such alterations as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the Unit- 15*] ed States shall think proper, *from time to time, by rule, to prescribe to any circuit or district court," apply only to "the forms of writs, executions and other process, and the forms and modes of proceeding in suits."

Every court has, like every other public political body the power necessary and proper to provide for the orderly conduct of its business. This may be compared to the separate power which each house of Congress has to determine the rules of its proceedings, and to punish contempts. This is altogether different from the general legislative power, which Congress cannot delegate, and never has attempted to delegate, to either house, separately, or to the executive and judicial departments of the government. To construe the power to regulate the forms of process and modes of proceeding, into a power in the courts to make execution laws, would be to suppose Congress intended to violate the constitution, by delegating their legislative power to the judiciary. The laws of the states on the subject of executions are various and contradictory. Did Congress mean to give to this court the power to make a uniform execution law throughout the Union, or to adopt the common law of England, and thus to repeal the statutes of all the states regulating what shall, and what shall not, be subject to execution? The forms of process are distinct from the rights and duties to be observed in their execution. The usual form of a fi. fa. is a mandate to the marshal to make the money of the goods and chattels of the defendant; *but what property may [*16 or may not be levied, and how, and when, and where it is to be sold, and whether the same is subject to redemption by the debtor, are all of the substance of the remedy.

4. In support of the position that Congress intended to leave the process of execution to be regulated from time to time by the state laws, it was argued, that the process act of 1792, c. 137 (XXXVI.), omits the words contained in the 2d section of the process act of 1789, c. 21, "and modes of process," used after the words, "forms of writs and executions," etc. The expressions which seem to occupy, in the act of 1792, the place of these omitted words, are the following: "And modes of proceeding in suits," which are too unequivocal to require comment. "Modes of proceeding in suits," made use of in connection with the preceding words, "writs, executions," etc., plainly refer to those acts in court which relate to the determination of the controversy, in opposition and contradistinction to the forms of the mesne process, and also of the process of execution by which the judgment is enforced after the termination of the suit. Proceedings after judgment are always distinguished by law writers, both from the mesne process, and from the proceedings in the suit.[1] There is a plain difference between the forms of writs, and their effects, with the powers and duties conferred under them; between the modes *of proceeding in suits, and the laws of [*17 execution to enforce the judgment. The only clause in the process act of 1789, c. 21, which favored the notion that it was the intention of Congress to prescribe the effect of any writ of execution, had been omitted in the process act of 1792, c. 137 (XXXVI.). The concluding paragraph in the 2d section of the act of 1789,

1.—3 Bl. Comm. c. 24, 25, 26.

c. 21, "and be at liberty to pursue the same, until a tender of the debt and costs in gold and silver shall be made," was entirely omitted in the subsequent act. And the circumstance of this act having been confined in its duration to one year, and that at the two succeeding sessions it had been continued for the same term only, and when the permanent act was passed, this clause, as well as the indefinite expression, "modes of process," were both excluded, showed that they were purposely excluded, so that no effect should be given to writs of execution, other than what they would receive from the local laws of the states.

The provision in the 34th section of the judiciary act of 1789, c. 20, making the state laws rules of decision in cases where they apply, furnishes the rules by which this case is to be determined. The question is, whether the marshal has conducted himself according to law in executing this process. The mere form of the writ is insufficient to determine it. If you apply the state execution laws as existing in 1789, or 1792, nearly all the western states will be left without an execution law applicable in the federal courts, since they were 18*] admitted into the *Union subsequent to the enactment of the process acts.

Congress has itself given a legislative exposition of the acts now in question, evidently considering the execution laws of the states to be the laws of execution for the federal courts. By the judiciary act of 1793, c. 167 (XXII.), s. 3, it is provided, "that where it is now required by the laws of any state, that goods taken in execution on a writ of fieri facias, shall be appraised previous to the sale thereof," the like proceedings are to be had on executions issuing out of the courts of the United States. So, also, by the act of May 7, 1800, c. 199 (XXV.), regulating sales of lands, on judgments obtained by the United States, it is enacted, (sec. 1) "that where the United States shall have obtained judgment in civil actions brought in those states wherein, by the laws and practice of such states, lands, or other real estate, belonging to the debtor, are delivered to the creditor in satisfaction of such judgment," etc., the marshal is to proceed to sell at public auction, and to execute a grant to the highest bidder. These legislative expositions were made long before the present case arose, and are as binding in fixing the sense of the legislature as any declaratory act which Congress could make on the subject.

The process acts regulate the forms of writs, and the modes of proceeding in suits, and give the courts the power to alter both. The 14th section of the judiciary act of 1789, c. 20, gives 19*] *to the courts power to issue writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Where a court has issued the execution, according to the form provided under the process acts, it has done all that is authorized by the 14th section of the judiciary act, and by the process acts. The rule which is to govern the manner of levying the execution, is to be found in the 34th section of the judiciary act. Various regulations prevail in the states, as to what property is liable to execution. In some, lands are exempt, except upon an elegit; in others, certain personal property is exempt; in all, the ca. sa. is variously modified. How are all these conflicting regulations to be reconciled, but by resorting to the wise and safe provision contained in the 34th section of the judiciary act, which gives the same rule as to the substance of the remedy which applies to the right in controversy, and the same for the federal courts as is used at the time in the state courts?

To the argument which had been urged for the plaintiffs, that, upon the supposition that executions from the federal courts are to be regulated by the local laws in each state, the state legislatures might entirely defeat the administration of justice in those courts, by exempting all property from execution, it was answered, that Congress (supposing them to possess the constitutional power) might, at any time, apply an effectual remedy by enacting a uniform law on the subject; and that, in the meantime, all regulations *made [*20 by the states must apply equally to their own courts; and it was an inadmissible and extravagant supposition that any state would thus entirely suspend the course of civil justice. It was the province of every sovereign legislature to regulate it, so far as the society had not surrendered that right to another power. In the present instance, even supposing the constitution to be silent on the subject, Congress had shown a disposition to leave to the states the power of regulating it, except as to cases arising under the constitution, laws, and treaties of the Union, and of peculiar federal cognizance, and excepting that general power of regulating the forms of process, and proceedings, which is essential to every court of justice.

The cause was continued to the present term for advisement.

Mr. Chief Justice Marshall delivered the opinion of the court, and after stating the case, proceeded as follows:

Some preliminary objections have been made by the counsel for the defendants, to the manner in which these questions are brought before the court, which are to be disposed of before the questions themselves can be considered.

It is said that the proceeding was ex parte. The law which empowers this court to take cognizance of questions adjourned from a circuit, gives jurisdiction over the single point on which the judges were divided, not over the whole cause. The inquiry, therefore, whether the parties *were properly before the [*21 Circuit Court, cannot be made, at this time, in this place.

The defendants also insist, that the judgment, the execution, and the return, ought to be stated, in order to enable this court to decide the question which is adjourned.

But the questions do not arise on the judgment, or the execution; and, so far as they depend on the return, enough of that is stated to show the court that the marshal had proceeded according to the late laws of Kentucky. In a general question respecting the obligation of these laws on the officer, it is immaterial whether he has been exact, or otherwise, in his observance of them. It is the principle on which the judges were divided, and that alone is referred to this court.

In arguing the first question, the plaintiffs contend that the common law, as modified by acts of Congress, and the rules of this court, and of the Circuit Court by which the judgment was rendered, must govern the officer in all his proceedings upon executions of every description.

One of the counsel for the defendants insists that Congress has no power over executions issued on judgments obtained by individuals; and that the authority of the states, on this subject, remains unaffected by the constitution. That the government of the Union cannot, by law, regulate the conduct of its officers in the service of executions on judgments rendered in the federal courts; but that the state legislatures retain complete authority over them.

The court cannot accede to this novel con- 22*] struction. *The constitution concludes its enumeration of granted powers, with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment.

That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The court, therefore, will only say, that no doubt whatever is entertained on the power of Congress over the subject. The only inquiry is, how far has this power been exercised?

The 13th section of the judiciary act of 1789, c. 20, describes the jurisdiction of the Supreme Court, and grants the power to issue writs of prohibition and mandamus, in certain specified cases. The 14th section enacts, "that all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The 17th section authorizes the courts "to make all necessary rules for the 23*] orderly conducting business *in the said courts;" and the 18th empowers a court to suspend execution, in order to give time for granting a new trial.

These sections have been relied on by the counsel for the plaintiffs.

The words of the 14th are understood by the court to comprehend executions. An execution is a writ, which is certainly "agreeable to the principles and usages of law."

There is no reason for supposing that the general term "writs," is restrained by the words, "which may be necessary for the exercise of their respective jurisdictions," to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction. Were it even true, that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done; and would, consequently, be necessary to the beneficial exercise of jurisdiction. If any doubt could exist on this subject, the 18th section, which treats of the authority of the court over its executions as actually existing, certainly implies that the power to issue them had been granted in the 14th section. The same implication is afforded by the 24th *and 25th sections, both [*24 of which proceed on the idea that the power to issue writs of execution was in possession of the courts. So, too, the process act, which was depending at the same time with the judiciary act, prescribes the forms of executions, but does not give a power to issue them.

On the clearest principles of just construction, then, the 14th section of the judiciary act must be understood, as giving to the courts of the Union, respectively, a power to issue executions on their judgments.

But this section provides singly for issuing the writ, and prescribes no rule for the conduct of the officer while obeying its mandate. It has been contended that the 34th section of the act supplies this deficiency.

That section enacts, "that the laws of the several states, except where the constitution, treaties, or statutes, of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

This section has never, so far as is recollected, received a construction in this court; but it has, we believe, been generally considered by gentlemen of the profession, as furnishing a rule to guide the court in the formation of its judgment; not one for carrying that judgment into execution. It is "a rule of decision," and the proceedings after judgment are merely ministerial. It is, too, "a rule of decision in trials at *common law;" a [*25 phrase which presents clearly to the mind the idea of litigation in court, and could never occur to a person intending to describe an execution, or proceedings after judgment, or the effect of those proceedings. It is true, that if, after the service of an execution, a question respecting the legality of the proceeding should be brought before the court by a regular suit, there would be a trial at common law; and it may be said, that the case provided for by the section would then occur, and that the law of the state would furnish the rule for its decision.

But, by the words of the section, the laws of the state furnish a rule of decision for those cases only "where they apply;" and the question arises, do they apply to such a case? In the solution of this question, it will be necessary to inquire whether they regulate the conduct of the officer serving the execution; for it would be contrary to all principle to admit, that, in the trial of a suit depending on the legality of an official act, any other law would

apply than that which had been previously described for the government of the officer. If the execution is governed by a different rule, then these laws do not apply to a case depending altogether on the regularity of the proceedings under the execution. If, for example, an officer take the property of A, to satisfy an execution against B, and a suit be brought by A, the question of property must depend entirely on the law of the state. But if an exe-
26*] cution issue against A, as *he supposes, irregularly or if the officer should be supposed to act irregularly in the performance of his duty, and A should, in either case, proceed against the officer, the state laws will give no rule of decision in the trial, because they do not apply to the case, unless they be adopted by this section as governing executions on judgments rendered by the courts of the United States. Before we can assume that the state law applies to such a case, we must show that it governs the officer in serving the execution; and, consequently, its supposed application to such a case is no admissible argument in support of the proposition that it does govern the execution. That proposition, so far as it depends on the construction of the 34th section, has already been considered; and we think that, in framing it, the legislature could not have extended its views beyond the judgment of the court.

The 34th section, then, has no application to the practice of the court, or to the conduct of its officer, in the service of an execution.

The 17th section would seem, both from the context and from the particular words which have been cited as applicable to this question, to be confined to business actually transacted in court, and not to contemplate proceedings out of court.

The act to "regulate processes in the courts of the United States," passed in 1789, has also been referred to. It enacts, "that until farther provision shall be made, and except where by this act, or other statutes of the United States,
27*] *is otherwise provided, the forms of writs and executions, except their style, and modes of process, in the circuit and district courts, in suits at common law, shall be the same in each state, respectively, as are now used in the supreme courts of the same.

This act, so far as respects the writ, is plainly confined to form. But form, in this particular, it has been argued, has much of substance in it, because it consists of the language of the writ, which specifies precisely what the officer is to do. His duty is prescribed in the writ, and he has only to obey its mandate.

This is certainly true, so far as respects the object to be accomplished, but not as respects the manner of accomplishing it. In a fi. fa., for example, the officer is commanded to make of the goods and chattels of A. B. the sum of money specified in the writ; and this sum must, of course, be made by a sale. But the time and manner of the sale, and the particular goods and chattels which are liable to the execution, unless, indeed, all are liable, are not prescribed.

To "the forms of writs and executions," the law adds the words, "and modes of process." These words must have been intended to comprehend something more than "the forms of writs and executions." We have not a right to consider them as mere tautology. They have a meaning, and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, but it is also applicable to every step taken in a cause. *It indicates the progressive [*28 course of the business from its commencement to its termination; and "modes of process" may be considered as equivalent to modes or manner of proceeding. If, by the word process, Congress had intended nothing more than a general phrase, which might comprehend every other paper issuing out of a court, the language would most probably have resembled that of the first section, where the word "processes," not "process," is used in that sense. But the introduction of the word "modes," and the change of the word "processes" for "process," seem to indicate that the word was used in its more extensive sense, as denoting progressive action; a sense belonging to the noun in the singular number, rather than in the sense in which it was used in the first section, which is appropriate to the same noun in its plural number.

This construction is supported by the succeeding sentence, which is in these words: "And the forms and modes of proceedings, in causes of equity, and of admiralty, and maritime jurisdiction, shall be according to the course of the civil law."

The preceding sentence had adopted the forms of writs and executions, and the modes of process, then existing in the courts of the several states, as a rule for the federal courts, "in suits at common law." And this sentence adopts "the forms and modes of proceedings" of the civil law, "in causes of equity, and of admiralty and maritime jurisdiction." It has not, we believe, *been doubted that this [*29 sentence was intended to regulate the whole course of proceeding, "in causes of equity, and of admiralty and maritime jurisdiction." It would be difficult to assign a reason for the solicitute of Congress to regulate all the proceedings of the court, sitting as a court of equity, or of admiralty, which would not equally require that its proceedings should be regulated when sitting as a court of common law. The two subjects were equally within the province of the legislature, equally demanded their attention, and were brought together to their view. If, then, the words making provision for each, fairly admit of an equally extensive interpretation, and of one which will effect the object that seems to have been in contemplation, and which was certainly desirable, they ought to receive that interpretation. "The forms of writs and executions, and modes of process in suits at common law," and "the forms and modes of proceedings, in causes of equity, and of admiralty and maritime jurisdiction," embrace the same subject, and both relate to the progress of a suit from its commencement to its close.

It has been suggested, that the words, "in suits at common law," restrain the preceding words to proceedings between the original writ and judgment. But these words belong to "writs and executions," as well as to "modes of process," and no more limit the one than the other. As executions can issue only after a

30*] judgment, *the words "in suits at common law," must apply to proceedings which take place after judgment.

But the legal sense of the word suit adheres to the case after the rendition of the judgment, and it has been so decided.[1]

This construction is fortified by the proviso, which is in these words: "Provided, that on judgments, in any of the cases aforesaid, where different kinds of executions are issuable in succession, a capias ad satisfaciendum being one, the plaintiff shall have his election to take out a capias ad satisfaciendum in the first instance, and be at liberty to pursue the same, until a tender of the debt and costs in gold or silver shall be made."

The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause. The object of this proviso is to enable the creditor to take out a capias ad satisfaciendum in the first instance, and to pursue it until the debt be satisfied, notwithstanding anything to the contrary in the enacting clause. It is perfectly clear, that this provision is no exception from that part of the enacting clause which relates to the "forms of writs and executions," and can be an exception to that part only which relates to the "modes of process." It secures the right to elect the capias ad satisfaciendum, in the first instance, where that writ was at all issuable under the law of the state; and to pursue it until the debt and 31*] *costs be tendered in gold or silver. It relates to the time and circumstances under which the execution may issue, and to the conduct of the officer while in possession of the execution. These, then, are objects which Congress supposed to be reached by the words, "modes of process," in the enacting clause.

This law, though temporary, has been considered with some attention, because the permanent law has reference to it, and adopts some of its provisions. It was continued until 1792, when a perpetual act was passed on the subject. This, whether merely explanatory, or also amendatory of the original act, is the law which must decide the question now before the court.

It enacts, that the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled, "An act to regulate processes in the courts of the United States," except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same.

This act is drawn with more deliberation than the original act; and removes, so far as 32*] respects *the question now under consideration, some doubt which might be entertained in relation to the correctness with which the act of 1789 has been construed. It distinguishes very clearly between the forms of writs, and all other process of the same character, and the forms and modes of proceeding in suits, and provides for both. It is impossible to confound "the forms of writs, execution and other process," which are to be attested by a judge, and to be under the seal of the court from which they issue, with "the forms and modes of proceeding in suits. They are distinct subjects. The first describes the paper which issues from the court, and is an authority to the officer to do that which it commands; the last embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may, then, and ought to be understood, as prescribing the conduct of the officer in the execution of process, that being a part of "the proceedings" in the suit. This is to conform to the law of the state, as it existed in September, 1789. The act adopts the state law as it then stood, not as it might afterwards be made.

A comparison of the proviso to the permanent act, with that which has been introduced into the temporary act, will serve to illustrate the idea that the proceedings under the execution were contemplated in the enacting clause, and supposed to be prescribed by the words, "modes of process," *in the one law, and [*33 "modes of proceeding," in the other.

The proviso to the act of 1789, authorizes the creditor to sue out a capias ad satisfaciendum in the first instance, and to continue it "until a tender of the debt in gold and silver shall be made." The proviso to the act of 1798, omits this last member of the sentence.

The appraisement laws existing in some of the states, authorized a debtor taking in execution to tender property in discharge of his person; and this part of the proviso shows an opinion that the enacting clause adopted this privilege, and an intention to deprive him of it. The enacting clause of the act of 1793, adopts the state law, to precisely the same extent with the enacting clause of the act of 1789; and the omission of the clause in the proviso which has been mentioned, leaves that part of the adopted law which allows the creditor to discharge his person by the tender of property, in force.

The subject was resumed in 1793, in the act, entitled, "An act in addition to the act entitled an act to establish the judicial courts of the United States."

The 8th section enacts, "that, where it is now required by the laws of any state, that goods taken in execution on a writ of fieri facias shall be appraised previous to the sale thereof, it shall be lawful for the appraisers appointed under the authority of the state, to appraise goods taken in execution on a fieri facias issued out of any court of the United States, in the same manner *as if such [*34 writ had issued out of a court held under the authority of the state; and it shall be the duty of the marshal, in whose custody such goods may be, to summon the appraisers in like manner as the sheriff is, by the laws of the state, required to summon them;" "and if the ap-

1.—Co. Litt. 291; 8 Co. 53, b.

praisers, being duly summoned, shall fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement."

This act refers to the appraisement laws of the respective states, which were in force at the time of its passage, without distinguishing between those which were enacted before, and those which were enacted after, September, 1789. The fact, however, is understood to be, that they were enacted previous to that time, generally as temporary laws, and had been continued by subsequent acts. They required, so far as they have been inspected, that appraisers should be appointed by the local tribunals to appraise the property taken in execution. Supposing laws of this description to have been adopted by the act of 1789, the regular mode of proceeding under them would have been, for the courts of the United States, respectively, to appoint appraisers, who should perform the same duty with respect to executions issuing out of the courts of the Union, as was performed by appraisers appointed under state authority, with respect to executions issuing out of the courts of the state. It was unquestionably much more convenient to employ that machinery which was already 35*] in operation, for such a *purpose, than to construct a distinct system; it was more convenient to employ the appraisers already existing in the several counties of a state, than to appoint a number of new appraisers, who could not be known to the courts making such appointments. Accordingly, the section under consideration does not profess to adopt the appraisement laws of the several states, but proceeds on the idea that they were already adopted, and authorizes the officer to avail himself of the agency of those persons who had been selected by the local tribunals, to appraise property taken in execution. Had these laws been supposed to derive their authority to control the proceedings of the courts of the United States, not from being adopted by Congress, but from the vigor imparted to them by the state legislatures, the intervention of Congress would have been entirely unnecessary. The power which was competent to direct the appraisement, was competent to appoint the appraisers.

The act passed in 1800, "for the relief of persons imprisoned for debt," takes up a subject on which every state in the Union had acted previous to September, 1789. It authorizes the marshal to allow the benefit of the prison rules to those who are in custody under process issued from the courts of the United States, in the same manner as it is allowed to those who are imprisoned under process issued from the courts of the respective states.

Congress took up this subject in 1792, and provided for it by a temporary law, which was 36*] *continued from time to time, until the permanent law of 1800. It is the only act to which the attention of the court has been drawn, that can countenance the opinion that the legislature did not consider the process act as regulating the conduct of an officer in the service of executions. It may be supposed, that, in adopting the state laws as furnishing the rule for proceedings in suits at common law, that rule was as applicable to writs of capias ad satisfaciendum, as of fieri facias; and that the marshal would be as much bound to allow a prisoner the benefit of the rules under the act of Congress, as to sell upon the notice, and on the credit prescribed by the state laws.

The suggestion is certainly entitled to consideration. But were it true, that the process acts would, on correct construction, adopt the state laws which give to a debtor the benefit of the rules, this single act of superfluous legislation, which might be a precaution suggested by the delicacy of the subject, by an anxiety to insure such mitigation of the hardships of imprisonment as the citizens of the respective states were accustomed to see, and to protect the officer from the hazard of liberating the person of an imprisoned debtor, could not countervail the arguments to be drawn from every other law passed in relation to proceedings on executions, and from the omission to pass laws, which would certainly be requisite to direct the conduct of the officer, if a rule was not furnished by the process act.

*But there is a distinction between [*37 the cases, sufficient to justify this particular provision. The jails in which prisoners were to be confined did not belong to the government of the Union, and the privilege of using them was ceded by the several states, under a compact with the United States. The jailers were state officers, and received prisoners committed under process of the courts of the United States, in obedience to the laws of their respective states. Some doubt might reasonably be entertained, how far the process act might be understood to apply to them.

The resolution of Congress under which the use of the state jails was obtained, "recommended it to the legislatures of the several states, to pass laws, making it expressly the duty of the keepers of their jails, to receive, and safe keep therein, all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof." The laws of the states, so far as they have been examined, conform to this resolution. Doubts might well be entertained, of permitting the prisoner, under this resolution, and these laws, to have the benefit of the rules. The removal of such doubts seems to have been a prudent precaution.

The case of Palmer v. Allen, 7 Cranch's Rep. 550 may be considered, at first sight, as supporting the opinion that the acts for regulating processes in the courts of the United States, do not adopt the laws of the several states, as they stood in September, 1789, as the rule by *which the officers of the [*38 federal courts are to be governed in the service of process issuing out of those courts; but, upon an examination of that case, this impression will be removed.

In that case, as appears from the statement of the judge who delivered the opinion of this court, Palmer, as deputy-marshal, arrested Allen on a writ sued out of the District Court of Connecticut, by the United States, to recover a penalty under a statute of the United States. Bail was demanded, and, not being given, Allen was committed to prison. For this commitment Allen brought an action of trespass, assault and battery, and false imprisonment, in the state court. Palmer pleaded the

whole matter in justification, and, upon demurrer, the plea was held insufficient. The judgment of the state court was brought before this court by writ of error, and was reversed; this court being of opinion that the plea was a good bar to the action.

The demurrer was sustained in the state court, because, by an act of the legislature of Connecticut, the officer serving process similar to that which was served by Palmer, must, before committing the person on whom it is served to jail, obtain a mittimus from a magistrate of the state, authorizing such commitment; and that court was of opinion that the act of Congress had adopted this rule so as to make it obligatory on the officer of the Federal Court.

This court was of opinion that the plea made out a sufficient justification, and, therefore reversed the judgment of the state court. 39*] This *judgment of reversal is to be sustained, for several reasons, without impugning the general principle that the acts under consideration adopt the state laws as they stood in September, 1789, as giving the mode of proceeding in executing process issuing out of the courts of the United States.

The act of 1792, for regulating processes in the courts of the United States, enacts, that "the modes of proceeding in suits, in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act, entitled, 'An act to regulate processes in the courts of the United States.'"

The indorsement of a mittimus on the writ had never been used, as appears by the opinion in the case of Palmer v. Allen, in the courts of the United States for the district of Connecticut. In connection with this fact, the provision of the act of 1792 subjects the modes of proceeding under the laws of the state, "to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient." The uniform course of that court, from its first establishment, dispensing with this mittimus, may be considered as the alteration in this particular which the court was authorized by law to make.

It may very well be doubted, too, whether the act of Congress which conforms the modes of proceeding in the courts of the Union to those in the several states, requires the agency of state officers, in any case whatever not expressly mentioned. The laws of the Union 40*] may permit *such agency, but it is by no means clear that they can compel it. In the case of the appraisement laws already noticed, it was deemed necessary to pass a particular act, authorizing the marshal to avail himself of the appraisers for the state; and the same law dispenses with the appraisement, should they fail to attend. If the mittimus should be required by the act of Congress, it should be awarded by a judge of the United States, not by a state magistrate, in like manner as an order for bail, in doubtful cases, is indorsed by a judge of the United States, in cases where the state law requires such indorsement to be made by the judge or justice of the court from which the process issues. The mittimus is a commitment for want of bail; and the magistrate who awards it, decides, in doing so, that it is a case in which bail is demandable. But in the particular case of Allen, that question was decided by the law. The act of Congress (act of 1799, c. 128, s. 65) required that bail should be given. No application to the judge was necessary. The officer was compelled to arrest the body of Allen, and to detain him in custody until bail should be given. This act, therefore, dispenses with any order of a judge requiring bail, and with a mittimus authorizing a commitment for the want of bail. The officer was obliged to detain the body of Allen in custody, and this duty was best performed by committing him to jail. These reasons operated with the court as additional to the opinion that the law of Connecticut, requiring a mittimus *in civil cases, was, in its terms, a [*41 peculiar municipal regulation imposing a restraint on state officers, which was not adopted by the process act of the United States, and was a provision inapplicable to the courts of the Union, a provision which could not be carried into effect according to its letter.

The reasons assigned by the court for its decision in the case of Palmer v. Allen, so far from implying an opinion that the process act does not adopt the laws of the several states as giving a rule to be observed by the officer in executing process issuing from the courts of the United States, recognizes the general principle, and shows why that case should be taken out of its operation.

So far as the process act adopts the state laws, as regulating the modes of proceeding in suits at common law, the adoption is expressly confined to those in force in September, 1789. The act of Congress does not recognize the authority of any laws of this description which might be afterwards passed by the states. The system, as it then stood, is adopted, "subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."

This provision enables the several courts of the Union to make such improvements in its *forms and modes of proceeding, as ex- [*42 perience may suggest, and especially to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789.

The counsel for the defendants contend that this clause, if extended beyond the mere regulation of practice in the court, would be a delegation of legislative authority which Congress can never be supposed to intend, and has not the power to make.

But Congress has expressly enabled the courts to regulate their practice by other laws. The 17th section of the judiciary act of 1789, c. 20, enacts, "that all the said courts shall have power" "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States;" and the 7th section of the act, "in addition to the act, entitled, An act to establish the judicial courts of the United States" (act of 1793, ch. 22, s. 7), details more at large the powers conferred by the 17th section of the judiciary act. These sections give the court

full power over all matters of practice; and it is not reasonable to suppose that the process act was intended solely for the same object. The language is different; and the two sections last mentioned have no reference to state laws.

It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and ex- [*43
43*] clusively legislative. *But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details. To determine the character of the power given to the courts by the process act, we must inquire into its extent. It is expressly extended to those forms and modes of proceeding in suits at common law, which were used in the state courts in September, 1789, and were adopted by that act. What, then, was adopted?

44*] *We have supposed, that the manner of proceeding under an execution was comprehended by the words "forms and modes of proceeding in suits" at common law. The writ commands the officer to make the money for which judgment has been rendered. This must be understood as directing a sale, and, perhaps, as directing a sale for ready money. But the writ is entirely silent with respect to the notice; with respect to the disposition which the officer is to make of the property between the seizure and sale; and, probably, with respect to several other circumstances which occur in obeying its mandate. These are provided for in the process act. The modes of proceeding used in the courts of the respective states are adopted for the courts of the Union, and they not only supply what is not fully expressed in the writ, but have, in some respects, modified the writ itself, by prescribing a more indirect and circuitous mode of obeying its mandate than the officer could be justified in adopting. In some instances, the officer is permitted to leave the property with the debtor, on terms prescribed by the law, and in others, to sell on a prescribed credit, instead of ready money.

Now, suppose the power to alter these modes of proceeding, which the act conveys in general terms, was specifically given. The execution orders the officer to make the sum mentioned in the writ out of the goods and chattels of the debtor. This is completely a legislative provision, which leaves the officer to exercise his discretion respecting the notice. That the legislature *may transfer this discretion [*45
to the courts, and enable them to make rules for its regulation, will not, we presume, be questioned. So with respect to the provision for leaving the property taken by the officer in the hands of the debtor, till the day of sale. He may do this, independent of any legislative act, at his own peril. The law considers the property as his, for the purposes of the execution. He may sell it, should it be produced, in like manner as if he had retained it in his personal custody, or may recover it, should it be withheld from him. The law makes it his duty to do that which he might do in the exercise of his discretion, and relieves him from the responsibility attendant on the exercise of discretion, in a case where his course is not exactly prescribed, and he deviates from that which is most direct. The power given to the court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution. To vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle. It is, in all its parts, the regulation of the conduct of the officer of the court in giving effect to its judgments. A general superintendence over this subject seems to be properly within the judicial province, and has been always so considered. It is, undoubtedly, proper for the legislature to prescribe the manner *in which these ministerial offi- [*46
ces shall be performed, and this duty will never be devolved on any other department without urgent reasons. But, in the mode of obeying the mandate of a writ issuing from a court, so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its courts.

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficulty inquiry, into which a court will not enter unnecessarily.

Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems, and accustomed to laws, which, though originating in the same great principles, had been variously modified. The perplexity arising from this state of things was much augmented by the circumstance that, in many of the states, the pressure of the moment had produced deviations from that course of administering justice between debtor and creditor, which consisted, not only with the spirit of the constitution, and,

47*] consequently, with *the views of the government, but also with what might safely be considered as the permanent policy, as well as interest, of the states themselves. The new government could neither entirely disregard these circumstances, nor consider them as permanent. In adopting the temporary mode of proceeding with executions then prevailing in the several states, it was proper to provide for that return to ancient usage, and just as well as wise principles, which might be expected from those who had yielded to a supposed necessity in departing from them. Congress, probably, conceived that this object would be best effected by placing in the courts of the Union the power of altering the "modes of proceeding in suits at common law," which includes the modes of proceeding in the execution of their judgments, in the confidence, that in the exercise of this power, the ancient, permanent and approved system would be adopted by the courts, at least as soon as it should be restored in the several states by their respective legislatures. Congress could not have intended to give permanence to temporary laws of which it disapproved; and, therefore, provided for their change in the very act which adopted them.

But the objection which gentlemen make to this delegation of legislative power seems to the court to be fatal to their argument. If Congress cannot invest the courts with the power of altering the modes of proceeding of their own officers, in the service of executions issued on their own judgments, how will gentle-48*] men defend a delegation *of the same power to the state legislatures? The state assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in Congress, and cannot receive it by delegation. How, then, will gentlemen defend their construction of the 34th section of the judiciary act? From this section they derive the whole obligation which they ascribe to subsequent acts of the state legislatures over the modes of proceeding in the courts of the Union. This section is unquestionably prospective, as well as retrospective. It regards future, as well as existing laws. If, then, it embraces the rules of practice, the modes of proceeding in suits; if it adopts future state laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the state legislatures the power which the constitution has conferred on Congress, and which, gentlemen say, is incapable of delegation.

As construed by the court, this section is the recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made.

But the question respecting the right of the courts to alter the modes of proceeding in suits at common law, established in the process act, does not arise in this case. That is not the point on which the judges at the circuit were divided, and which they have adjourned to this court. The question really adjourned is, whether the laws of Kentucky respecting execu-49*] tions, *passed subsequent to the process act, are applicable to executions which issue on judgments rendered by the federal courts.

If they be, their applicability must be maintained, either in virtue of the 34th section of the judiciary act, or in virtue of an original inherent power in the state legislatures, independent of any act of Congress, to control the modes of proceedings in suits depending in the courts of the United States, and to regulate the conduct of their officers in the service of executions issuing out of those courts.

That the power claimed for the state is not given by the 34th section of the judiciary act, has been fully stated in the preceding part of this opinion. That it has not an independent existence in the state legislatures, is, we think, one of those political axioms, an attempt to demonstrate which would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will, probably, never be advanced. Its utter inadmissibility will at once present itself to the mind, if we imagine an act of a state legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficacy of such an act. It seems not much less extravagant, to maintain that the practice of the federal courts, and the conduct of their officers, can be indirectly regulated by the state legislatures, by an act professing to regulate *the proceedings of the state courts, [*50 and the conduct of the officers who execute the process of those courts. It is a general rule, that what cannot be done directly from defect of power, cannot be done indirectly.

The right of Congress to delegate to the courts the power of altering the modes (established by the process act) of proceedings in suits, has been already stated; but, were it otherwise, we are well satisfied that the state legislatures do not possess that power.

This opinion renders it unnecessary to consider the other questions adjourned in this case. If the laws do not apply to the federal courts, no question concerning their constitutionality can arise in those courts.

Certificate.—This cause came on to be heard on the questions certified from the United States Court for the seventh circuit and district of Kentucky, and was argued by counsel. On consideration whereof, this court is of opinion, that the statutes of Kentucky in relation to executions, which are referred to in the questions certified to this court, on a division of opinion of the said judges of the said Circuit Court, are not applicable to executions which issue on judgments rendered by the courts of the United States; which is directed to be certified to the said Circuit Court.

[*Constitutional Law. Practice.] [*51

THE BANK OF THE UNITED STATES v. HALSTEAD.

The Act of Assembly of Kentucky of the 21st of December, 1821, which prohibits the sale of property taken under executions for less than three-fourths of its appraised value, without the consent of the owner, does not apply to a venditioni exponas issued out of the Circuit Court for the district of Kentucky.

The laws of the United States authorize the courts of the Union so to alter the form of proc-

ess of execution used in the Supreme Courts of the states in 1789, so as to subject to execution lands and other property, not thus subject by the state laws in force at that time.

THIS cause was argued at the last term, by the same counsel with the preceding case of Wayman v. Southard (ante, p. 1), and continued to the present term for advisement.

Mr. Justice **Thompson** delivered the opinion of the court:

This case comes up on a division of opinion of the judges of the Circuit Court of the United States for the district of Kentucky, upon a motion there made to quash the return of the marshal upon a venditioni exponas issued in this cause. The writ commanded the marshal to expose to sale certain articles of property therein particularly specified; and, among other things, two hundred acres of land of Abraham Venable, one of the defendants. The marshal, in his return, states substantially, [*52] that he had exposed to *sale, for cash, the lands mentioned in the writ, no indorsement having been made on the execution, to receive in payment certain bank notes, according to the provision of the laws of Kentucky. That [illegible]nds had been valued at $26 per acre, [illegible]on the offer for sale, no more than fi[illegible]per acre was bid; which, not being [illegible]rths of the appraised value, the land [illegible] sold; thereby conforming his pro[illegible] under the venditioni exponas to the [illegible]ons of the law of Kentucky of the 21st [illegible]December, 1821, which prohibits the sale of property taken under executions, for less than three-fourths of its appraised value, without the consent of the owner.

The motion in the court below was to quash this return, and to direct the marshal to proceed to sell the land levied upon, without regard to the act above referred to. Upon this motion, the judges, being divided in opinion, have, according to the provisions of the act of Congress in such cases, certified to this court the following questions:

1. Whether the said act of the General Assembly of Kentucky, when applied to this case, was, or was not, repugnant to the constitution of the United States; and,

2. Whether, if it were not repugnant to the constitution, it would operate upon, and bind, and direct, the mode in which the venditioni exponas should be enforced by the marshal, and forbid a sale of the land levied upon, unless it commanded three-fourths of its value [53*] when estimated *according to the provisions of the said act.

In examining these questions, I shall invert the order in which they have been certified to this court, because, if the law does not apply to the case so as to regulate and govern the conduct of the marshal, it will supersede the necessity of inquiring into its constitutionality.

It ought to be borne in mind, that this law does not profess, in terms, to extend to marshals, or to executions issued out of the courts of the United States; and it is only under some general expressions, that either can, by possibility, be embraced within the law. And it ought not, in justice to the legislature, to be presumed that it was intended, by any general terms there used, to regulate and control that over which it is so manifest they had no authority.

It cannot certainly be contended, with the least color of plausibility, that Congress does not possess the uncontrolled power to legislate with respect both to the form and effect of executions issued upon judgments recovered in the courts of the United States. The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the laws of the United States. The authority to carry into complete effect the judgments of the courts, necessarily results, by implication, from the power to ordain and establish such courts. *But [*54 it does not rest altogether upon such implication; for express authority is given to Congress to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. The right of Congress, therefore, to regulate the proceedings on executions, and direct the mode, and manner, and out of what property of the debtor satisfaction may be obtained, is not to be questioned, and the only inquiry is, how far this power has been exercised. The critical review taken by the Chief Justice of the various laws of the United States, in the opinion delivered in the case of Wayman v. Southard,[1] very much abridges an examination that might otherwise have been proper in this case. The result of that opinion shows that Congress has adopted, as the guide for the courts of the United States, the processes which were used and allowed in the supreme courts of the several states, in the year 1789. That the 34th section of the judiciary act, which requires that the laws of the several states shall be regarded as rules of decision in trials at common law, in the courts of the United States, has no application to the practice of the courts, or in any manner calls upon them to pursue the various changes which may take place from time to time in the state courts, with respect to their processes, and modes of proceeding under them. The principal *inquiry in this case is, whether the [*55 laws of the United States authorize the courts so to alter the form of the process of execution, which was in use in the Supreme Courts of the several states in the year 1789, as to uphold the venditioni exponas issued in this cause. In the year 1792, when the process act of 1789 was made perpetual, land in the state of Kentucky could not be taken and sold on execution; a law, however, subjecting lands to executions, was passed shortly thereafter in the same year; and the question now arises, whether the Circuit Court of the United States for the Kentucky district, could so alter the process of execution as to authorize the seizure and sale of land by virtue thereof.

For the decision of this question, it is necessary again to recur to some of the acts of Congress which were under consideration in the case referred to, for the purpose of ascertaining whether they do not provide as well for the effect and operation, as for the form of process.

By the 14th section of the judiciary act (2

1.—Ante, p. 20.

L. U. S. 62), power is given to the courts of the United States to issue a writ of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. That executions are among the writs hereby authorized to be issued, cannot admit of a doubt; they are indispensably necessary for the beneficial exercise of the jurisdiction of the courts; and in subsequent 56*] parts of the act, *this writ is specifically named as one to be used, and the control which the court, in certain cases, is authorized to exercise over it, is pointed out. The precise limitations and qualifications of this power, under the terms, agreeable to the principles and usages of law, is not, perhaps, so obvious. It doubtless embraces writs sanctioned by the principles and usages of the common law. But it would be too limited a construction, as it respects writs of execution, to restrict it to such only as were authorized by the common law. It was well known to Congress, that there were in use in the state courts, writs of execution, other than such as were conformable to the usages of the common law. And it is reasonable to conclude that such were intended to be included under the general description of writs agreeable to the principles and usages of law. If it had been intended to restrict the power to common law writs, such limitation would probably have been imposed in terms. That it was intended to authorize writs of execution sanctioned by the principles and usages of the state laws, is strongly corroborated by the circumstance that the process act, passed a few days thereafter, adopts such as the only writs of execution to be used. Can it be doubted, but that, under the power here given in the judiciary act, the courts of the United States, in those states where lands were liable to be taken and sold on execution, would have been authorized to issue a like process? But under this act, the courts are not restricted to the 57*] kind of process used in the state *courts, or bound in any respect to conform themselves thereto. This latitude of discretion was not deemed expedient to be left with the courts; and the act of the 29th of September, 1789 (2 L. U. S. 72), entitled, "An act to regulate processes in the courts of the United States," modifies and limits this power. So far as is material to the present inquiry, it declares that the forms of writs and executions, and modes of process, in the circuit and district courts, in suits at common law, shall be the same in each state respectively, as are now used or allowed in the Supreme Courts of the same. The form of the writ contains substantially directions as to what is to be done under it. Whether mesne or final process, it is on its face so shaped and moulded as to be adapted to the purposes for which it is intended. This act, therefore, adopts the effect as well as the form of the state processes; and as these were various in the different states, it goes further, and adopts the modes of process, which must include everything necessary to a compliance with the command of the writ. The effect and operation of executions must, of course, vary in the different states, according to the different forms which were used and allowed. The mode of proceeding, where lands, for instance, were liable to be taken and sold on execution, was different from that which would be necessary where they were only liable to be extended under an elegit. It was therefore necessary to adopt the modes of process, if the process itself was adopted. This act was temporary; and continued *from time to time, until [*58 the permanent law of the 8th of May, 1792 (2 L. U. S. 299), was passed; the second section of which, so far as relates to the second question, declares that the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits of common law, in the courts of the United States, shall be the same as are now used in the said courts, in pursuance of the act entitled, "An act to regulate processes in the courts of the United States." This section then goes on to prescribe the rules and principles by which the courts of equity, and of admiralty and maritime jurisdiction, were to be governed; and then follows this provision: "Subject, however, to such alterations and additions, as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same." There can be no doubt that the power here given to the courts extends to all the subjects in the preceding parts of the section; and embraces as well the forms of process, and modes of proceeding in suits of common law, as those of equity, and of admiralty and maritime jurisdiction. It will be perceived, that this act presupposes that, in point of practice, the several courts of the United States had carried into execution the provisions of the act of 1789; and had adopted the forms of process, and modes of proceeding thereon, which were then usual, and allowed *in the Supreme Courts of the respective [*59 states; and it ratifies and continues such practice, and extends it to all the proceedings in suits. This course was no doubt adopted as one better calculated to meet the views and wishes of the several states, than for Congress to have framed an entire system for the courts of the United States, varying from that of the state courts. They had in view, however, state systems then in actual operation, well known and understood, and the propriety and expediency of adopting which, they would well judge of and determine. Hence the restriction in the act, now used and allowed in the Supreme Courts of the several states. There is no part of the act, however, that looks like adopting prospectively, by positive legislative provision, the various changes that might thereafter be made in the state courts. Had such been the intention of Congress, the phraseology of the act would doubtless have been adapted to that purpose. It was, nevertheless, foreseen, that changes probably would be made in the processes and proceedings in the state courts, which might be fit and proper to be adopted in the courts of the United States; and, not choosing to sanction such changes absolutely in anticipation, power is given to the courts over the subject, with a view, no doubt, so to alter and mould their processes and proceedings, as to conform to those of the state courts

as nearly as might be, consistently with the ends of justice. This authority must have been given to the courts for some substantial and [*60] beneficial *purpose. If the alterations are limited to mere form, without varying the effect and operation of the process, it would be useless. The power here given, in order to answer the object in view, cannot be restricted to form as contradistinguished from substance, but must be understood as vesting in the courts authority so to frame, mould and shape the process, as to adapt it to the purpose intended.

The general policy of all the laws on this subject is very apparent. It was intended to adopt, and conform to, the state process and proceedings, as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States. They have authority, therefore, from time to time to alter the process, in such manner as they shall deem expedient, and likewise to make additions thereto, which necessarily implies a power to enlarge the effect and operation of the process. The exercise of this power is, to be sure, left in the discretion of the court; but the object and purpose for which it is given is so plainly marked, that it is hardly to be presumed the courts would omit carrying it into execution, without some substantial reason. And, the better to insure this, authority is given to this court, to prescribe to the circuit and district courts such regulations on the subject as it shall think proper. And should this trust not be duly and discreetly exercised by the courts, it is at all times in the power of Congress to correct the evil by more [*61] specific legislation. But so long as *the courts of the United States shall make such alterations or additions in their process of execution as only to reach property made subject to execution from the state courts, there would seem to be no just ground for complaint. When, therefore, the law of Kentucky made land subject to executions, it was carrying into effect the spirit and object of the act of Congress, for the Circuit Court so to alter and add to the form of its execution, as to authorize the taking and selling the debtor's land.

It is said, however, that this is the exercise of legislative power, which could not be delegated by Congress to the courts of justice. But this objection cannot be sustained. There is no doubt that Congress might have legislated more specifically on the subject, and declared what property should be subject to executions from the courts of the United States. But it does not follow, that because Congress might have done this, they necessarily must do it, and cannot commit the power to the courts of justice. Congress might regulate the whole practice of the courts, if it was deemed expedient so to do; but this power is vested in the courts; and it never has occurred to anyone that it was a delegation of legislative power. The power given to the courts over their process is no more than authorizing them to regulate and direct the conduct of the marshal, in the execution of the process. It relates, therefore, to the ministerial duty of the officer; and partakes no more of legislative power than that discre- [*62] tionary authority intrusted *to every department of the government in a variety of cases. And, as is forcibly observed by the court, in the case of Wayman v. Southard, the same objection arises to delegating this power to the state authorities, as there does to intrusting it to the courts of the United States. It is as much a delegation of legislative power in the one case as in the other. It has been already decided, in the case referred to, that the 34th section of the judiciary act has no application to the practice of the courts of the United States, so as in any manner to govern the form of the process of execution. And all the reasoning of the court, which denies the application of this section to the form, applies with equal force to the effect or extent and operation of the process. If, therefore, Congress has legislated at all upon the effect of executions, they have either adopted and limited it to that which would have been given to the like process from the supreme courts of the respective states, in the year 1789, or have provided for changes, by authorizing the courts of the United States to make such alterations and additions in the process itself, as to give it a different effect.

To limit the operation of an execution now, to that which it would have had in the year 1789, would open a door to many and great inconveniences, which Congress seems to have foreseen and to have guarded against, by giving ample powers to the courts, so to mould their process as to meet whatever changes might take place. And if any doubt existed whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, *the practical construction heretofore [*63 given to it ought to have great weight in determining both questions. It is understood that it has been the general, if not the universal practice of the courts of the United States, so to alter their executions as to authorize a levy upon whatever property is made subject to the like process from the state courts; and under such alterations, many sales of land have no doubt been made, which might be disturbed if a contrary construction should be adopted. That such alteration, both in the form and effect of executions, has been made by the Circuit Court for the district of Kentucky, is certain from the case now before us, as, in 1789, land in Kentucky could not be sold on execution. If the court, then, had the power so to frame and mould the execution in this case, as to extend to lands, the only remaining inquiry is, whether the proceedings on the execution could be arrested and controlled by the state law. And this question would seem to be put at rest by the decision in the case of Wayman v. Southard. The law of Kentucky, as has been already observed, does not in terms profess to exercise any such authority; and if it did, it must be unavailing. An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws, any farther than such laws have been adopted and sanctioned by the legislative authority of the United States. And he does not, in such case, act under the authority of the state law, but under that of the United States, *which adopts such law. An execution [*64 is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution, are proceedings in the

suit, and which are expressly, by the act of Congress, put under the regulation and control of the court out of which it issues. It is a power incident to every court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty, and a due execution of the process, according to its command. But we are not left to rest upon any implied power of the court, for such authority over the officer. By the 7th section of the act of the 2d of March, 1793 (3 L. U. S. 367), it is declared that "it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, etc., and to regulate the practice of the said courts respectively, in such manner as shall be fit and necessary for the advancement of justice, and especially to the end to prevent delays in proceedings." To permit the marshal, in this case, to be governed and controlled by the state law, is not only delaying, but may be entirely defeating the effect and operation of the execution, and would be inconsistent with the advancement of justice.

Upon the whole, therefore, the opinion of this court is, that the Circuit Court had authority to alter the form of the process of exe-
65*] cution, so as *to extend to real as well as personal property, when, by the laws of Kentucky, lands were made subject to the like process from the state courts; and that the act of the general assembly of Kentucky does not operate upon, and bind, and direct the mode in which the venditioni exponas should be enforced by the marshal, so as to forbid a sale of the land levied upon, unless it commanded three-fourths of its value, according to the provisions of the said act; and that, of course, the return of the marshal is insufficient, and ought to be quashed. This renders it unnecessary to inquire into the constitutionality of the law of Kentucky.

Certificate.—This cause came on to be heard on the transcript, etc., and the points on which the judges of the Circuit Court of the United States for the seventh circuit and district of Kentucky were divided in opinion, and which were, in pursuance of the act of Congress in that case made and provided, adjourned to this court, and was argued by counsel. On consideration whereof, this court is of opinion, that the act of the general assembly of Kentucky, referred to in the said questions, cannot operate upon, bind and direct the mode in which the said venditioni exponas should be enforced by the marshal, and forbid a sale of the land levied upon, unless it commanded three-fourths of its value when estimated according to the provisions of the said act; and that this opinion renders it unnecessary to decide whether the said act is, or is
66*] *not, repugnant to the constitution of the United States. All which is directed to be certified to the Circuit Court of the United States for the seventh circuit and district of Kentucky.[1]

[Prize. Instance Court. Slave Trade.]

THE ANTELOPE.

The Vice-Consuls of Spain and Portugal, Libelants.

The African slave trade is contrary to the law of nature, but is not prohibited by the positive law of nations.

Although the slave trade is now prohibited by the laws of most civilized nations, it may still be lawfully carried on by the subjects of those nations who have not prohibited it by municipal acts or treaties.

The slave trade is not piracy, unless made so by the treaties or statutes of the nation to whom the party belongs.

The right of visitation and search does not exist in time of peace. A vessel engaged in the slave trade, even if prohibited by the laws of the country to which it belongs, cannot, for that cause alone, be seized on the high seas, and brought in for adjudication, in time of peace, in the courts of another country. But if the laws of the other country be violated, or the proceeding be authorized by treaty, the act of capture is not in that case unlawful.

*It seems that in case of such a seizure, [*67 possession of Africans is not a sufficient evidence of property, and that the onus probandi is thrown upon the claimant, to show that the possession was lawfully acquired.

Africans who are first captured by a belligerent privateer, fitted out in violation of our neutrality, or by a pirate, and then recaptured and brought into the ports of the United States, under a reasonable suspicion that a violation of the slave trade acts was intended, are not to be restored without full proof of the proprietary interest; for in such a case the capture is lawful.

And whether, in such a case, restitution ought to be decreed at all, was a question on which the court was equally divided.

Where the court is equally divided, the decree of the court below is of course affirmed, so far as the point of division goes.

Although a consul may claim for subjects unknown of his nation, yet restitution cannot be decreed without specific proof of the individual proprietary interest.

APPEAL from the Circuit Court of Georgia.

These cases were allegations filed by the vice-consuls of Spain and Portugal, claiming certain Africans as the property of subjects of their nation. The material facts were as follows: A privateer, called the Columbia, sailing under a Venezuelan commision, entered the port of Baltimore in the year 1819; clandestinely shipped a crew of thirty or forty men; proceeded to sea, and hoisted the Artegan flag, assuming the name of the Arraganta,

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NOTE.—Slave Trade.—Congress has the constitutional power to prohibit the foreign slave trade. U. S. v. Gould, 8 Am. Law Reg. 525. What constitutes a violation of the laws against the slave trade. The Plattsburg, post, 133; U. S. v. The Garome, 11 Pet. 73; The Caroline, 1 Brock. Marsh. 384; U.

1.—In the case of the Bank of the United States v. January, also certified from the Circuit Court of Kentucky, the process was a capias, to which the acts of 1789 and 1792 extend in express terms. This court, therefore, determined, that Congress must be understood to have adopted that process as one that was to issue permanently from the courts of the United States, whenever it was in use, at the epoch contemplated by those acts, as a state process. A certificate was directed accordingly.

and prosecuted a voyage along the coast of Africa, her officers and the greater part of her crew being citizens of the United States. Off the coast of Africa she captured an American vessel, from Bristol, in Rhode Island, from which she took twenty-five Africans; she captured several Portuguese vessels, from which she also took Africans; and she captured a Spanish vessel, called the Antelope, in which 68*] she *also took a considerable number of Africans. The two vessels then sailed in company to the coast of Brazil, where the Arraganta was wrecked, and her master, Metcalf, and a great part of his crew, made prisoners; th rest of the crew, with the armament of the Arraganta, were transferred to the Antelope, which, thus armed, assumed the name of the General Ramirez, under the command of John Smith, a citizen of the United States; and on board this vessel were all the Africans which had been captured by the privateer in the course of her voyage. This vessel, thus freighted, was found hovering near the coast of the United States, by the revenue cutter Dallas, under the command of Captain Jackson, and finally brought into the port of Savannah for adjudication. The Africans, at the time of her capture, amounted to upwards of two hundred and eighty. On their arrival, the vessel, and the Africans, were libeled, and claimed by the Portuguese and Spanish vice-consuls reciprocally. They were also claimed by John Smith, as captured jure belli. They were claimed by the United States, as having been transported from foreign parts by American citizens, in contravention to the laws of the United States, and as entitled to their freedom by those laws, and by the law of nations. Captain Jackson, the master of the revenue cutter, filed an alternative claim for the bounty given by law, if the Africans should be adjudged to the United States; or to salvage, if the whole subject should be adjudged to the Portuguese and Spanish consuls.

69*] *The court dismissed the libel and claim of John Smith. They dismissed the claim of the United States, except as to that portion of the Africans which had been taken from the American vessel. The residue was divided between the Spanish and Portuguese claimants.

No evidence was offered to show which of the Africans were taken from the American vessel, and which from the Spanish and Portuguese; and the court below decreed that, as about one-third of them died, the loss should be averaged among these three different classes; and that sixteen should be designated, by lot, from the whole number, and delivered over to the marshal, according to the law of the United States, as being the fair proportion of the twenty-five proved to have been taken from an American vessel.

The Attorney-General for the appellants, stated that the cases of the respective allegations of the Spanish and Portuguese consuls, upon which distinct appeals had been taken, which had been separately docketed in this court,[1] were so blended together, that it was thought most proper to bring on the hearing in both cases at the same time.

Mr. Chief Justice Marshall stated that the appellants, in the argument of No. 12, might refer to the evidence in No. 13; they might invoke it into this cause, so far as it was necessary for their purpose, and the court would take notice *of the facts which appeared [*70 in the other transcript; but that the two causes must come on separately, and in their order. But it has been thought most expedient to report the two arguments together.

The reasons assigned in the appellants' case, for reversing the decrees of the court below were as follows:

1. That the possession of these Africans by the claimants, before the capture by the privateer, affords no presumption that they were their property; that they must show a law entitling them to hold them as property.

2. That if these Africans are to be considered as having been in a state of slavery, when in the Spanish and Portuguese vessels from which they were taken, and if the court shall consider itself bound to restore them to the condition from which they were taken, this can be done only by placing them in the hands of those who shall prove themselves to have been the owners; and that this purpose cannot be answered by restoring them to the consuls of Spain and Portugal.

3. That if some of these Africans were the property of the claimants, yet some were not; and failing to prove which were theirs, the decree is erroneous, in determining by lot a matter which the claimants were bound to establish by proof.

Mr. Key, for the appellants, argued that the facts of the case presented the question to be considered in a point of view, peculiarly favorable *to the appellants. A piratical ves- [*71 sel was found hovering near our coast, apparently meditating a violation of our laws. It was brought, with the persons on board, into the custody of the court, by an act of seizure, not only lawful, but meritorious towards the

1.—The Spanish case as No. 12, and the Portuguese as No. 13.

S. v. Libby, 1 Wood. & M. 221; U. S. v. Catherine, 3 Law Rep. 255; The Wanderer, 1 Sprague, 515; S. C. 13 Law Rep. N. S. 139; U. S. v. Gooding, 12 Wheat. 460; The Emily, 9 Wheat. 381; The Slavers, 2 Wall. 383; U. S. v. LaCoste, 2 Mas. 129; U. S. v. Morris, 14 Pet. 464; The Alexander, 3 Mas. 175; U. S. v. Catherine, 2 Paine, 721; The Porpoise, 2 Curt. C. C. 307; U. S. v. Hann, 8 Am. Law Reg. 663; U. S. Isla de Cuba, 2 Sprague, 26; 9 Op. Att-Gen. 282; U. S. v. Westervelt, 5 Blatchf. 30; Strohm v. U. S. Taney. 413; Williamson v. Daniel, 12 Wheat. 568.

The African slave trade is an offense against the municipal laws of most nations in Europe. 1 Kent's Com. 191.

For a history of the legislation on this subject, see 1 Kent's Com. 192 to 200; Woolsey Int. Law, s. 146. The district courts have jurisdiction under slave trade acts to determine who are the actual captors under the law of Louisiana of March 13, 1818. The Josefa Segunda, post, 312.

The African slave trade, abstractedly considered, is inconsistent with the law of nations; and a claim founded upon it may be repelled in any court where it is asserted, unless the trade be legalized by the nation to which the claimant belongs. U. S. v. La Jeune Eugenie, 2 Mas. 409.

Slaves captured in time of war and brought into the United States, will not be condemned as prize, nor will the court consider them as prisoners of war; the disposition of them is matter of state in which it is not for the judiciary to determine. Almelda v. Certain Slaves, 5 Hall's Am. L. Journ. 459.

claimants, since it rescued what they claim as their property, from the grasp of pirates. If the claimants had not interposed, the course of the court would have been obvious. The illegal and piratical capture by our citizens, gave them no rights; and even if it did, they instantly forfeited them under our laws, which they intended to violate. But the claimants demand restitution of the Africans found on board this vessel, alleging them to be their property, lawfully acquired on the coast of Africa, and piratically taken from them by the Arraganta. This demand is resisted by the government of the United States, upon the ground that the persons in question are not by our laws to be considered as slaves, but as freemen. These laws the court must administer, and not the laws of Spain. Our national policy, perhaps our safety, requires that there should be no increase of this species of population within our territory. The acts of Congress provide that, however brought here, they shall be set free, and sent back to their own native country. The Spanish and Portuguese claimants demand them as their property. We repel the claim, by asserting their right to liberty. The demand of restitution is inconsistent with our policy, as declared in our statutes and other
72*] *public acts.[1] These declarations gave fair warning to those engaged in the slave trade, that though we did not intend to interfere with them on the high seas, yet, if their victims should come within the reach of our laws, we should protect them. These acts constitute a solemn pledge to all nations interested in the suppressions of this inhuman traffic, and to Africa herself, that if the objects of it should seek our protection, where they may lawfully receive it, within our territorial jurisdiction, and at the feet of our tribunals of justice, they should be entitled to that protection. Therefore, admitting the facts as alleged by the claimants, what they claim as justice in a matter of property, cannot be done to them, without disregarding our own policy, endangering our own safety, infringing our own laws, and violating the plighted faith of the country.

But supposing they have a right to insist on restitution of their property, what proof ought to be required, and what proof do they give, of their proprietary interest? It is material, also, here to consider that those human beings, who are claimed as property, come into the jurisdiction of the court, not by any wrongful act of ours, but lawfully, providentially; and are to be treated just as if they were thrown upon our shore by a storm. The Spanish owners show, as proof of property, their previous possession; and the possessor of goods, it is said, is to be presumed the lawful owner. This is true as to goods, because they have universally and nec-
73*] essarily an *owner. But these are men, of whom it cannot be affirmed that they have universally and necessarily an owner. In some particular and excepted cases, depending upon the local law and usage, they may be the subjects of property and ownership: but by the law of nature all men are free. The presumption that even black men and Africans are slaves, is not a universal presumption. It would be manifestly unjust to throw the onus probandi upon them to prove their birthright. Whatever may have once been the condition of Africa, and of the African slave trade, the authentic information on this subject will show that it is now impossible to determine, by the fact of possession, whether the party has been lawfully acquired or not. There must be an overwhelming probability of the lawfulness of such acquisition, to raise such a presumption. This is instanced by the different presumptions allowed in different parts of our own country, in respect to this description of persons. In the southern states, there is the highest degree of probability, from universal practice and well-known law, that such persons are slaves. But in the northern states, the probability is just the contrary, and the presumption is reversed. And in the present state of the slave trade, Africans, in a slave ship on the high seas, are in no such circumstances as to raise a presumption that they are lawfully held in slavery. For if there be a permitted slave trade, there is also a prohibited slave trade; and the prohibition is much more extensive than the permission. *The claimants must, conse- [*74
quently, show something more than mere possession. They must show a law, making such persons property, and that they acquired them under such law. In order to maintain their title, they show the municipal law of Spain; but the operation of that law can only extend throughout the territory of Spain, and to Spanish vessels on the high seas. These persons are now within the jurisdiction of our conflicting law; and they are brought here without any violation of the sovereign rights of Spain. Our own law, which is in force here, must prevail over the law of Spain, which cannot have an extraterritorial operation. There is no reason of comity, or policy, or justice, which requires us to give effect to a foreign law conflicting with our own law on the same subject. Besides, the Spanish law is not only contrary to ours, but is inconsistent with the law of nature, which is a sufficient reason for maintaining the supremacy of our own code. If this municipal law of Spain were allowed to prevail against our law, in our own territory, and before our own courts, the same effect must be given to the law of every other country, under the same circumstances. If, instead of these Africans, there had been taken by the same illegal capture, Spanish slaves, from an Algerine corsair, and afterwards brought in the same manner into our ports, they might, upon the same principle, be reclaimed by the representative of Algiers, who could easily show that, by the law prevailing among the Barbary states, they were slaves.

The municipal law of Spain, then, is insufficient *to maintain the title set by the [*75
claimants. They are driven to the necessity of invoking the aid of the law of nations, as sanctioning their asserted right to property in these human beings. But if the law of nations is silent upon this subject; if it neither sanctions nor forbids the traffic in African slaves; if it is municipal law alone which determines in what manner private property is acquired and lost, then the claimants have no law to stand upon in asserting their claim. Supposing, however, this idea not to be correct, it is incumbent on the claimants to show, positively, that the

1.—Vide Appendix, Note I, a.

slave trade, as now practiced, has the sanction of the law of nations, as now understood by the civilized and Christian nations of the world. That it once had that sanction, may, perhaps, be admitted; but it must also be admitted that there was once a time when it had not that sanction. The permission began by general assent and usage. The King of Spain, in the preamble to his edict of 1817, admits that it was incorporated into the code of nations as an exception to the general principles on which that code is founded.[1] When the practice was adopted by the general, not universal assent, of civilized nations, it became a part of the law of nations. In the same manner, a general, and not a universal denunciation of the practice, is sufficient to make it cease to be a part of the law of nations. In the great moral and legal revolution which is now going on in the 76*] world respecting this trade, the *time must come when it will cease to have a legal existence by the universal concurrence of nations. In the meantime, the question must be discussed, as it arises under various circumstances, until we reach the desired period when the universal sentiment of the wise and the good shall become the rule of conduct sanctioned by authority capable of enforcing it. All the modifications and improvements in the modern law of nations have been gradually introduced. The writers upon that law explain the manner in which these changes have been made and sanctioned.[2] The documents to be laid before the court will show the present state of the world's opinion and practice upon this subject, and will prove that the time is at hand, if it has not already arrived, when the slave trade is not only forbidden by the concurrent voice of most nations, but is denounced and punished as a crime of the deepest die. This is shown by the declarations contained in the treaties of Paris and Ghent; by the acts and conferences at the congresses of Vienna, London, and Aix la Chapelle; by the treaties between Great Britain, and Spain, and Portugal; by the negotiations between the United States and Great Britain; and by the reports of the committees of the House of Commons, and the House of Representatives in Congress. We contend, then, that whatever was once the fact, this trade is now condemned by the general consent of nations, who have publicly 77*] *and solemnly declared it to be unjust, inhuman and illegal. We insist, that absolute unanimity on this subject is unnecessary; that, as it was introduced, so it may be abolished, by general concurrence. This general concurrence may not authorize a court of justice to pronounce it a crime against all nations, so as to make it the duty of all to seek out and punish offenders, as in the case of piracy. No decision has yet gone that length, nor is it necessary in this case to contend for such a principle. But in a case where the Africans are lawfully brought before a court of the law of nations, and are claimed as property, by those who must be considered as actors in the cause, and who must, consequently, prove their title as alleged, the fair abstract question arises, and their claim may well be repudiated as founded in injustice and illegality.

The learned counsel here commented upon the different cases in England and this country, with the view of reconciling them, and showing that they were all consistent with the principle he maintained. In the cases of The Amedie,[3] The Fortuna,[4] and The Donna Marianna,[5] the ship and persons on board were lawfully brought into the custody of the court, either as being captured jure belli, or taken under circumstances which warranted a seizure as for a municipal offense. The claims were accordingly rejected, upon the ground of the unlawfulness of the trade. In the subsequent cases of The Louis,[6] and of Madrazo *v. Willes,[7] [*78 the original seizure was held to be unjustifiable, and consequently restitution was decreed. But none of the important principles settled in the other cases, are overruled in these cases, which turn exclusively upon the point that the wrong first done in the unlawful seizure must be redressed. In the case of La Jeune Eugenie,[8] the claim of a French subject was rejected, as being founded in a breach of the municipal law of his own country, and the subject-matter in controversy was delivered up, with the consent of the executive government of this country, to the sovereign of France, to be dealt with as he should think fit. All these latter cases show, that where the court has rightfully obtained possession of human beings, who are claimed as slaves, it will not restore them to their alleged proprietors, although it may not go so far as to punish those who are engaged in the trade, by the confiscation of the vehicle in which it is carried on.

But another view may be taken of this subject. The King of Spain, in his edict of 1817 (before referred to), informs us, that the slave trade originated in motives of humanity, and was intended to avoid the greater evils growing out of the barbarous state of the African continent. Suppose this to be a just representation, and that the trade formerly consisted merely in the transportation of persons who were slaves in Africa, to be slaves elsewhere; it is at last discovered, by the *evidence tak- [*79 en before the British House of Commons in 1790, by the investigations of the African Institution, and by the reports of the British and American naval officers, to have entirely changed its character. Slaves are no longer acquired merely by capture in war, or by trade; but free persons are seized and carried off by the traders and their agents. Wars are instigated by them, for the mere purpose of making slaves. The persons thus enslaved are clandestinely brought away, under circumstances of extreme cruelty, aggravated by the necessity of concealment, and smuggled into every country where the cupidity of avarice creates a demand

1.—Vide Appendix, Note I. b. p. 82.

2.—Vattel, Droit des Gens, Chap. Prelim. s. 25-27, 56, liv. 1. ch. 23, s. 293; Burlam. 165; Martens, 1. 9, s. 5, l. 11 s. 1.

3.—Acton's Rep. 240.

4.—1 Dodson's Rep. 81.

5.—Id. 91.

6.—2 Dodson's Rep.

7.—3 Barnwell and Ald. 353. The several cases cited will be found in the Appendix to the present volume of these reports, g. p. 40-48.

8.—2 Mason's Rep.

for these unhappy victims. May it not be asked, is this trade? Is it lawful? Has it not so changed its nature as to have become prohibited?

Again; supposing the slave trade not yet to have become generally illegal; still it has become so to the subjects of those countries who have issued declarations against the trade. To such the argumentum ad hominem may be fairly applied, as Sir W. Scott says in The Louis. Spain and Portugal are among the countries who have issued the most formal declarations against this trade, although they have not yet taken the most effectual measures to suppress it. By the treaties between these powers and Great Britain, they have stipulated the entire abolition of the slave trade north of the equator. But their authentic declarations pronounce it to be unlawful and inhuman, wherever carried on; and the permission to continue it south of the line can 80*] only *affect them, and their subjects, and the powers with whom they have made such treaties. Their subjects cannot avail themselves of the permission, so far as other nations are concerned. Those nations have a right to look to the declarations as authentic evidence of the understanding of the Spanish and Portuguese governments, as to the law of nations.

But suppose they can avail themselves of the permission to trade in slaves within the limits prescribed by the treaties. The onus probandi is thrown upon them to bring themselves within those limits. This they have failed to do by satisfactory evidence.

And even if the law was in their favor, and they had shown the trade in which they were engaged to be within the limits permitted by the treaties, such a general claim could not be given in by the consuls of Spain and Portugal for their fellow-subjects. The court has a right to the oath of the individual owners, as to their proprietary interest, and to explain the other circumstances of the case. As to the Portuguese claim, the owners are still unknown, and it is impossible that restitution can be made to the consul, or even to his government, merely upon evidence that the Africans were taken from a vessel sailing under the Portuguese flag and papers, without any specific proof of the individual proprietary interest.

Lastly; if some of those Africans were the property of the claimants, some were not; and, failing to identify their own, they are not enti- 81*] tled *to restitution of any as slaves, since among them may be included some who are entitled to their freedom. The proof, by lot, which was substituted by the court below for ordinary legal proof, is not satisfactory, especially where a claim to freedom conflicts with a claim to property.

Mr. Berrien, for the respondents, stated that a reference to the transcript would show, that of all the parties to this cause in the court below, the United States, and the Spanish and Portuguese vice-consuls, are alone before this court; and that the United States, acquiescing in all the residue of the decree, have appealed from only so much as directs restitution to the Spanish and Portuguese vice-consuls.

The allowance of these claims is resisted on various grounds.

One prominent proposition pervades the whole of the opposite argument. Unless we can meet and resist it, we must submit to be its 272 victims. It asserts, that the United States have acquired the possession of these negroes lawfully, without wrong; that with the possession so acquired, they have incurred the obligation to protect them; that all presumptions are in favorem libertatis; and, whatever the laws of other countries may tolerate or ordain, having ourselves declared the slave trade to be contrary to the principles of humanity and justice, we are bound, prima facie, to hold that there can be no property in a human being.

*This proposition suggests the follow- [*82 ing inquiries:

1. Was the possession lawfully acquired?

2. If so, does the right which is asserted necessarily follow?

3. With a view to their own peculiar condition, can the United States exercise such a power?

1. The lawfulness of the possession will be determined by considering the capacity of the seizing officer to make the seizure, in connection with the liability of the thing seized.

The seizure was made by John Jackson, commander of the revenue cutter Dallas, belonging to the district of Georgia; and was made off the coast of Florida, while that was yet a province of Spain. The right of Captain Jackson must have resulted from the authority given by his commission, and the laws of the United States.[1]

It did not result from the act of 1799, providing for the establishment of revenue cutters; for this only authorizes them to board vessels on the coasts of their respective districts, or within four leagues thereof; nor from the acts forbidding the slave trade, for these are directed only against vessels of the United States, or foreign vessels intending to violate our laws by introducing negroes into the United States. The President is, indeed, authorized to employ the armed vessels of the United States, to cruise on the coasts of the United States, or territories thereof, or of *Africa, or elsewhere, and [*82 to instruct them to bring in all vessels found contravening those acts. But the laws of the United States can operate only on American vessels, on American citizens on board of foreign vessels, or on such vessels within the limits and jurisdiction of the United States. Besides, it is not pretended that the revenue cutter Dallas had been selected as a cruising vessel under these acts, or that Captain Jackson had received any instructions from the President of the United States. Neither can the seizor derive any aid from the acts to preserve the neutral relations of the United States; for although the courts of the United States will restore property taken in violation of these acts, when it is found within their jurisdiction, yet they do not authorize the cruisers of the United States to rove the ocean in search of objects on which that jurisdiction may be exercised.

So far, then, as it depends on the official character of the seizor, the act was lawless.

The thing seized was a Spanish vessel, in the possession of persons, some of whom were American citizens, who had captured it jure belli, under the flag of Artegas, or of Venezuela, and in a vessel which had been fitted out, or whose armament had been increased, in the United States.

1.—The Louis, 2 Dodson's Rep. 238.

The right to seize for a violation of the acts to preserve the neutral relations of the United States, has been already spoken of; but the adverse argument considers these captors as pirates, and asserts the right of every individual 84*] to war *against them as enemies of the human race. The answer is,

1. The seizure by Captain Jackson was not made on that ground. The libel alleges the seizure to have been made for a violation of the act of 1818, prohibiting the slave trade.

2. The courts of the United States have declined to decide that such an act would amount to piracy.

3. To put himself in a situation to make this seizure, Captain Jackson abandoned the duty enjoined upon him by his commission, and the laws of the United States, by leaving the limits intrusted to his vigilance. If he had lost his vessel, could he have justified himself before a court-martial?

4. But if these men were pirates, and lawfully brought in, then the Spanish property was, from the moment of its introduction, under the protection of the ninth article of the treaty of San Lorenzo el Real.

Neither have the United States acquired any rights to enforce against these foreigners their own speculative notions on this subject, in consequence of their being actors. All parties are actors in a court of admiralty, and these parties only became so after their property had been taken into the custody of the marshal, and at the suit of the United States. But they were entitled, under the treaty, to have restitution of their property, without being put to other proof than that it was found in their possession.

2. If the possession had been lawfully ac- 85*] quired, *could the court refuse restitution on the ground suggested?

The great case on this subject, is that of The Louis.[1] Our adversaries agree to refer the question to its decision.

It is a singular mistake, to suppose that Sir W. Scott directed restitution solely on the ground of the unlawfulness of the seizure; and thence to infer, that if the seizure had been lawful, he would have condemned. On the contrary, admitting the lawfulness of the seizure, he decides expressly that restitution must, notwithstanding, be awarded.

3. With a view to their own peculiar situation, could the United States maintain the doctrines contended for? It is said, that, having promulgated our policy in relation to this subject, we have thereby given a warning to slave traders, which they are bound to respect—a pledge to the rest of the world which we are bound to redeem. But what is this policy, which we have thus notified to the world? It is to be found in our laws, inhibiting the slave trade. The penalties of these are denounced against our own vessels, and our own citizens, who shall engage in this traffic anywhere; and against foreigners and their vessels, who pursue it for the purpose of introducing negroes into the United States. There is no warning to the subjects of Spain and Portugal, quietly pursuing this traffic under the sanction of their own laws.

86*] *The notion of the pledge is equally visionary. I find it difficult to form a conception of a pledge, which the party making it can at any time capriciously recall; and yet no one doubts that an act of the American Congress can, at any moment, throw open the slave trade.

These considerations apart, would it become the United States to assume to themselves the character of censors of the morals of the world on this subject; to realize the lofty conception of the adverse counsel, and consider themselves as the ministers of heaven, called to wipe out from among the nations the stain of this iniquity? Might not the foreign claimant thus rebuke them, in the strong language of truth? For more than thirty years you were slave traders; you are still extensively slave owners. If the slave trade be robbery, you were robbers, and are yet clinging to your plunder. For more than twenty years this traffic was protected by your constitution, exempted from the whole force of your legislative power; its fruits yet lay at the foundation of that compact. The principle by which you continue to enjoy them, as protected by that constitution, forms a basis for your representatives, is infused into your laws, and mingles itself with all the sources of authority. Relieve yourselves from these absurdities, before you assume the right of sitting in judgment on the morality of other nations. But this you cannot do. Paradoxical as it may appear, they constitute the very bond of your union. The shield of your constitution protects them from your touch.

*We have no pretense, then, to enforce [*87 against others our own peculiar notions of morality. The standard of morality, by which courts of justice must be guided, is that which the law prescribes.[2]

The learned counsel here proceeded to examine the evidence of proprietary interest, and insisted that (besides the other testimony) the official interposition of the Portuguese government supplied the place of proof of individual interest, and established the legality of the traffic.[3]

The objection to the decree of the Circuit Court, on the ground that the distribution of the negroes was directed to be made by lot, was answered by the following considerations:

1. It appearing that the negroes found on board the Antelope consisted of three distinct parcels, taken from American, Spanish, and Portuguese vessels, the obligation to protect the former was equal to, and not greater than, that which required the restoration of the latter. The capture by Smith being considered, as in the argument of our adversaries it is considered, as piratical, the right of the Spanish claimant to restoration under the treaty was the primary right, as founded on the treaty which is the supreme law; and in the fair construction of that treaty, it extended to everything found on board the Spanish vessel. Then the proof which should diminish that right was to be furnished by those who sought to diminish it.

*2. It being ascertained that these ne- [*88 groes were property, they were liable to distribution as other property; and, notwithstanding the assertion to the contrary, the lot is often

1.—2 Dodson's Rep. 243, 249, 264.

6 L. ed.

2.—The Louis, 2 Dodson's Rep. 249.

3.—The Bello Corrunes, 6 Wheat. Rep. 152.

and legally resorted to, to separate undivided interests.

3. As between the Spanish and Portuguese claimants, no question on this point can arise here, because they have not appealed.

4. The United States cannot question this part of the decree, because they have not only not appealed from it, but have actually proceeded to enforce it ex parte, and have received restitution by lot of the negroes taken from the American vessel.

The United States have, then, derived no right to refuse restitution, from the manner in which they have acquired possession.

They are not entitled, by law, or the stipulations of treaty, to apply their speculative notions of morality to the subjects of Spain and Portugal.

They have ill-grounded pretensions in reference to this ill-fated subject, to set themselves up as the moral censors of the civilized world. Here is evidence of a proprietary interest to satisfy the mind beyond a reasonable doubt, and it is wholly uncontradicted; and the passport of the King of Spain, and the interposition of the government of Portugal, show, if any necessity for it, the legality of the traffic, as to their respective subjects.

On what ground, then, is restitution refused? 89*] *It is said, the slave trade is unlawful, contrary to the principles of justice and humanity, and that no right can be derived from so nefarious a traffic.

Our inquiry is, by what law, which this court is competent to enforce, is it inhibited?

1. Is it contrary to the law of nations?

2. Is it contrary to the laws of the sovereigns of the claimants; and can this court refuse restitution for that cause?

3. Is it contrary to the laws of the United States; and can those laws be enforced against these claimants?

1. What is the slave trade, considered as a subject on which the law of nations can operate. Slavery exists, and has from all time existed, in Africa, and in many other countries. Where it exists, there will, of course, be an interior traffic in slaves, which the law of nations cannot touch. It is only on the transportation of negroes between two countries mutually tolerating slavery, that this operation is contended for. But this transportation is but an incident to the original sin of slavery. If humanity nerves the arm of the law, why is its force spent on the incident? Why is it powerless in relation to the principal wrong?

If the traffic in slaves be considered as increasing the number of victims, by affording a market for them, what is it then but an aggression by the subjects of one nation on the rights of another? If the nation forbids it, the offender is punished by the municipal law; if the 90*] nation *permits it, she herself becomes the aggressor. In either case, how does it concern other nations?

The law of nations may be defined to be a collection of rules deduced from natural reason, as that is interpreted by those who adopt them, and resting in usage, or established by compact, for regulating the intercourse of nations with each other.

Rights and obligations are interior between sovereign and people, and are regulated by the municipal law; or exterior, between nations considered as moral persons; and these are regulated by the law of nations.

Now, the slave trade is not contrary to the natural law of nations, because, until recently, it was universally tolerated and encouraged. It is not contrary to the positive law of nations, because there is no general compact inhibiting it; and nothing is more certain, than that the usage, or compact, even of a majority of nations, cannot produce rights or obligations among others. To what other evidences of the law of nations can we resort, except those of usage and compact; the former interpreting the rules of natural reason, the latter stipulating those of positive institution?

From this general view, it would seem that the slave trade is untouched by the law of nations. Let us render our inquiries more particular.

Is this traffic considered to be contrary to the law of nations, by the statesmen and jurists of Europe and America?

*We are all aware of the conferences [*91 of the European powers on this subject, at Vienna, at Aix la Chapelle, and at London. But all the efforts of Great Britain to have it so denounced were ineffectual. The marginal references point to the answers of the several powers respectively, and to the note and the answer of Lord Castlereagh; and all of them distinctly show that the inhibiting of this traffic finds no place in the code of international law.[1]

The reports of various committees of Congress in the United States, also clearly prove that, in the view of American statesmen, this traffic is not inhibited by the law of nations, since the object of them all is to devise means by which it may be so inhibited.[2]

After all, these conferences are only valuable as evidence of opinion, since they could not effect any change in the law of nations. On this subject the opinion of Sir W. Scott is distinctly expressed, in the case of The Louis.[3]

Among jurists, we find the judges of the K. B. in England, denying that the slave trade is contrary to the law of nations.[4]

And the same doctrine is announced by Sir W. Scott, after the most elaborate investigation, in the case of The Louis.[5]

*The only opposing cases are those of [*92 The Amedie[6] and La Jeune Eugenie.[7]

And, first, of The Amedie. It is most obvious that this case has not been considered by the statesmen of Europe as establishing the doctrine contended for. The conferences to which we have just referred, look to a general compact among nations as the only mode by which this traffic can be inhibited, and proposed, by general suffrage, to declare it piracy,

1.—4th Report African Institution, Russia, 20, 21; France, 23, 24; Austria, 26; Prussia, Ib; Lord Castlereagh, 19, 20, 31, 32.

2.—Vide Appendix Note I, a, p. 1–32.

3.—2 Dodson's Rep. 252, 253.

4.—Madrazo v. Willis, 3 Barnwell and Ald. 353.

5.—2 Dodson's Rep. 210.

6.—1 Acton's Rep. 240.

7.—2 Mason's Rep. 409.

admitting, at the same time, that their views may be defeated by the refusal of any one state. But if the British ministry had so considered this case, they would most surely have availed themselves of it in these conferences. That it was not so viewed by Sir W. Scott is most certain; or, bound as his judicial conscience was by the decision of the Court of Appeals, he could not have pronounced the opinion given in the case of The Louis. The argument in the case of The Amedie is founded entirely on the effect of the British act of Parliament. Before the passing of that act, the learned judge declares, that no court in England could have pronounced the slave trade to be illegal; since it is prima facie illegal everywhere, and on principles of universal law a claimant is not entitle to be heard in any court. We inquire,

1. If, before the enactment of the British act of Parliament, the slave trade was not forbidden, how that act could have changed the uni-93*] versal law? It is said, that that act, proprio vigore, rendered it, prima facie, illegal everywhere, incapable abstractly of having a legal existence. Are these not mere caballistic terms, too occult for the apprehension of a legal mind?

Consider the operation ascribed to this act of Parliament. Jurisdiction, derived from place, is confined to the territory of the sovereign, from the person, to his own subjects; but here is an act of the British Parliament, which, according to Sir Wm. Grant, operates locally throughout all space, and personally over every individual in the various communities of nations. Sir W. Scott holds a doctrine directly opposite to this, in the case so often cited.[1] It did not arise from the locality of the tribunal, for it was solemnly held, in the case of The Maria[2] (the Swedish convoy), that this could not influence its decisions.

2. By what rule, other than that of sic volo, sic jubeo, did the master of the rolls throw the burthen of proof on the claimants? It is said, because the slave trade is illegal, contrary to justice and humanity; that human beings are not the subjects of property. The obvious answer is, this is a petitio principii. It assumes the very question in controversy. The case admits, and so the fact was, that up to the time when this act was passed, with the exception of America, this traffic was everywhere lawful; 94*] that property *was acquired by it. If at that time it had become otherwise, the change must have been effected by some positive act. The assertion that such an act existed, was an affirmative proposition. He who made it was bound to prove it. Such is the opinion of Sir W. Scott, and of Sir. J. M'Intosh.[3] Nay, in the case of La Jeune Eugenie, it is admitted that a prohibitory act of the country of which the claimant is a subject must concur with the general law of nations, to authorize the forfeiture. Now, if the onus be on the claimant, it is certainly not necessary for the libelant to show a prohibitory act; all that in such case is essential is, that the claimant should fail to prove a permissive one. The opinion of Sir W. Scott, in relation to this case, will be found in The Fortuna, The Diana and The Louis.[4]

3. How can even the rigid rule laid down by that court be availed of? The court expressly decline to decide what will be the effect of the proof, it made, declaring that a claimant, under such circumstances, is not entitled to be heard in any court.[5] Of what avail, then, is the proof?

4. I find a difficulty in understanding what principles of the law of nations are not general in their operation, and yet the inhibition of the slave trade is said not to be one of the general principles of that law.

5. The argument seems to me to be self-destructive. *It admits that this novel [*95 principle cannot be enforced against the subjects of those nations whose municipal regulations permit it. One of two things seems to follow. Either the slave trade is not contrary to the law of nations, or the municipal law may permit what the law of nations forbids. Can any single nation control the universal law? strike piracy from the law of nations? or deprive a belligerent of the rights of contraband, or of blockage? The learned judge, in the case of La Jeune Eugenie, thus solves this difficulty: If a nation permits this traffic, the wrong is confined to the nation injured; and other nations are neither bound nor permitted to interfere. But the question recurs, what is the consequence, if a nation inhibit it? The offense must be against the power inhibiting, not, surely, against other nations, who, ex concessis, had no power either to inhibit or to permit. On this point, also, we are fortified by the opinion of Sir W. Scott.[6]

The case of The Amedie may, then, we think, be considered as an experiment; a trial of the legal intelligence of Europe and America, and affords no safe guide for the decisions of this tribunal.

It is obvious to remark, that the case of La Jeune Eugenie is referred to by our adversaries under circumstances of some singularity. The principles advanced by the learned judge, in delivering his opinion in that case, are maintained *by our opponents, while they [*96 revolt from the conclusion to which those principles conducted him. What we ask in this case, is precisely what was done in the case of La Jeune Eugenie, that the property should be restored to the consular agents of Spain and Portugal; and yet that very case is relied upon as an authority against this concession.

The proposition, that the slave trade is inconsistent with the law of nations, is maintained on the following, among other grounds, in the case of Le Jeune Eugenie:

1. Its accumulated wrongs, and consequent inconsistency with that code.

"It is of this traffic, in the aggregate of its accumulated wrongs, that I would ask," says the learned judge, "if it can be consistent with the law of nations?"

To us, the inquiry seems to be vain and nugatory. The gravamen of the question is equally applicable to any other act of atrocity, and to

1.—2 Dodson's Rep. 289.

2.—1 Rob. Rep. 350.

3.—2 Dodson's Rep. 242; 27 Eng. Parl. Deb. 253, 254.

4.—1 Dodson's Rep. 85, 95; 2 Dodson's Rep. 210, 260.

5.—La Jeune Eug. 2 Mason's Rep. 409.

6.—2 Dodson's Rep. 251.

any other code of laws. Murder, robbery, etc., etc., are attended with accumulated wrong. They, too, are inconsistent with the principles of justice and humanity, which lay at the foundation of international law. Do the laws which forbid these crimes, therefore, form part of that universal law? are they governed by it, or punished by it?

2. Again, it is said, the law of nations is deduced from the general principles of right and justice; that whatever can be deduced from these principles as applicable to nations, 97*] and to the *nature of moral obligation, exists theoretically in the law of nations, and may be enforced.

It seems to us that nothing is gained by the first of these propositions. The principles of right and justice, it is most certain, are capable of being applied equally to the law of nations and to the municipal law; to nations and to individuals. But the question here is, whether, in their application to the concerns of individuals, by the act of one or more nations, or of any number less than the whole, they do not rather constitute a part of the municipal law of the nations applying them, than of the general law of nations.

The second proposition appears to us to be too broad. Without doubt, it is the right and duty of every nation to prohibit crimes, and among others this crime. It is entirely consistent with moral obligation that they should do so. What then? Is the act of a single nation, fulfilling this duty, less simply municipal, because the morality of the act which it performs is of universal obligation, equally affecting all nations?

3. It is urged, moreover, that the slave trade is in violation of some of the first principles which ought to govern nations. The assertion is unquestionable. But may not the same thing be said of many acts, which are confessedly the objects of municipal regulations alone? Smuggling often begins in perjury. It is prosecuted in violation of the duty of the citizen. Its tendency is to corrupt the morals of the community. It sometimes eventuates in murder. 98*] Is it an *offense cognizable by the law of nations as an infraction of that law?

For these reasons, we submit to the court that restitution cannot be refused on the ground that the slave trade is contrary to the law of nations.

2. Is the traffic contrary to the laws of Spain and Portugal; and can the court enforce those laws by refusing restitution?

1. The preceding arguments, the decision in The Louis, and even that of La Jeune Eugenie, are referred to, to prove that, as to this point, the burthen of proof is on the appellants. They must show a prohibitory act.

2. If the burthen of proof be with us, we have furnished the evidence. The royal passport, and the order of the Portuguese government, are decisive on this point. The sanction of the colonial Governor was considered sufficient in the case of The Diana.[1]

3. The laws of Spain and Portugal are merely municipal, and, from the very nature of their provisions, incapable of enforcement by the courts of the United States.[2]

4. Each sovereign has a right to the forfeiture, from the time of the commission of the act. He has the right of remission, and of pardon. Especially he has a right to decide, in his own tribunals, on the conduct of his own subjects, in relation to his own laws.[3] A monarch, or a nation, *stripped of these nec- [*99 essary attributes of sovereignty, would cease to be sovereign. The attempt by the United States to enforce these laws would be an usurpation.

3. Can this court apply the laws of the United States to this claim of foreign subjects?

1. The question has been answered in the preceding argument. The laws of the United States are strictly municipal, confined to citizens of the United States, to persons committing offenses on board vessels of the United States, to foreigners seeking to introduce negroes into the United States. The claimants are not within these provisions.

2. Though the law of the United States has made this traffic piracy, it has not, therefore, made it an offense against the law of nations. The jurisdiction of the Circuit Court of the United States is exclusive for the punishment of this offense. Besides, no particular nation can increase or diminish the list of offenses punishable by the law of nations.[4]

Such, in the opinion of the judge of the High Court of Admiralty in England, is the only legitimate operation of the British act of Parliament on this subject.[5] Such, in the opinion of Congress, is the necessary limitation of ours.[6]

Mr. C. J. Ingersoll, on the same side, insisted *that there was no evidence in the cause [*100 which sustained the allegation that this vessel was found hovering on the coasts of the United States when she was seized; and if it were so, that would furnish no sufficient reason for refusing restitution to the Spanish and Portuguese claimants, who were unaffected by the misconduct of the piratical captors of their property.[7] Here the capturing vessel was illegally equipped in our ports, and the libelants have established their claim to the property in question under the laws of their own country. The original capture was not only made in violation of our neutrality, but was an act of piracy, and the duty of making restitution becomes imperative under the treaty with Spain. It appears from the treaties and edicts which have been referred to, that the slave trade was then tolerated by Spain and Portugal south of the equator; and, consequently, the presumption is, that Africans, obtained within the permitted limits, are legitimately held as slaves. This presumption is as strong as that which prevails in those states of the Union where slavery exists. None of the judicial decisions cited have gone the length of asserting that the nations who have prohibited the slave trade can compel others to join in that prohibition. The case of The Amedie itself, as explained by Sir W. Scott in the The Diana,[8] does not extend

1.—1 Dodson's Rep. 95.
2.—4th Report Am. Inst. Abstract, etc. 26.
3.—2 Dodson's Rep. 256.
4.—Rutherf. 488, 491.
5.—2 Dodson's Rep. 239.
6.—Vide Appendix. Note I. a, report of committee of the House of Representatives, 1824, 1825.
7.—The Josefa Segunda, 5 Wheat. Rep. 338.
8.—1 Dodson's Rep. 98, 99.

the principle by which the general prohibition 101*] *is to be enforced in the courts of another country, to the case of claimants engaged in the trade permitted by the law of their own country.

Is, then, the slave trade contrary to the law of nations?

That law is a body of political ethics applied to nations. Not being reduced to a written code, we must seek for it in the elementary writings of publicists; in judicial precedents; and in general usage and practice.[1] Sir W. Scott adds to these ample sources the more limited and appropriate standard of ancient and admitted practice, not only by treaties, but by the laws, ordinances and formal transactions of civilized States.[2] The great men who drew up the report upon the Silesia loan, declare the law of nations to be "founded on justice, equity, convenience, and the reason of the thing, and confirmed by long usage."

As to the judicial precedents, they neutralize each other, if, indeed, the authority of the original case of The Amedie be not entirely subverted by that of Madrazo v. Willes, and the admirable judgment of Sir W. Scott in The Louis. To the new conventional law which is now attempted to be established in the world, the United States have not yet become parties. We cannot enforce the treaties between other powers, by which the African slave trade is 102*] denounced *as contrary to humanity and justice, and is prohibited to their subjects. No jurist has been cited, from the earliest to the most recent, who has pronounced the trade contrary to the positive law of nations. So that the court is left entirely to the light of reason in determining the question whether it be contrary to the law of nature, as properly applied to the conduct of nations and states.

If this prohibition be a part of the law of nations, it must be of the modern law of European nations. Are the United States parties to that law? And if they are, can they enforce its penal sanctions against other nations not parties to it?

Many principles have been at various periods asserted by confederacies of nations, which have ultimately failed to obtain a place in the general code of nations. The principles of the armed neutrality of 1780 were maintained by nearly all the powers of Europe against Great Britain alone; and yet her doctrines have not ceased to regulate the conduct of nations engaged in war. It is, at least, doubtful which is the true law of nations. The supposed inconsistency of the slave trade with the law of nature, will not alone condemn it in the view of a court of justice, so as to authorize all nations to treat it as a crime, or to enforce its prohibition by the confiscation of the property of those engaged in it. It becomes all reflecting men to think seriously, and speak cautiously, on the subject of the illegality of a trade which was once universally participated in by the civilized nations of Europe and 103*] America. This *fact is avowed by all the speakers on both sides of the abolition question, in the British Parliament. It is matter of notorious history, that both in ancient and modern Europe, the condition of slavery, and the commerce in slaves, were sanctioned by the universal practice, and law of nations.[3] The very definition of slavery in the civil law, which has been copied by writers on public law, shows that it was an institution established by positive law, against the law of nature: Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur.[4] The old common law writers are full of the subject of villeinage, which, it is well known, was not abolished in England until after the period when the African slave trade commenced. The offense of vagrancy was punished with slavery by the statute, 1 Edw. VI. c. 3.[5] The first case relating to the African slave trade, is that of Butts v. Pen, determined in the 29th of Charles II., being trover for negroes. The special verdict found that they were usually bought and sold in India.[6] In a subsequent case, trover was brought for a negro in England. Holt, C. J., said that trespass was the kind of action, but that trover *would lie, "if the sale was in Vir- [*104 ginia." Other cases turn upon questions as to the form of action, but they all concur in establishing the right to this species of property.[7] In 1689, all the judges of England, with the eminent men who then filled the offices of Attorney and Solicitor-General, concurred in opinion, that negroes were "merchandise," within the general terms of the navigation act.[8] The famous case of Somerset,[9] whilst it determined that negroes could not be held as slaves in England, recognized the existence of slavery in the colonies, as does the whole legal policy, both of that country and of France.[10] The slave trade was long the subject of negotiations, treaties, and wars, between different European states, all of which consider it as a lawful commerce. The very declarations in the recent European congresses, and the negotiations between Great Britain and the United States, all show that the slave trade has not yet been prohibited by anything like the unanimous consent of nations, so as to make it absolutely unlawful in the view of a court of the law of nations.

The United States have done all in their power, consistently with their constitution, to abolish the trade. But they have sought to abolish it by municipal means only. They have prohibited it to their own citizens, not only by the ordinary *penal sanctions [*105 of revenue and trade laws; but they have made it a criminal offense, and punished it as piracy. No treaty has yet been ratified with any foreign power, by which they engage to co-operate with the United States in the pro-

1.—United States v. Smith, 5 Wheat. Rep. 160.

2.—Le Louis, 2 Acton's Rep. 249.

3.—Hallam, Middle Ages, Vol. IV. p. 221; Gibbon's Decline and Fall, Vol. I. p. 63.

4.—Domat, Loix Civ. Prel. tit. 2, s. 2; Woods' Inst. Imp. and Civ. Law, Introd. 93; Grotius, de J. B. ac P. C. 2, c. 5, s. 27; Puffend. b. 3, 2, s. 8; 1 Rutherf. b. 1, c. 20, p. 474; Bynk. Quæst. Jur. Pub. l. 1, c. 3, p. 20, Du Ponceau's Transl.

5.—4 Reeve's Hist. Law, 451.

6.—2 Keebl. 785; 2 Lev. 201.

7.—2 Salk. 666; 1 Lord Raym. 146; 5 Mod. Rep. 185; Carth. 596.

8.—2 Chalmers' Opinion of Eminent Lawyers, 263.

9.—Cobbett's State Trials, Vol. XX. p. 1.

10.—Valin Ord. la Mar, liv. 2, tit. 1, du Capitaine, art. 16.

6 L. ed.

hibition; and yet the court is called on to anticipate, by judicial legislation, the exercise of the treaty-making power, and to refuse restitution to the subjects of Spain and Portugal, of that which they claim as their property, under the laws of their own country. This property has been brought into our jurisdiction in consequence of its having been taken from the possession of the original owners, by armaments fitted out in our ports in viclation of our neutrality. The duty of restitution is therefore plain, under the laws and treaties of the Union, and the uniform decisions of this court.

The learned counsel also entered into a minute and elaborate examination of the proofs of proprietary interest, and reiterated many of the grounds of argument insisted on by his associate. But as they have been already fully stated in the report of Mr. Berrien's argument, it has not been thought necessary to repeat them.

The Attorney-General, for the appellants, in reply, answered the objection, that the only question presented by the pleadings, on the part of the United States, was, whether this was a trade in breach of the slave trade acts? He insisted, that as the libels filed by the Spanish and Portuguese consuls, demanded 106*] restitution upon the *ground of the illegal armament in our ports, and the claim, or defensive allegation, given in by the United States, resisted that demand upon two specific grounds: (1st) That the Africans were taken on board with intent to import the same, etc.; and (2d) that the vessel was found hovering on the coast with the same persons on board. If the testimony disclosed a case on which it would be proper for the United States to interpose, which was not reached by the pleadings, the consequence would be, not that the decrees should be affirmed, but that the cause would be remanded, with directions to amend. And, supposing the United States to have made no case by their pleadings, the question was, have the libelants made a case which justifies the decree? The Africans are parties to the cause, at least such of them as are free; and even if the other parties had colluded to make a case for restitution, they would still have been entitled to the protection of the court.

As to the seizure by the revenue cutter, he insisted that it was justifiable under the slave trade act of the 2d of March, 1807, s. 7, which forfeits "any ship or vessel found hovering on the coast of the United States, having on board any negro, mulatto, or person of color, for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States." This act made no distinction as to the national character of the ship, whether it belonged to citizens or foreigners. So, also, the act of the 15th of May, 1820, c. 113, s. 5, makes the slave 107*] trade *piracy, where it is carried on by citizens of the United States. So that, whether we regard the predicament of the vessel, or of the persons engaged in the transaction, the seizure was fully warranted by the laws applicable to the case. Captain Jackson performed only an act of duty in capturing and bringing in the vessel for adjudication.

The question, then, recurs, what was the condition of the Africans thus brought in, as defined by our laws; which must be the rule to guide the determination of the court. They are placed under the protection of those laws, and are, prima facie, free. On whom, then, is the onus probandi thrown. Being here rightfully, they are under the protection of our laws and courts of justice. No person can claim a right to take them from the custody of the court, and carry them away into slavery, but those who can prove them to be slaves; who can prove it by such evidence as ought alone to be held sufficient in a question of freedom or slavery. This view of the case settles the question of the burthen of proof. He who would seek to disturb the apparently rightful condition of things, assumes the burthen of proving his own right. This is the ordinary doctrine of the Court of Admiralty, if the seizure has been rightful, and the case is, prima facie, a case for condemnation. The onus probandi is thrown upon the claimant to prove his property, and his right to restitution. But, in the present case, the rule is peculiarly applicable, and the clearness and fullness of the *proof ought to be in [*108 proportion to the importance of the matter in controversy. The case is one of human liberty. The Africans stand before the court as if brought up before it upon a habeas corpus. Suppose them here, on such a process, asserting their freedom, and claiming your protection; what kind of proof would you exact from those who claim to hold them in slavery? Most certainly you would not demand inferior evidence to that which you require in a case of life or death. The witnesses must present themselves fairly before you. Their statements must be clear and consistent, and such as to command the confidence of the court. They must be sustained by the documentary evidence; and, where any doubt is left, the decision should be in favorum libertatis.

The claimants wish the court to consider this as a question exclusively between Spain on one side, and the United States on the other, in which these persons are to be considered as "effects," and "merchandise," taken by pirates, and as such liable to restitution under the stipulations of the treaty of 1795. But is the court at liberty so to consider them, under the laws of our own country? Some of them are confessedly free, because the decree has established the fact. Which of them are slaves, it is impossible to determine by any rule of evidence known to our practice. The claimants must prove their property; and this involves the necessity of proving that these persons are property. They must prove that they are property, and that they are *their property. Possession may be a [*109 sufficient indicium of property, in those places where the local law makes a particular subject property. The local laws of some of the states, generally make persons of color, prima facie, slaves, and throw the burthen of proof upon them to show the contrary. But even in those states, the possession of a newly imported African would not be evidence of property. The question, therefore, recurs, is it enough to justify the court in delivering up these persons to the parties for whom they are claimed, to show a possession on the high seas? Is the

mere possession of such persons a sufficient evidence of their slavery to justify it in restoring them as claimed? The question is not whether the cruisers of the United States have a right to seize a Spanish slave ship upon the high seas, bring her in for adjudication, and throw the burthen of proof of proprietary interest upon the claimants. Any such right of interference with foreign states, their subjects, or people, is disclaimed. But these people are here, in the custody of the court, without any invasion of the sovereignty of foreign nations on our part; for the piratical vessel, which took them out of other vessels sailing under Spanish and Portuguese colors, was not acting under the authority, or upon the responsibility of the United States. They are brought here by a seizure authorized by our own laws, and perfectly consistent with the sovereignty and independence of Spain and Portugal. The laws, under which they were 110*] seized and brought in, declare *them to be entitled to their freedom. Can the court surrender them as slaves upon no other proof than mere naked possession? 'Is the possession of Africans, on the coast of Africa, sufficient evidence of title, per se, without connecting that possession with any law, international or municipal, to justify the court in taking an active part in consigning to slavery these persons, thus placed under its protection?

It is unnecessary for the United States to show that the possession was, prima facie, wrongful. The opposite parties, who call upon the active aid of the court to maintain that possession, must prove that it was rightful.

The real question, then, is, whether the mere possession, under such circumstances, is sufficient evidence of title, not as against the United States, but as against these Africans. The court will not shut their eyes to what is passing in the world. Such a possession may be evidence of title in some of the states of this Union, and in the European colonies. It might have been so formerly on the coast of Africa. But it is not so now, even under the municipal laws of Spain and Portugal. Both of these powers have prohibited the slave trade on the coast of Africa to the north of the line, since 1815. It was prohibited long before by the United States and Great Britain, on every part of the coast, and of the world. It has been prohibited by France, Holland, and all the principal maritime states of Europe. Under these circumstances, it is impossible for the court to say that possession on the coast 111*] of *Africa is so habitually found in connection with right, under the municipal laws of the country to which the vessel belongs, as to constitute prima facie evidence of property. The presumption ought rather to be reversed. The natives of Africa, however, imperfect may be their civilization, compose an independent nation. By the general law of nations, they are as free as the Spaniards, or the Portuguese. Hence, it may be seen that the mere possession of an African, claiming him as a slave, by a Spanish ship on the coast of Africa, would no more prove the African a slave, than the possession of a Spaniard, by an African ship on the coast of Spain, would prove the Spaniard a slave. The actual possessor must, therefore, show some other right than mere possession. The Spaniard alleges that it has been the practice of the civilized and Christian nations of Europe, to make slaves of the Africans for three centuries; and hence, that, by the law of nations, he has a right to make slaves of them. The African opens the volume of the law of nations, and shows that the foundations of that code are laid in justice and humanity, and that no legitimate right can grow out of a violation of these principles. If he is answered, that the trade had its origin in humane motives, he may well upbraid us for such a vindication. Nor does the existence of slavery in the United States form any excuse or palliation, for perpetuating, and extending the guilt and misery of the slave trade. Slavery was introduced among us, during our colonial state, against the solemn remonstrances *of [*112 our legislative assemblies. Free America did not introduce it. She led the way in measures for prohibiting the slave trade. The revolution which made us an independent nation, found slavery existing among us. It is a calamity entailed upon us by the commercial policy of the parent country.[1] There is no nation which has a right to reproach us with the supposed inconsistency of our endeavoring to extirpate the slave trade as carried on between Africa and America, whilst at the same time we are compelled to tolerate the existence of domestic slavery under our own municipal laws.

It may well be asked, whether Africa is without the pale of the law of nations. Are not Africans in their own country, under the protection of that law? If it be answered, that the condition of slavery has existed from time immemorial, growing out of the exercise of the rights of war, as understood and practiced in that barbarous country, it may be replied, that those very wars have been stimulated by the arts and avarice of the slave traders. This fact is shown by the most conclusive evidence, in the examinations before the House of Commons in 1791. It appears, also, by the more recent reports of the American and British naval officers, and the agents of the London African Institution, and American Colonization Society. Unless, therefore, the slave traders can derive a right, founded *upon wrong practiced at their insti- [*113 gation, this argument cannot avail them.

Their possession, then, derives no support from the law of nations. Supposing that by the municipal law of Spain these persons are slaves, whilst by your law they are free; being brought into this country without any trespass on the sovereign rights of Spain, is the court bound to restore them from comity? If the general law of nations binds us to do this, it also binds us to deliver up persons charged with crimes, or even with political offenses. But this is a principle which has been repudiated by all nations.[2] The stipulation in the Spanish treaty, by which we are bound to restore the ships and effects, or merchandise of Spanish subjects, when captured within our territorial jurisdiction, or by pirates on the high seas, does not apply. These Africans are

1.—Hargrave's argument, in Somersett's case, 11 State Trials, 346.

2.—Somersett's case, 11 State Trial, 339, 346.

claimants, since it rescued what they claim as their property, from the grasp of pirates. If the claimants had not interposed, the course of the court would have been obvious. The illegal and piratical capture by our citizens, gave them no rights; and even if it did, they instantly forfeited them under our laws, which they intended to violate. But the claimants demand restitution of the Africans found on board this vessel, alleging them to be their property, lawfully acquired on the coast of Africa, and piratically taken from them by the Arraganta. This demand is resisted by the government of the United States, upon the ground that the persons in question are not by our laws to be considered as slaves, but as freemen. These laws the court must administer, and not the laws of Spain. Our national policy, perhaps our safety, requires that there should be no increase of this species of population within our territory. The acts of Congress provide that, however brought here, they shall be set free, and sent back to their own native country. The Spanish and Portuguese claimants demand them as their property. We repel the claim, by asserting their right to liberty. The demand of restitution is inconsistent with our policy, as declared in our statutes and other 72*] *public acts.[1] These declarations gave fair warning to those engaged in the slave trade, that though we did not intend to interfere with them on the high seas, yet, if their victims should come within the reach of our laws, we should protect them. These acts constitute a solemn pledge to all nations interested in the suppressions of this inhuman traffic, and to Africa herself, that if the objects of it should seek our protection, where they may lawfully receive it, within our territorial jurisdiction, and at the feet of our tribunals of justice, they should be entitled to that protection. Therefore, admitting the facts as alleged by the claimants, what they claim as justice in a matter of property, cannot be done to them, without disregarding our own policy, endangering our own safety, infringing our own laws, and violating the plighted faith of the country.

But supposing they have a right to insist on restitution of their property, what proof ought to be required, and what proof do they give, of their proprietary interest? It is material, also, here to consider that those human beings, who are claimed as property, come into the jurisdiction of the court, not by any wrongful act of ours, but lawfully, providentially; and are to be treated just as if they were thrown upon our shore by a storm. The Spanish owners show, as proof of property, their previous possession; and the possessor of goods, it is said, is to be presumed the lawful owner. This is true as to goods, because they have universally and nec- 73*] essarily an *owner. But these are men, of whom it cannot be affirmed that they have universally and necessarily an owner. In some particular and excepted cases, depending upon the local law and usage, they may be the subjects of property and ownership; but by the law of nature all men are free. The presumption that even black men and Africans are slaves, is not a universal presumption. It would be manifestly unjust to throw the onus probandi upon them to prove their birthright. Whatever may have once been the condition of Africa, and of the African slave trade, the authentic information on this subject will show that it is now impossible to determine, by the fact of possession, whether the party has been lawfully acquired or not. There must be an overwhelming probability of the lawfulness of such acquisition, to raise such a presumption. This is instanced by the different presumptions allowed in different parts of our own country, in respect to this description of persons. In the southern states, there is the highest degree of probability, from universal practice and well-known law, that such persons are slaves. But in the northern states, the probability is just the contrary, and the presumption is reversed. And in the present state of the slave trade, Africans, in a slave ship on the high seas, are in no such circumstances as to raise a presumption that they are lawfully held in slavery. For if there be a permitted slave trade, there is also a prohibited slave trade; and the prohibition is much more extensive than the permission. *The claimants must, conse- [*74 quently, show something more than mere possession. They must show a law, making such persons property, and that they acquired them under such law. In order to maintain their title, they show the municipal law of Spain; but the operation of that law can only extend throughout the territory of Spain, and to Spanish vessels on the high seas. These persons are now within the jurisdiction of our conflicting law; and they are brought here without any violation of the sovereign rights of Spain. Our own law, which is in force here, must prevail over the law of Spain, which cannot have an extraterritorial operation. There is no reason of comity, or policy, or justice, which requires us to give effect to a foreign law conflicting with our own law on the same subject. Besides, the Spanish law is not only contrary to ours, but is inconsistent with the law of nature, which is a sufficient reason for maintaining the supremacy of our own code. If this municipal law of Spain were allowed to prevail against our law, in our own territory, and before our own courts, the same effect must be given to the law of every other country, under the same circumstances. If, instead of these Africans, there had been taken by the same illegal capture, Spanish slaves, from an Algerine corsair, and afterwards brought in the same manner into our ports, they might, upon the same principle, be reclaimed by the representative of Algiers, who could easily show that, by the law prevailing among the Barbary states, they were slaves.

The municipal law of Spain, then, is insufficient *to maintain the title set by the [*75 claimants. They are driven to the necessity of invoking the aid of the law of nations, as sanctioning their asserted right to property in these human beings. But if the law of nations is silent upon this subject; if it neither sanctions nor forbids the traffic in African slaves; if it is municipal law alone which determines in what manner private property is acquired and lost, then the claimants have no law to stand upon in asserting their claim. Supposing, however, this idea not to be correct, it is incumbent on the claimants to show, positively, that the

1.—Vide Appendix, Note I, a.

slave trade, as now practiced, has the sanction of the law of nations, as now understood by the civilized and Christian nations of the world. That it once had that sanction, may, perhaps, be admitted; but it must also be admitted that there was once a time when it had not that sanction. The permission began by general assent and usage. The King of Spain, in the preamble to his edict of 1817, admits that it was incorporated into the code of nations as an exception to the general principles on which that code is founded.[1] When the practice was adopted by the general, not universal assent, of civilized nations, it became a part of the law of nations. In the same manner, a general, and not a universal denunciation of the practice, is sufficient to make it cease to be a part of the law of nations. In the great moral and legal revolution which is now going on in the 76*] world respecting this trade, the *time must come when it will cease to have a legal existence by the universal concurrence of nations. In the meantime, the question must be discussed, as it arises under various circumstances, until we reach the desired period when the universal sentiment of the wise and the good shall become the rule of conduct sanctioned by authority capable of enforcing it. All the modifications and improvements in the modern law of nations have been gradually introduced. The writers upon that law explain the manner in which these changes have been made and sanctioned.[2] The documents to be laid before the court will show the present state of the world's opinion and practice upon this subject, and will prove that the time is at hand, if it has not already arrived, when the slave trade is not only forbidden by the concurrent voice of most nations, but is denounced and punished as a crime of the deepest die. This is shown by the declarations contained in the treaties of Paris and Ghent; by the acts and conferences at the congresses of Vienna, London, and Aix la Chapelle; by the treaties between Great Britain, and Spain, and Portugal; by the negotiations between the United States and Great Britain; and by the reports of the committees of the House of Commons, and the House of Representatives in Congress. We contend, then, that whatever was once the fact, this trade is now condemned by the general consent of nations, who have publicly 77*] *and solemnly declared it to be unjust, inhuman and illegal. We insist, that absolute unanimity on this subject is unnecessary; that, as it was introduced, so it may be abolished, by general concurrence. This general concurrence may not authorize a court of justice to pronounce it a crime against all nations, so as to make it the duty of all to seek out and punish offenders, as in the case of piracy. No decision has yet gone that length, nor is it necessary in this case to contend for such a principle. But in a case where the Africans are lawfully brought before a court of the law of nations, and are claimed as property, by those who must be considered as actors in the cause, and who must, consequently, prove their title as alleged, the fair abstract question arises, and their claim may well be repudiated as founded in injustice and illegality.

The learned counsel here commented upon the different cases in England and this country, with the view of reconciling them, and showing that they were all consistent with the principle he maintained. In the cases of The Amedie,[3] The Fortuna,[4] and The Donna Marianna,[5] the ship and persons on board were lawfully brought into the custody of the court, either as being captured jure belli, or taken under circumstances which warranted a seizure as for a municipal offense. The claims were accordingly rejected, upon the ground of the unlawfulness of the trade. In the subsequent cases of The Louis,[6] and of Madrazo *v. Willes,[7] [*78 the original seizure was held to be unjustifiable, and consequently restitution was decreed. But none of the important principles settled in the other cases, are overruled in these cases, which turn exclusively upon the point that the wrong first done in the unlawful seizure must be redressed. In the case of La Jeune Eugenie,[8] the claim of a French subject was rejected, as being founded in a breach of the municipal law of his own country, and the subject-matter in controversy was delivered up, with the consent of the executive government of this country, to the sovereign of France, to be dealt with as he should think fit. All these latter cases show, that where the court has rightfully obtained possession of human beings, who are claimed as slaves, it will not restore them to their alleged proprietors, although it may not go so far as to punish those who are engaged in the trade, by the confiscation of the vehicle in which it is carried on.

But another view may be taken of this subject. The King of Spain, in his edict of 1817 (before referred to), informs us, that the slave trade originated in motives of humanity, and was intended to avoid the greater evils growing out of the barbarous state of the African continent. Suppose this to be a just representation, and that the trade formerly consisted merely in the transportation of persons who were slaves in Africa, to be slaves elsewhere; it is at last discovered, by the *evidence tak- [*79 en before the British House of Commons in 1790, by the investigations of the African Institution, and by the reports of the British and American naval officers, to have entirely changed its character. Slaves are no longer acquired merely by capture in war, or by trade; but free persons are seized and carried off by the traders and their agents. Wars are instigated by them, for the mere purpose of making slaves. The persons thus enslaved are clandestinely brought away, under circumstances of extreme cruelty, aggravated by the necessity of concealment, and smuggled into every country where the cupidity of avarice creates a demand

1.—Vide Appendix, Note I. b. p. 82.

2.—Vattel, Droit des Gens, Chap. Prelim. s. 25-27, 56, liv. 1. ch. 23, s. 293; Burlam. 165; Martens, 1, 9, s. 5, l. 11 s. 1.

3.—Acton's Rep. 240.

4.—1 Dodson's Rep. 81.

5.—Id. 91.

6.—2 Dodson's Rep.

7.—3 Barnwell and Ald. 353. The several cases cited will be found in the Appendix to the present volume of these reports, g, p. 40-48.

8.—2 Mason's Rep.

for these unhappy victims. May it not be asked, is this trade? Is it lawful? Has it not so changed its nature as to have become prohibited?

Again; supposing the slave trade not yet to have become generally illegal; still it has become so to the subjects of those countries who have issued declarations against the trade. To such the argumentum ad hominem may be fairly applied, as Sir W. Scott says in The Louis. Spain and Portugal are among the countries who have issued the most formal declarations against this trade, although they have not yet taken the most effectual measures to suppress it. By the treaties between these powers and Great Britain, they have stipulated the entire abolition of the slave trade north of the equator. But their authentic declarations pronounce it to be unlawful and inhuman, wherever carried on; and the permission to continue it south of the line can 80*] only *affect them, and their subjects, and the powers with whom they have made such treaties. Their subjects cannot avail themselves of the permission, so far as other nations are concerned. Those nations have a right to look to the declarations as authentic evidence of the understanding of the Spanish and Portuguese governments, as to the law of nations.

But suppose they can avail themselves of the permission to trade in slaves within the limits prescribed by the treaties. The onus probandi is thrown upon them to bring themselves within those lmiits. This they have failed to do by satisfactory evidence.

And even if the law was in their favor, and they had shown the trade in which they were engaged to be within the limits permitted by the treaties, such a general claim could not be given in by the consuls of Spain and Portugal for their fellow-subjects. The court has a right to the oath of the individual owners, as to their proprietary interest, and to explain the other circumstances of the case. As to the Portuguese claim, the owners are still unknown, and it is impossible that restitution can be made to the consul, or even to his government, merely upon evidence that the Africans were taken from a vessel sailing under the Portuguese flag and papers, without any specific proof of the individual proprietary interest.

Lastly; if some of those Africans were the property of the claimants, some were not; and, failing to identify their own, they are not enti- 81*] tled *to restitution of any as slaves, since among them may be included some who are entitled to their freedom. The proof, by lot, which was substituted by the court below for ordinary legal proof, is not satisfactory, especially where a claim to freedom conflicts with a claim to property.

Mr. Berrien, for the respondents, stated that a reference to the transcript would show, that of all the parties to this cause in the court below, the United States, and the Spanish and Portuguese vice-consuls, are alone before this court; and that the United States, acquiescing in all the residue of the decree, have appealed from only so much as directs restitution to the Spanish and Portuguese vice-consuls.

The allowance of these claims is resisted on various grounds.

One prominent proposition pervades the whole of the opposite argument. Unless we can meet and resist it, we must submit to be its 272 victims. It asserts, that the United States have acquired the possession of these negroes lawfully, without wrong; that with the possession so acquired, they have incurred the obligation to protect them; that all presumptions are in favorem libertatis; and, whatever the laws of other countries may tolerate or ordain, having ourselves declared the slave trade to be contrary to the principles of humanity and justice, we are bound, prima facie, to hold that there can be no property in a human being.

*This proposition suggests the follow- [*82 ing inquiries:

1. Was the possession lawfully acquired?

2. If so, does the right which is asserted necessarily follow?

3. With a view to their own peculiar condition, can the United States exercise such a power?

1. The lawfulness of the possession will be determined by considering the capacity of the seizing officer to make the seizure, in connection with the liability of the thing seized.

The seizure was made by John Jackson, commander of the revenue cutter Dallas, belonging to the district of Georgia; and was made off the coast of Florida, while that was yet a province of Spain. The right of Captain Jackson must have resulted from the authority given by his commission, and the laws of the United States.[1]

It did not result from the act of 1799, providing for the establishment of revenue cutters; for this only authorizes them to board vessels on the coasts of their respective districts, or within four leagues thereof; nor from the acts forbidding the slave trade, for these are directed only against vessels of the United States, or foreign vessels intending to violate our laws by introducing negroes into the United States. The President is, indeed, authorized to employ the armed vessels of the United States, to cruise on the coasts of the United States, or territories thereof, or of *Africa, or elsewhere, and [*83 to instruct them to bring in all vessels found contravening those acts. But the laws of the United States can operate only on American vessels, on American citizens on board of foreign vessels, or on such vessels within the limits and jurisdiction of the United States. Besides, it is not pretended that the revenue cutter Dallas had been selected as a cruising vessel under these acts, or that Captain Jackson had received any instructions from the President of the United States. Neither can the seizor derive any aid from the acts to preserve the neutral relations of the United States; for although the courts of the United States will restore property taken in violation of these acts, when it is found within their jurisdiction, yet they do not authorize the cruisers of the United States to rove the ocean in search of objects on which that jurisdiction may be exercised.

So far, then, as it depends on the official character of the seizor, the act was lawless.

The thing seized was a Spanish vessel, in the possession of persons, some of whom were American citizens, who had captured it jure belli, under the flag of Artegas, or of Venezuela, and in a vessel which had been fitted out, or whose armament had been increased, in the United States.

1.—The Louis, 2 Dodson's Rep. 238.

The right to seize for a violation of the acts to preserve the neutral relations of the United States, has been already spoken of; but the adverse argument considers these captors as pirates, and asserts the right of every individual 84*] to war *against them as enemies of the human race. The answer is,

1. The seizure by Captain Jackson was not made on that ground. The libel alleges the seizure to have been made for a violation of the act of 1818, prohibiting the slave trade.

2. The courts of the United States have declined to decide that such an act would amount to piracy.

3. To put himself in a situation to make this seizure, Captain Jackson abandoned the duty enjoined upon him by his commission, and the laws of the United States, by leaving the limits intrusted to his vigilance. If he had lost his vessel, could he have justified himself before a court-martial?

4. But if these men were pirates, and lawfully brought in, then the Spanish property was, from the moment of its introduction, under the protection of the ninth article of the treaty of San Lorenzo el Real.

Neither have the United States acquired any rights to enforce against these foreigners their own speculative notions on this subject, in consequence of their being actors. All parties are actors in a court of admiralty, and these parties only became so after their property had been taken into the custody of the marshal, and at the suit of the United States. But they were entitled, under the treaty, to have restitution of their property, without being put to other proof than that it was found in their possession.

2. If the possession had been lawfully ac- 85*] quired, *could the court refuse restitution on the ground suggested?

The great case on this subject, is that of The Louis.[1] Our adversaries agree to refer the question to its decision.

It is a singular mistake, to suppose that Sir W. Scott directed restitution solely on the ground of the unlawfulness of the seizure; and thence to infer, that if the seizure had been lawful, he would have condemned. On the contrary, admitting the lawfulness of the seizure, he decides expressly that restitution must, notwithstanding, be awarded.

3. With a view to their own peculiar situation, could the United States maintain the doctrines contended for? It is said, that, having promulgated our policy in relation to this subject, we have thereby given a warning to slave traders, which they are bound to respect—a pledge to the rest of the world which we are bound to redeem. But what is this policy, which we have thus notified to the world? It is to be found in our laws, inhibiting the slave trade. The penalties of these are denounced against our own vessels, and our own citizens, who shall engage in this traffic anywhere; and against foreigners and their vessels, who pursue it for the purpose of introducing negroes into the United States. There is no warning to the subjects of Spain and Portugal, quietly pursuing this traffic under the sanction of their own laws.

86*] *The notion of the pledge is equally visionary. I find it difficult to form a conception of a pledge, which the party making it can at any time capriciously recall; and yet no one doubts that an act of the American Congress can, at any moment, throw open the slave trade.

These considerations apart, would it become the United States to assume to themselves the character of censors of the morals of the world on this subject; to realize the lofty conception of the adverse counsel, and consider themselves as the ministers of heaven, called to wipe out from among the nations the stain of this iniquity? Might not the foreign claimant thus rebuke them, in the strong language of truth? For more than thirty years you were slave traders; you are still extensively slave owners. If the slave trade be robbery, you were robbers, and are yet clinging to your plunder. For more than twenty years this traffic was protected by your constitution, exempted from the whole force of your legislative power; its fruits yet lay at the foundation of that compact. The principle by which you continue to enjoy them, as protected by that constitution, forms a basis for your representatives, is infused into your laws, and mingles itself with all the sources of authority. Relieve yourselves from these absurdities, before you assume the right of sitting in judgment on the morality of other nations. But this you cannot do. Paradoxical as it may appear, they constitute the very bond of your union. The shield of your constitution protects them from your touch.

*We have no pretense, then, to enforce [*87 against others our own peculiar notions of morality. The standard of morality, by which courts of justice must be guided, is that which the law prescribes.[2]

The learned counsel here proceeded to examine the evidence of proprietary interest, and insisted that (besides the other testimony) the official interposition of the Portuguese government supplied the place of proof of individual interest, and established the legality of the traffic.[3]

The objection to the decree of the Circuit Court, on the ground that the distribution of the negroes was directed to be made by lot, was answered by the following considerations:

1. It appearing that the negroes found on board the Antelope consisted of three distinct parcels, taken from American, Spanish, and Portuguese vessels, the obligation to protect the former was equal to, and not greater than, that which required the restoration of the latter. The capture by Smith being considered, as in the argument of our adversaries it is considered, as piratical, the right of the Spanish claimant to restoration under the treaty was the primary right, as founded on the treaty which is the supreme law; and in the fair construction of that treaty, it extended to everything found on board the Spanish vessel. Then the proof which should diminish that right was to be furnished by those who sought to diminish it.

*2. It being ascertained that these ne- [*88 groes were property, they were liable to distribution as other property; and, notwithstanding the assertion to the contrary, the lot is often

1.—2 Dodson's Rep. 243, 249, 264.

6 L. ed.

2.—The Louis, 2 Dodson's Rep. 249.

3.—The Bello Corrunes, 6 Wheat. Rep. 152.

depositions, to prove a fact which is matter of general and public history. This long, and otherwise unaccountable absence, of any Portuguese claimant, furnishes irresistible testimony that no such claimant exists, and that the real owner belongs to some other nation, and feels the necessity of concealment.

An attempt has been made to supply this defect of testimony, by adducing a letter from the secretary to whose department the foreign relations of Portugal are supposed to be intrusted, suggesting the means of transporting to Portugal those slaves which may be in the possession of the vice-consul, as the property of his fellow-subjects. Allow to this document all the effect which can be claimed for it, and it can do no more than supply the want of 131*] an express power *from the owners of the slaves to receive them. It cannot be considered as ascertaining the owners, or as proving their property.

The difficulty, then, is not diminished by this paper. These Africans still remain unclaimed by the owner, or by any person professing to know the owner. They are rightfully taken from American citizens, and placed in possession of the law. No property whatever in them is shown. It is said, that possession, in a case of this description, is equivalent to property. Could this be conceded, who had the possession? From whom were they taken by the Arraganta? It is not alleged that they are the property of the crown, but of some individual. Who is that individual? No such person is shown to exist, and his existence, after such a lapse of time, cannot be presumed.

The libel, which claims them for persons entirely unknown, alleges a state of things which is prima facie evidence of an intent to violate the laws of the United States, by the commission of an act which, according to those laws, entitles these men to freedom. Nothing whatever can interpose to arrest the course of the law, but the title of the real proprietor. No such title appears, and every presumption is against its existence.

We think, then, that all the Africans, now in possession of the marshal of the district of Georgia, and under the control of the Circuit Court of the United States for that district, which were brought in with the Antelope, 132*] otherwise *called the General Ramirez, except those which may be designated as the property of the Spanish claimants, ought to be delivered up to the United States, to be disposed of according to law. So much of the sentence of the Circuit Court as is contrary to this opinion, is to be reversed, and the residue affirmed.

Decree.—This cause came on to be heard, etc. On consideration whereof, this court is of opinion that there is error in so much of the sentence and decree of the said Circuit Court, as directs the restitution to the Spanish claimant of the Africans in the proceedings mentioned, in the ratio which one hundred and sixty-six bears to the whole number of those which remained alive at the time of pronouncing the said decree; and also in so much thereof as directs restitution to the Portuguese claimant; and that so much of the said decree ought to be reversed, and it is hereby reversed and annulled. And this court, proceeding to give such decree as the said Circuit Court ought to have given, doth direct and order that the restitution to be made to the Spanish claimant, shall be according to the ratio which ninety-three (instead of one hundred and sixty-six) bears to the whole number, comprehending as well those originally on board the Antelope as those which were put on board that vessel by the captain of the Arraganta. After making the apportionment according to this ratio, and deducting from the number the ratable loss which must fall on the slaves to which the Spanish claimants were originally entitled, the residue *of the said ninety-three are [*133 to be delivered to the Spanish claimant, on the terms in the said decree mentioned; and all the remaining Africans are to be delivered to the United States, to be disposed of according to law; and the said decree of the said Circuit Court is, in all things not contrary to this decree, affirmed.

[Instance Court. Slave Trade Acts.]

THE PLATTSBURGH. Marino, Claimant.

A question of fact under the slave trade acts, as to a vessel claimed by a Spanish subject, as having been engaged in the trade under the laws of his own country, but proved to have been originally equipped in the United States for the voyage in question.

Under the slave trade act of 1794, c. 11, the forfeiture attaches where the original voyage is commenced in the United States; whether the vessel belong to citizens or foreigners, and whether the act is done suo jure, or by an agent for the benefit of another person who is not a citizen or resident of the United States.

Circumstances of a pretended transfer to a Spanish subject, and the commencement of a new voyage in a Spanish port, held not to be sufficient to break the continuity of the original adventure, and to avoid the forfeiture.

It is not necessary, to incur the forfeiture under the slave trade acts, that the equipments for the voyage should be completed. It is sufficient if any preparations are made for the unlawful purpose.

APPEAL from the Circuit Court for the Southern District of New York.

This was a seizure of the schooner Plattsburgh, otherwise called the Maria Gertrudes, on the coast of Africa, made by the United States ship of war, the Cyane, in the year 1820. The *vessel was brought into the port [*134 of New York for adjudication, and a libel of information was filed in the District Court, under the acts of Congress of 1794, c. 11, and of 1800, c. 205, prohibiting the slave trade. A claim was given in on behalf of Juan Marino, a Spanish subject, and a resident merchant of St. Jago de Cuba. Upon the proofs taken, a decree of condemnation was pronounced in the District Court, which was affirmed in the Circuit Court pro forma, and the cause was brought by appeal to this court.

The cause was argued by Mr. **Jones** and Mr. **Mayer**[1] for the appellants, and by the Attorney-

NOTE.—As to what constitutes a violation of the laws against the slave trade, see note ante, 268.

1.—They cited The Diana, 1 Dodson's Rep. 95; The Louis, 2 Dodson's Rep. 228.

General for the respondents.[2] The argument turned principally upon the question of fact, as to the origin of the adventure in the United States, and the alleged subsequent transfer to a Spanish subject, so as to change the property, and break the continuity of the voyage. The same grounds of law were also insisted on by both parties, as in the argument of the preceding case of The Antelope; but, as the present cause was determined by the court exclusively upon the facts respecting the alleged sale and change of voyage, it has not been thought necessary to report the arguments of counsel.

135*] *Mr. Justice Story delivered the opinion of the court:

This is a libel founded on the several acts of Congress for the prohibition of the slave trade, and contains various distinct allegations, and especially counts framed on the slave trade acts of 1794, ch. 11, and 1800, ch. 205. It is unnecessary to enter upon a minute examination of the pleadings, because the whole case turns upon the question, whether, in point of fact, the voyage was originally undertaken from the United States, or was undertaken by the claimant, Mr. Marino, from the Island of Cuba, after a bona fide purchase made by him, altogether disconnected from the original enterprise.

The Plattsburgh was duly registered at Baltimore as an American vessel, owned by Messrs. Sheppard, D'Arcy & Didier, Jun., of that place, in October, 1817. She cleared out at the custom-house under the command of Captain Joseph F. Smith, in December, 1819, having what is called an assorted cargo on board, on a voyage ostensibly for St. Thomas, in the West Indies, but in reality, for St. Jago, in the Island of Cuba. Up to this period, the ownership remained upon the ship's papers wholly unchanged. But it is now asserted that the shares of D'Arcy and Didier were purchased by Sheppard for the sum of $6,000, and that the voyage was wholly undertaken on his account. The first remark which arises upon this state of the case is, how it should come to pass, if the purchase were bona fide, that the 136*] requisite alterations were not made *in the ship's papers, since, by the act of Congress, unless registered anew upon such sale, the vessel forfeits her American character. Sheppard, in his testimony, gives an extraordinary reason for the occurrence, declaring that he was insolvent at the time of the purchase, and so could not give the usual bond for the proper use and delivery up of the registry upon any future sale. Yet, according to his own showing, and that of the other part owners, he was, at this time, the owner of one-half of the Plattsburgh, valued at $6,000, and of an interest in another vessel, valued at $4,000. Sheppard further states that one of his inducements to purchase the Plattsburgh was an offer made to him by one George Stark (who became a conspicious character in the subsequent proceedings), to get for her $12,500, in St. Jago de Cuba, Stark asserting that he was authorized to purchase a vessel at that place. Accordingly, Sheppard determined to intrust Stark with the negotiation, and a bill of sale of the schooner was executed to Stark, by all the owners, to enable him to convey the same to any purchaser. The cargo of the Plattsburgh, as contained in the manifest, consisted principally of goods belonging to various shippers, who are not in the slightest degree implicated in any part of the guilt of this transaction; and upon the sales of the same at St. Jago de Cuba, the proceeds were regularly remitted to them. These shippers all contracted with Stark for the shipment and freight of their goods, and he informed one of *them that he had [*137 purchased the schooner for certain persons in the Island of Cuba, and that he had no interest in her himself, but was to receive $2,000 for delivering her at that port. How far this statement is reconcilable with the account given of the transaction by the owners of the Plattsburgh, it is unnecessary to examine.

At the time of the equipment of the Plattsburgh at Baltimore, there was another vessel, the brig Eros, which was also fitting out at that port for St. Jago de Cuba, with a cargo suited for the slave trade, under the management of Stark, as charterer for the voyage. This vessel was at first detained by the collector upon suspicion, but he, being satisfied, upon inquiry, that the owner of the Eros had no intention of having her engaged in the slave trade, afterwards released her, taking out some few of her equipments. The Plattsburgh first dropped down the Chesapeake Bay, and, afterwards (if the witnesses are to be believed), some grape, canister and round shot were taken on board, and, on stowing them away, a barrel of irons, or handcuffs, was discovered, which was not contained in the manifest of the cargo. The vessel then sailed down to New Point Comfort, and there waited ten or twelve days for the Eros, and as soon as the latter appeared, after taking on board Mr. Stark, the Plattsburgh sailed, in company with the Eros, directly for St. Jago de Cuba. The crew on board are represented to have distinctly understood, soon afterwards, that the voyage was designed ultimately for the African coast for slaves.

*In due time both vessels arrived at [*138 the port of destination, and unladed their cargoes. And here the sale to Mr. Marino is alleged to have taken place, in entire good faith, for the sum of $12,000, although, upon the production of the bill of sale, the sum is there asserted to be $8,000 only. Both of the vessels are consigned to a Mr. Wanton, at St. Jago, through whom the negotiation seems to have been made. After the ostensible sale, the Plattsburgh underwent repairs under the agency of Wanton, and was in due form made a Spanish ship, with Spanish national documents; and the usual preparations were made, and the usual passports obtained, to equip her for a slave voyage to the coast of Africa, under her new owners. A part of the cargo of the Eros was taken on board of the Plattsburgh, and particularly about 300 casks of gunpowder. The original crew were, apparently, discharged, but Captain Smith, two of the mates, and six or eight of the men, together with Stark, still remained on board, and accompanied the vessel to the coast of Africa, she being, during that

2.—He cited The Fortuna, 1 Dodson's Rep. 81, 86; The Donna Marianna, 1 Dodson's Rep. 91; The St. Jago de Cuba, 9 Wheat. Rep. 409.

The cases cited from the English admiralty reports will be found in the Appendix to the present volume, c, p. 40–84.

voyage, under the nominal command of a Mr. Gonzalez, with the assumed name of the Maria Gertrudes. She was captured, while lying on the coast of Africa, north of the line, by the boats of the United States ship of war Cyane, under Lieutenant Stringham, and was brought into the port of New York for adjudication, and was there finally condemned by the district and circuit courts; and the present appeal is 139*] from *the decree pronounced, pro forma, by the latter.

Such is a general outline of the circumstances of the case, upon which it is material to observe, that if the original object of the equipment and voyage from Baltimore was for the purpose of carrying on the African slave trade, the forfeiture equally attaches, whether the schooner was then owned by American citizens, or by a foreigner. The act of 1794, ch. 11, expressly declares that no citizen or resident in the United States shall, for himself, or any other person whatsoever, either as master, factor or owner, build, fit, equip, load or otherwise prepare, any vessel within any port of the United States, nor cause any vessel to sail from any port within the same, for the purpose of carrying on any trade or traffic in slaves, to any foreign country, etc., etc., under the penalty of forfeiture. Under this act, it is immaterial to whom the ownership belongs, and whether the act is done suo jure, or for the benefit of another person. If, therefore, the Plattsburgh was equipped at Baltimore by the owners, or by the master, or by Stark, as factor or agent, to carry on the slave trade for the benefit of Marino, the case falls directly within the prohibitions of the act. And, in this view, the declarations of Sheppard and Stark, respecting the sale, are not without considerable significance. But there is no pretense to say, upon the facts in proof, that the actual ownership, at the commencement of the voyage, was not in Sheppard and his partners, or in Stark. 140*] We *find the latter traveling with the vessel through all her subsequent wanderings, with a considerable cargo on board, which belonged to himself when she left Baltimore, and which was at St. Jago transhipped from the Eros; we find the original master, and mates, with efficient authority, on board, on the coast of Africa; we find all parties yielding obedience to them, and to Stark; we find the master resorting to subterfuges, and concealments, after the capture, and the log-book kept in the English language; and if the testimony of two of the crew is admitted (and one of them is not in the slightest degree discredited), we find the most decisive proofs that the original voyage was conceived and executed solely with a view to the slave trade. Whatever exceptions may be taken to the testimony of Ferver (and it is certainly open to much animadversion from his first prevarications), it has the merit of standing supported, as to its main facts, by all the other circumstances of the case. The natural, nay, the almost necessary inference from those circumstances is, that they belong to a meditated infringement of the acts prohibiting the slave trade.

It has been asked, in what manner the original intention can be deduced from the facts, since the Plattsburgh had on board an innocent cargo when she left Baltimore. That, however, is not quite certain, for though nothing noxious appeared on the face of the manifest, yet, if Ferver and Flower are believed, there was a barrel of handcuffs concealed in the run, demonstrating, in no *equivocal manner, [*141 the object of the parties. But, assuming that the equipments were all innocent in their own nature, that would not help the case, if there were positive proof of a guilty intention. The law does not proceed upon the notion that provisions or equipments which are adapted to ordinary voyages, are not within the forfeiting clause, if they are intended for carrying on the slave trade. Nor is it necessary that there should be complete equipments for this purpose. It is sufficient if any preparations are made for the unlawful purpose. Such was the doctrine of this court in the cases formerly adjudged, which were cited at the bar.[1]

But there is no pretense to separate the voyage of the Plattsburgh from that of the Eros. Both were undertaken by the same party, and for the same object. The Eros carried out the cargo adapted to carry on the traffic, and for the purpose of concealment, the Plattsburgh was made to assume the garb of innocence. It was an ingenious device to lull suspicions, and escape the penalties of the law; but the intention is just as strongly manifested as though all the offensive articles had been laden on board the Plattsburgh. In short, the Eros may be considered as the mere tender of the Plattsburgh, and subservient to all the objects of the latter. Her cargo found its way on board after the arrival at St. Jago, under the direction of Stark, who, true to his original purpose, remained with the Plattsburgh as the dux facti. *It is impossible, upon any reasonable [*142 grounds, to assume his intention to have been a purely lawful traffic at St. Jago. If it had been so, why should he have been found on board on the coast of Africa? Men do not, ordinarily, take upon themselves such an odious and dangerous post, surrounding themselves with penalties and suspicions, without causes deeply connected with their own private interest and purposes.

But we are told that here was a genuine sale to a Spaniard, who was authorized, by the laws of his country, to carry on the slave trade, and, however immoral or inhuman it may be, the court are to decide his case upon principles of law, and not merely upon principles of justice or morality. Certainly the court have nothing to do with the conscience of the Spanish claimant, if he has established a bona fide, legal ownership. But that is the very point in controversy. This is not the case of an ordinary trade, where no disguise is necessary or useful. It is the case of a trade prohibited to American citizens under very heavy penalties, penalties which have since been aggravated to the infliction of capital punishment. It is a trade odious in our country, and carries a permanent stain upon the reputation of all who are concerned in it, and is watched by the severest vigilance of the government. Under such circumstances, it is obvious that it cannot be carried on under our flag, but at the greatest hazards, and with few chances of escaping detection. If carried on at all, it must, therefore,

1.—The Emily and The Caroline, 9 Wheat. Rep. 381.

143*] *be carried on by Americans under the disguise of foreign flags; and it is notorious that, in the colonial ports of Spain, there is little difficulty in procuring all the apparatus for the use of the national flag. The existence of such flag is not, when circumstances of just suspicion occur, any decisive proof of innocence, for it is just such a cover as must accompany the fraud. And these considerations cannot fail to attract the attention of a bona fidei Spanish purchaser. He cannot but know that American cruisers are in search of those who violate our laws respecting this traffic; and he would deem it the highest imprudence to place his property in a situation in which it might justly be suspected of an admixture of American interests. He would studiously exclude from his ship all Americans, lest they should involve him in serious losses. Of course, he would, a fortiori, exclude from his employment the original American master and owner from whom he had purchased. He could not, without the grossest rashness, be presumed to forget that an American owner and master, on board of a vessel recently under their control, and recently purchased, would jeopard the whole adventure, for, upon the search of a cruiser, they would excite very strong presumptions of guilt. How, then, can we reconcile, with the notion of a bona fide purchase in this case, the continued employment of the owner, the master, the mates, and a large proportion of the crew, of the Plattsburgh? Does it not necessarily diminish the credibility of such a claim?

144*] *What, then, are the explanations attempted to be given upon this subject? It is said that Smith and Stark were employed by Wanton to go to the coast of Africa to transact business for him, and that they were mere passengers. But what business of Wanton? None is proved, or attempted to be proved. And who, in fact, is Wanton? He is the consignee of Stark, both for the Plattsburg and the Eros. He is the shipper of the cargo for the coast of Africa, and, upon the face of the bill of lading, no other person appears as owner; and it is now said, that he is what is called an actionist, or share-holder, in the voyage; and, by the Spanish laws, or course of trade, such persons do not appear as owners on the papers. It is remarkable, that if such be the law, Marino's name should not appear on the bill of lading, and that Wanton's alone is stated. The ambiguous fact is alleged that no freight is payable, because the vessel and cargo are united for the voyage. Surely it must have been in the power of the claimant to have given much more full and exact information on this point.

Then, as to Captain Smith's being a mere passenger, on which so much reliance is placed by the claimant, how does it comport with the facts upon the record? At the time of the capture he appeared as a principal personage, and evidently conducted himself differently from a person who had no interest in the voyage, and was a mere spectator. But what is decisive, to show that this is a mere disguise,

145*] too thin not to be *easily seen through, is the letter found on board, written by him, to the mate, a short time before the vessel sailed from St. Jago, in which the mask is stripped off, and he appears in his natural character as master. It is as follows: "Sir, I wish you to get the schooner down to Moro in the morning, and get the men quartered to the guns, and station them on the tops and forecastle, the same as on board armed ships, and get all ready for going to sea tomorrow night. After you get down to the Moro, send the boat, with four men, for me. Yours, Jos. Smith." Nothing can be more unlike the character or authority of a passenger, than these directions. They belong to one who has a right to command, and knows he is to be obeyed. The language imports a right to control the voyage, and could be dictated only by one in possession of the effective command. It would be absurd for an American passenger to address such a note to an American mate, who was responsible to a Spanish master for all his orders and conduct. It would be an exercise of credulity far beyond any just claims of the evidence to lead the court to the belief that Captain Smith was a mere passenger. The circumstances of the case are at war with the supposition, and the positive testimony of Ferver and Flower completely overturns it.

Without going more at large into the evidence, in which there is much matter open to observation, it is sufficient to state that, in the opinion of the court, the reality of the asserted sale to Marino is not established by the proofs, and our *conclusion is, that the unlaw- [*146
ful enterprise had its origin at Baltimore.

Decree affirmed with costs.

[Chancery.]

THOMAS, Appellant,

v.

GABRIELLE BROCKENBROUGH, John Harvie, Edwin Harvie, Jacqueline Harvie, Julia Ann Harvie, Heirs-at-law and Devisees of John Harvie, Respondents.

Although bills of review are not strictly within the statute of limitations, yet courts of equity will adopt the analogy of the statute in prescribing the time within which they shall be brought.

Appeals in equity causes being limited by the judiciary acts of 1789, c. 20, s. 22, and of 1803, c. 353, (XCIII.), s. 2, to five years after the decree, the same period of limitation is applied to bills of review.

Quære, Whether a bill of review, founded upon matter discovered since the decree, is also barred by the lapse of five years.

It is in the discretion of the court, to grant leave to file a bill of review for that cause.

APPEAL from the Circuit Court of Kentucky.

The appellant, Thomas, filed in that court, at the November term, 1818, a bill to review and reverse a final decree of the same court,

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NOTE.—Limitation of actions in equity cases. In all cases of concurrent jurisdiction, in the courts of law and equity, the statute of limitations applies equally to both courts, but it does not apply to cases in which courts of equity have exclusive jurisdiction. Hovenden v. Ld. Annesley, 2 Sch. & Lefr. 607, 630; Tatam v. Williams, 3 Hare. 347. Bank of U. S. v. Daniel, 12 Pet. 32; Sherwood v. Sutton, 5 Mas. 143; Pratt v. Northam, 5 Mas. 95; Union Bk. v. Stafford, 12 How. 327; Miller v. McIntyre, 6 Pet. 61; 1 McLean, 85; Coulson v. Walton, 9 Pet. 62; 1 McLean, 120; Lewis v. Marshall, 5 Pet. 470; McKnight v. Taylor, 17 Pet. 197;

pronounced at the May term, 1810, by which the plaintiff in the bill of review, and defendant in the original suit, was decreed to convey 147*] *to the heirs of John Harvie, the plaintiffs in the original suit, a certain tract of land, which formed the subject of controversy in that suit. The bill of review, after stating the substance of the original bill, which was filed by John Harvie, and the bill of revivor, after his death, in the name of the present respondents, in whose favor the decree was passed, assigns the following errors in the said decree, as causes for its reversal:

1. That the entry of James Clark, under whom the said John Harvie claimed the land in dispute, was void for uncertainty.

2. That before the final decree was passed the said Harvie died, leaving a will, by which he devised the land in controversy to his sons, Edwin and Jacqueline, two of the plaintiffs in the bill of revivor, of which will the plaintiff was wholly ignorant until long after the final decree was entered.

3. That the said Edwin Harvie died previous to the said decree, and his right in the said land descended to his heirs-at-law, John and Lewis, who were no parties to the said suit, of which facts the plaintiff was wholly ignorant until long after the decree complained of.

To this bill of review, the defendants plead, in bar, the decree passed and enrolled in the original suit, and the prosecution by the plaintiff, Thomas, of a writ of error to the Supreme Court to reverse the same, which was dismissed, and then demurred to so much of the bill as sought to review and reverse the said decree. Upon argument of the plea and demurrer, the 148*] court below *dismissed the bill of review, and the cause was brought, by appeal, to this court.

Mr. Talbot, for the appellant, argued upon the merits of the original cause, to invalidate the title of the plaintiff in that cause, founded upon the entry of Clark; and, also, upon the other errors assigned in the bill of review. He insisted that there was no period of limitation to bills of review, by the act of Congress, and that, in this case, the bill of review being founded upon newly-discovered evidence, and having been permitted by the court below, in its discretion, to be filed, it must be determined by the error in the original decree. In England, it is usual to recite all the important facts of the cause in the decree. In this country, this is not done, and, therefore, the pleadings, exhibits and proofs must be resorted to, in order to discover the errors apparent upon the face of the original decree.

Mr. Bibb, contra, insisted that the first error assigned upon the merits of the original cause, was no ground for a bill of review. The errors in law must be apparent on the face of the decree. If a fact be mistaken at the hearing, and in the decretal order, it must be rectified by a rehearing, which rehearing cannot be after decree enrolled.[1] The other errors assigned did not prejudice the appellant, nor had he any interest in correcting them. But the conclusive *objection to the whole proceeding [*149 was, that here is an attempt by a bill of review to revise the original decree, after the appeal is barred by the limitation of five years, prescribed in the acts of Congress. In England, writs of error are limited by statute to twenty years, and the courts of equity have limited appeals, and bills of review, to the same period, by analogy to that statute.[2]

Mr. Justice Washington delivered the opinion of the court, and after stating the case, proceeded as follows:

The first error assigned in the bill of review involves the merits of the original cause, and was intended to induce a re-examination of the title of the plaintiffs in that cause, the validity of which had been established by the decree. But, previous to an investigation of that subject, a preliminary question has been suggested by the counsel for the appellee, which the court is called upon to consider. The record shows that the order of the court, permitting the bill to be filed, was granted eight years subsequent to the final decree in the original cause; and the question to be decided is, whether this remedy was not barred by length of time.

It must be admitted that bills of review are not strictly within any act of limitations prescribed by Congress; but it is unquestionable that *courts of equity, acting upon the [*150 principle that laches and neglect ought to be discountenanced, and that in cases of stale demands its aid ought not to be afforded, have

1.—Comb. v. Proud, Cases in Ch. 54; 3 Bl. Comm. 454.

2.—Stat. 10 and 11, Wm. III. c. 14; Stat. at Large, Vol. III. p. 2043; Viner's Abr. tit. Limitation, 105; Smith v. Clay, Ambl. 645; but much better reported in note to Deloraine v. Browne, 3 Bro. Ch. Cas. 639.

Bond v. Hopkins, 1 Sch. & Lefr. 413; Starkhouse v. Barnston, 10 Ves. 466; Ex-parte Dewdney, 15 Ves. 496; Beckford v. Wade, 17 Ves. 96; Portlock v. Gardner, 1 Hare, 594; Vigors v. Pike, 8 Clarke & Fin. 650; Deconshe v. Savetier, 3 John. Ch. 190; Murray v. Corter, 20 John. 576; 2 Story, Eq. Jur. sec. 1520; Prevost v. Gratz, 6 Wheat. 481; Hughes v. Edwards, 9 Wheat. 489; Stafford v. Bryan, 1 Paige, 239.

Equity of redemption is barred by time. The analogy between the right in equity to redeem and the right of entry at law, is generally preserved. The limitation at law and equity is usually the same, with the allowance of same time for disabilities. Rafferty v. King, 1 Keen. 602–619; Corbett v. Barker, 1 Anstr. 138; 3 Anstr. 755; White v. Parnther, 1 Knapp, 228; Jenner v. Tracy, 3 P. Wms. 287, note; Belch v. Harvey, Ibid; Anon. 3 Atk. 313; Stewart v. Nichols, 1 Tam. 307; Aggas v. Pickerell, 3 Atk. 225; Christopher v. Sparke, 2 Jac. & Walk. 223; Smith v. Clay, 3 Bro. C. C. 639, note; Hodle v. Healy, 1 Ves. & B. 536; 4 Kent's Com. 187; Demorest v. Wynkoop, 3 John. Ch. 129; 2 Story Eq. Jur. sec. 1028, a; Kane v. Bloodgood, 7 John. Ch. 90; Trash v. White, 3 Bro. C. C. 289; Toplis v. Baker, 2 Cox, 119; Slee v. Manhattan Co. 1 Paige, 48; Lamar v. Jones, 3 Harr. & McH. 328; Chalmer v. Bradley, 1 Jac. & Walk. 83; Hughes v. Edward, 9 Wheat. 489; Slier v. Bk. of Pittsburg, 16 How. 571; Lytton v. Rowton, 1 Marsh. 519; Elmendorf v. Taylor, post, 168; Cholmondelly v. Clinton, 2 Jac. & Walk. 191; Gordon v. Hobart, 2 Sumn. 401; Dexter v. Arnold, 3 Sumn. 152.

Twenty years' actual adverse possession is a complete bar in equity, whenever the same possession would be a bar at law to ejectment. Dexter v. Arnold, 1 Sumn. 109; Miller v. McIntyre, 6 Pet. 61; Coulson v. Walton, 9 Pet. 62; Elmendorf v. Taylor, post, 152; Hunt v. Wickliffe, 2 Pet. 201; Peyton v. Stith, 5 Pet. 485; Lewis v. Marshall, 5 Pet. 470; 1 McLean, 17; Rhode Island v. Massachusetts, 15 Pet. 233; Pindell v. Mulliken, 1 Black. 585.

Courts of equity, although not in strictness bound by statutes of limitation, act by analogy to it, and, in a proper case apply as an equitable rule, the limitation prescribed by statute. Sherwood v.

always interposed some limitation to suits brought in those courts. It is stated by Lord Camden, in the case of Smith v. Clay, Ambl. 645; 3 Bro. Ch. Cas. 639, note, "that as the court of equity has no legislative authority, it could not properly define the time of bar by a positive rule; but that as often as Parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity." Upon this principle it is, that an account for rents and profits, in a common case, is not carried beyond six years, or a redemption of mortgaged premises allowed after twenty years' possession by the mortgagee, or a bill of review entertained after twenty years, by analogy to the statute which limits writs of error to that period.

These principles seem to apply, with peculiar strength, to bills of review, in the courts of the United States, from the circumstances that Congress has thought proper to limit the time within which appeals may be taken in equity causes, thus creating an analogy between the two remedies, by appeal, and a bill of review, so apparent, that the court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former. For it is obvious that, if a bill of review to reverse a decree, on the ground of 151*] error apparent *on its face, may be filed at any period of time beyond the five years limited for an appeal, it will follow that an original decree may, in effect, be brought before the Supreme Court for re-examination, after the period prescribed by law for an immediate appeal from such decree, by appealing from the decree of the Circuit Court, upon the bill of review. In short, the party complaining of the original decree would, in this way, be permitted to do indirectly what the act of Congress has prohibited him from doing directly.

Whether a bill of review, founded upon matter discovered since the decree, is in like manner barred by the lapse of five years after such decree, is a question which need not be decided in the present case, since we are all of opinion that it is in the discretion of the court to grant leave to file a bill of review for that cause, and that such leave ought not to be granted in a case where it appears that the plaintiff is not aggrieved by the decree, on account of the error so assigned; or, that being granted, the court ought to dismiss the bill, where no other error is assigned.

In this case, the court below decided, in the original cause, that the title to the land in controversy was vested in the heirs of John Harvie, and decreed the appellant to convey the same to them.

If Thomas, then, had no title to the land, of what consequence was it to him that the conveyance was decreed to be made to all the complainants *in that cause, as being the [*152 heirs of Harvie, rather than to two of them, who, he alleged, were entitled to the land as devisees? If they did not complain of the decree (and that they did not, is proved by their plea and demurrer to the bill of review), and if the plaintiff in this bill was not injured by it, the court is at a loss to conceive upon what legal or equitable ground that decree could have been reversed for the errors growing out of the after discovered evidence. These observations apply equally to the second and third errors assigned.

Decree affirmed with costs.

[Chancery. Limitation. Local Law.]

ELMENDORF, Appellant, v. TAYLOR et al., Respondents.

Although the statutes of limitation do not apply, in terms, to courts of equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has been held by analogy to bar relief in equity, even where the period of limitation for a writ of right, or other real action, had not expired.

Where an adverse possession has continued for twenty years, it constitutes a complete bar in equity, wherever an ejectment would be barred if the plaintiff possessed a legal title.

The rule which requires all the parties in interest to be brought before the court, does not affect the jurisdiction, but is subject to the discretion of the court, and may be modified according to circumstances.

In the courts of the United States, wherever the case may be completely decided as between the litigant parties, an interest existing *in some [*153 other person, whom the process of the court cannot reach, as if such party be a resident of another state, will not prevent a decree upon the merits.

The courts of every government have the exclu-

Sutton, 5 Mas. 143; Pratt v. Northam, 5 Mas. 95; Baker v. Biddle, Baldw. 394; Union Bk. of Louisiana v. Stafford, 12 How. 327.

Time only begins to run against an express trust from the period when it is openly disavowed by the trustee who insists upon an adverse right and interest which is fully and unequivocally made known to the cestui que trust. Boone v. Chiles, 10 Pet. 177; Prevost v. Gratz, 6 Wheat. 481; Bk. of U. S. v. Beverly, 1 How. 134; Michoud v. Girod, 4 How. 503; Platt v. Oliver, 2 McLean, 267; Harpending v. Ref. D. Church, 16 Pet. 455.

The rule in equity, in cases of trust, is that those trusts which are mere creatures of a court of equity, and not within the cognizance of courts of law, are not within the operation of the statute. So long as there is a subsisting trust acknowledged or acted upon by the parties, the statute does not apply. Other trusts, which are the ground of an action at law, are within it. Neilly v. Neilly, 28 Hun, N. Y. 651; Wisner v. Barnett, 4 Wash. C. C. 631.

As to relief barred by lapse of time in equity actions, see note to Pratt v. Carroll, 8 Cranch, 471. 6 L. ed.

The rule that the statute of limitations will not protect trustees, applies only to express, and not constructive trusts. Boone v. Chiles, 10 Pet. 177; Hayman v. Keally, 3 Cranch. C. C. 325; Elmendorf v. Taylor, post. 152; Beaubien v. Beaubien, 23 How. 190.

Where there has been great and unreasonable delay and no excuse shown, a court of equity may refuse relief on that ground. Platt v. Vattier, 9 Pet. 405; 1 McLean, 146; McKnight v. Taylor, 1 How. 161; 17 Pet. 197; Gould v. Gould, 3 Story, C. C. 516; Scott v. Evans, 1 McLean, 486; Ferson v. Sanger, Davies, 252; S. C. 5 N. Y. Leg. Obs. 43; Wagner v. Baird, 7 How. 234; Sterns v. Page, 7 How. 819; Kennedy v. Georgia State Bank, 8 How. 586; Bowman v. Wathem, 1 How. 189; 17 Pet. 235; 2 McLean, 376; Maxwell v. Kennedy, 8 How. 210; Knight v. Taylor, 1 How. 161; 17 Pet. 197; Holt v. Rogers, 8 Pet. 420; Harkness v. Underhill; 1 Black, 316; Fisher v. Boody, 1 Curt. C. C. 206; Smith v. Babcock, 2 Wood. & M. 246; Hough v. Richardson, 3 Story, C. C. 659.

Further, as to lapse of time being a bar to trusts, see note to Provost v. Gratz, 6 Wheat. 481.

sive authority of construing its local statutes, and their construction will be respected in every other country.

This court respects the decisions of the state courts upon their local statutes, in the same manner as the state courts are bound by the decisions of this court in construing the constitution, laws and treaties of the Union.

In Kentucky, a survey must be presumed to be recorded at the expiration of three months from its date, and an entry dependent on it is entitled to all the notoriety of the survey as a matter of record.

An entry in the following words, "W. D. enters 8,000 acres, beginning at the most south-westwardly corner of D. R.'s survey of 8,000 acres, between Floyd's Fork and Bull Skin; thence along his westwardly line to the corner; thence the same course with J. K.'s line north 2° west, 964 poles, to a survey of J. L. for 22,000 acres; thence with Lewis's line, and from the beginning south 7° west till a line parallel with the first line will include the quantity," is a valid entry.

Such an entry is aided by the notoriety of the survey, which it calls to adjoin, where those surveys had been made three months anterior to its date.

APPEAL from the Circuit Court of Kentucky.

This was a bill in equity, brought by the appellant, Elmendorf, in the court below, to obtain a conveyance of lands held by the respondents under a prior grant, and under entries which were all older than his entry. But the defendants below relied entirely on their patent; and the case, consequently, depended on the validity of the plaintiff's entry. This entry was made on the 19th of April, 1784; as follows: "Walker Daniel enters 8,000 acres, beginning at the most south-westwardly corner of Duncan Rose's survey of 8,000 acres, between Floyd's Fork and Bull Skin; thence [*154] along his westwardly line to the *corner; thence, the same course with Granville Smith's lower line, to John Lewis's corner; thence with Lewis's line, and from the beginning south 7° west, till a line parallel with the first will include the quantity." This entry was afterwards explained and amended on the 1st of July, 1784, so as to read as follows: "Walker Daniel enters 8,000 acres, beginning at the most south-westwardly corner of Duncan Rose's survey of 8,000 acres, between Floyd's Fork and Bull Skin; thence along his westwardly line to the corner; thence the same course with James Kemp's line north 2° west, 964 poles, to a survey of John Lewis for 22,000 acres; thence with Lewis's line, and from the beginning south 7° west, till a line parallel with the first line will include the quantity.

The plaintiff's bill was dismissed by the court below, and the cause brought by appeal to this court. It was argued, at a former term, by Mr. Clay and Mr. Talbot for the appellant, and by Mr. Bibb for the respondents, and was again argued at the present term by the same counsel.

On the part of the appellant, it was contended that the survey referred to in the amended entry, was, at the time, an object of sufficient notoriety to give validity to the entry, which called for one of its corners as a beginning. The land law of Virginia prescribes that surveys shall be returned to the office, and recorded in a record book, to be kept for that purpose by the principal surveyor, within three months from the time *of their being made. [*155 This survey had thus become a matter of record; and subsequent purchasers were bound to know its position, in the same manner as they are bound to know the position of entries. The book of surveys has every quality of a record, except that the surveyor is restrained from granting copies until the time limited by law for the return of surveys to the land-office has expired; and the notoriety attached to the record of survey does not entirely depend on the right to demand a copy of it. The right to inspect it still exists, and this right has been considered by the legislature as giving sufficient notice to all persons interested to enter a cavcat against the issuing of a patent. Were the question of novel impression, there could

NOTE.—Construction and effect of state laws and constitution, and state decisions in regard to same.

As to conflict between laws of the United States and laws of the states, see Gibbons v. Ogden, 9 Wheat. 1,210; Amis v. Smith, 16 Pet. 303; Dobbins v. Erie County, 16 Pet. 435; Barbarie v. Eslava, 9 How. 421; Barbarie v. Mayor of Mobile, 9 How. 451; McGuire v. The Commonwealth, 3 Wall. 387.

As far as the decisions of the state courts settle the rules of property, they will be properly respected by the United States Supreme Court. But where the only effect of a state decision is to regulate the practice of the courts, and to determine what shall be a judgment, the Supreme Court cannot consider themselves bound by such decisions, upon the ground that the laws upon which they are made are local in their character. Amis v. Smith, 16 Pet. 303.

The laws of a state, regulating the proceedings of its own courts, cannot authorize a district or circuit court sitting in that state to depart from the modes of proceeding and rules prescribed by the acts of Congress. Kelsey v. Forsyth, 21 How. 5.

Rules of practice, in relation to the federal court, form a law arising under the constitution of the United States, and consequently are not subject to state regulation. Golden v. Prince, 3 Wash. C. C. 313; S. C. 5 Am. Law. Journ. 502; Duncan v. U. S. 7 Pet. 435; Fullerton v. Bank of U. S. 1 Pet. 604, 613.

The true construction of section 34 of the judiciary act of Sept. 24, 1789, is that the laws governing rights of persons, and rules of property, as settled in the states, shall be guides to the courts of the United States, in controversies depending before them. But this does not extend to rules of practice established in the states. U. S. v. Wonson; 1 Gall. 5, 18; Golden v. Prince, 3 Wash. C. C. 313; 5 Am. L. Journ. 502; Tobey v. Claflin, 3 Sumn. 379; Brown v. Van Braam, 3 Dall. 314.

Laws which relate to practice, process, or modes of proceeding before or after judgment, are exceptions to section 34 of the judiciary act of Sept. 24, 1789. Thompson v. Phillips, Baldw. 246.

Under sec. 34 of the judiciary act of Sept. 24, 1789, the existing statutes of a state, when applicable, must be considered in the same manner as if the words of the state law had been adopted and specially re-enacted by act of Congress. U. S. v. Mundell, 6 Call. 245.

The effects of the acts of 1789 was, as to proceedings in the courts of the United States, in actions at common law, that such proceedings were to be the same in each state as were used in the Supreme Court of the state in Sept. 1789, subject to such alterations as the courts of the United States may make, or the Supreme Court of the United States may prescribe. Wayman v. Southard, ante, 1; Boyle v. Zacharie, 6 Pet. 648.

The acts of 1789 did not operate prospectively to adopt future regulations upon procedure which might from time to time be established in the states. Brewster v. Gelston, 1 Paine 426; Bell v. Davidson, 3 Wash. C. C. 328; Craig v. Brown, 3 Wash. C. C. 503; Yaw v. Mead, 5 McLean, 272.

Under the act of May 8th, 1792, the effect of final process in the United States courts may be so varied by rule as that it shall reach property which by the state laws in force in 1789, was not liable to be taken in execution; or, so as to exempt property not then exempt, but which has been made so by subsequent state laws. Wayman v. Southard, ante, 1; Bk. of U. S. v. Halstead, ante, 51; Fullerton v. Bk. of U. S. 1 Pet. 604;

be no doubt. But it had been settled by a long series of decisions in the local tribunal, and has become a settled rule of property, which this court would respect, in the same manner as it always respected the interpretation of local statutes by the state courts.[1]

On the part of the respondents, it was insisted that the prohibition in the statute to give a copy of the survey, excludes the idea of that notoriety which is ascribed to a record. Though inserted for preservation in a book, which is termed a book of record, it does not become substantially a matter of record, until it becomes public, and accessible to all the 156*] world. Even if an inspection of *the book was demandable as a matter of right, such an inspection would, from the nature of things, be of no avail, unless an office copy could be obtained. The notoriety of the surveys referred to in the entry, would not, therefore, be inferred from the fact that the three months, within which they were directed by the statute to be recorded, had expired before making the entry. It was also insisted that the appellant's claim did not entitle him to maintain the bill in his own name, for the land in question. He was a tenant in common with the others, and could not be allowed to sue in equity without making his co-tenants parties to the bill.[2] The length of time since which the plaintiff's title had accrued, was also insisted on as an equitable bar. More than twenty years had elapsed, and the principle was well settled that a court of equity would adopt the analogy of the statute of limitations, applied to bar an entry, or an ejectment, as the rule to be applied to equitable rights and remedies.[3] The statute of limitations is made to protect against ancient claims, whether well or ill founded, the *evidences of which may [*157 have been lost, or obscured by time.[4]

Mr. Chief Justice Marshall delivered the opinion of the court:

The suit was brought by the appellant, Elmendorf, in the court for the seventh circuit and district of Kentucky, to obtain a conveyance of lands held by the defendants under a prior grant, and under entries which are also older than the entry of the plaintiff. As the defendants do not adduce their entries, and rely entirely on their patent, the case depends on the validity of the plaintiff's entry. That was made in April, 1784, and was afterwards, in July of the same year, explained, or amended, so as to read as follows: "Walker Daniel enters 8,000 acres, beginning at the most south-westwardly corner of Duncan Rose's survey of 8,000 acres between Floyd's Fork and Bull Skin; thence along his westwardly line to the corner; thence the same course with James Kemp's line, north 2° west, 964 poles to a survey of John Lewis for 22,000 acres; thence with Lewis's line, and from the beginning south 7° west, till a line parallel with the first line will include the quantity."

As this entry begins at "the most south-westwardly corner of Duncan Rose's survey of 8,000 acres, between Floyd's Fork and Bull Skin," the first inquiry is, whether this survey was at the time an object of sufficient notoriety to give validity *to an entry [*158

1.—The cases cited are enumerated in the opinion of the court.

2.—Hinde. Pract. 2; 16 Ves. 325; 6 John's Ch. Cas. 450; 3 Bro. Ch. Rep. 229; 2 Ves. Sen. 312; 4 Johns. Ch. Rep. 199.

3.—Francis' Max. X. p. 58; Smith v. Clay, 3 Bro. Ch. Rep. 639, note; Jenner v. Tracy, 3 P. Wms. note b.; 2 Equ. Cas. Abr. tit. "Length of Time," Cook v. Arnham, 3 P. Wms. 283; Bond v. Hopkins, 1 Scho. & Lefr. 413; Hovenden v. Lord Annesley, 2 Scho. & Lefr. 607; 1 Vern. 196, 362; 1 Ch. Rep. 105; 3 Atk. 225; 2 Ves. Sen. 226; 2 Atk. 83; Cholmondeley v. Clinton, 2 Jacobs & Walker, 138.

4.—Clementson v. Williams, 8 Cranch's Rep. 72; Shipp v. Miller, 2 Wheat. Rep. 324.

Beers v. Haughton, 9 Pet. 329; 1 McLean, 226; Ross v. Duval, 13 Pet. 45; U. S. v. Knight, 14 Pet. 301; 3 Sumn. 358; Amis v. Smith, 16 Pet. 303; Duncan v. Darst, 17 Pet. 204; 1 How. 301.

The acts of 1839 and 1841, adopting state laws abolishing or restricting imprisonment for debt, do not adopt future state legislation, but only state laws as they then existed. Matter of Freeman, 2 Curt. C. C. 491; Campbell v. Hadley, Sprague, 470.

The civil practice act of California has been adopted by a rule of the Circuit Court in common law cases. Cheang Kee v. U. S. 3 Wall. 320; Beard v. Federy, 3 Wall. 478; Lyon v. Bertram, 20 How. 149; Teese v. Phelps, 1 McAll. 17.

The practice of the Circuit Court as to the form and effect of verdicts and the manner of entering judgment thereon, in Louisiana, is governed by the acts of Congress and the rules of the common law, and not by the laws of that state. Parks v. Turner, 12 How. 39.

The local law of the state in which a federal court is authorized to exercise jurisdiction forms the rule by which it is guided in adjudicating the rights of the parties in civil actions at common law, not arising under the laws of the United States. Livingston v. Moore, 7 Pet. 469; Owings v. Hull, 9 Pet. 607; Pennington v. Gibson, 16 How. 65; Campbell v. Claudius, Pet. C. C. 484; Gordon v. Hobart, Sumn. 401; The Alida, Abb. Adm. 165; The Infanta, Abb. Adm. 263; U. S. v. Wonson, 1 Gall. 5, 18; McNeil v. Holbrook, 12 Pet. 84.

The courts of the United States will take notice of and enforce the public statutes of the state within which they are adjudicating. McCluny v. Silliman, 3 Pet. 270; Bk. of Ala. v. Dalton, 9 How. 522; Ennis v. Smith, 14 How. 400; Clark v. Sobier, 1 Wood. & M. 368; Golden v. Prince, 3 Wash. C. C. 313; Mayer v. Folkrod, 4 Wash. C. C. 349; Lorman v. Clarke, 2 McLean, 568; Merrill v. Dawson, Hempst. 563.

This rule applied to state statute of limitations, McCluny v. Silliman, 2 Pet. 370; Bk. of Ala. v. Dalton, 9 How. 522; Nicolls v. Rodgers, 2 Paine, 437. And for sale of lands for unpaid taxes, Mayhew v. Davis, 4 McLean, 213; Amory v. Lawrence, 3 Cliff. 523; Davie v. Briggs, 7 Otto, 628; States v. Thompson, 8 Otto, 487; Chemung Canal B. v. Lowry, 3 Otto, 72.

In determining questions as to title of property, the federal courts are bound to apply the laws and rules of property of the state in which the property is situate, and to decide the controversy as the state court would. Walker v. State Com'rs, 17 Wall. 648; Supervisors v. U. S. 18 Wall. 71; State v. The Swallow, 1 Bond. 189; Coolidge v. Curtis, 1 Bond. 222; Simms v. Irvine, 3 Dal. 425, 426; Waring v. Jackson, 1 Pet. 570; Davis v. Mason, 1 Pet. 503; Bk. of Hamilton v. Dudley, 2 Pet. 492; Hinde v. Vattier, 5 Pet. 398; Clarke v. Smith, 13 Pet. 195; Wilcox v. Jackson, 13 Pet. 498; Amis v. Smith, 16 Pet. 303; Fisher v. Haldeman, 20 How. 186; Miles v. Caldwell, 2 Wall. 35; Bayerque v. Cohen, 2 McAll. 113; New Eng. S. C. v. Bilven, 3 Blatchf. 240; Suydam v. Williamson, 24 How. 427; Chicago v. Robbins, 2 Black, 418; Ross v. Duval, 13 Pet. 45; Society v. Wheeler, 2 Gall. 105; Brine v. Ins. Co. 6 Otto, 627; Orvis v. Powell, 8 Otto, 176.

In administering the local law of a state, the courts of the United States follow implicitly the settled decisions of the courts of last resort of the state in question. Mut. Soc'y v. Watts, 1 Wheat. 279; Shipp v. Miller, 2 Wheat. 316; Jackson v. Chew, 12 Wheat. 153; Fullerton v. Bk. of U. S.

calling for one of its corners as a beginning. It is not pretended that the survey itself had acquired this notoriety; but the plaintiff contends that it had become a matter of record; and that subsequent purchasers were, on that account, bound to know its position, in like manner as they are bound to know the position of entries. The land law prescribes that surveys shall be returned to the office, and recorded in a record book, to be kept for that purpose by the principal surveyor, within three months from the time of their being made. They are to be returned to the land-office in twelve months from their date, during which time the surveyor is forbidden to give a copy to any person other than the owner.

It is contended by the defendants, that this prohibition to give a copy of the plat and certificate of survey, excludes the idea of that notoriety which is ascribed to a record. Though inserted for preservation in a book which is denominated a book of record, it does not become, in fact, a record, until it shall partake of that characteristic quality of the record, on which the obligation to notice it is founded, being accessible to all the world. Were even an inspection of the book demandable as matter of right, which the defendants deny, that inspection would, they say, from the nature of the thing, be of no avail, unless a copy was also attainable. They insist, therefore, that the notoriety of these surveys is not to be implied from the fact that the three months had expired, during which they were directed by law to be recorded.

159*] *The plaintiff contends that the book of surveys has every characteristic of a record, except that the surveyor is restrained from granting copies, until the time limited by law for the return of surveys to the land-office shall have expired; and denies that the notoriety attached to a record is dependent entirely on the right to demand a copy of it. He maintains the right to inspect it, and insists that this right has been considered by the legislature as giving sufficient notice to all persons interested in the property to enter a caveat against the issuing of a patent, from which he implies that it is intended as a record to give notice, although a copy of it cannot be obtained.

Were this question now for the first time to be decided, a considerable contrariety of opinion respecting it would prevail in the court; but it will be unnecessary to discuss it, if the point shall appear to be settled in Kentucky.

This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect *itself into a tribunal which should cor- [*160 rect such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled.

The defendants contend that conflicting opinions have ben given in the state, and that the question is still open; while the plaintiff insists that the real question, that is, the notoriety of a survey after being made three months, has never been determined in the negative.

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1 Pet. 604; Green v. Neal, 6 Pet. 291; Rowan v. Runnels, 5 How. 139; Beauregard v. City of N. O. 18 How. 497; Doswell v. De la Lanza, 29 How. 29; Parker v. Kane, 22 How. 1; League v. Egery, 24 How. 264; Ex-parte Robinson, 6 McLean, 355; Leffingwell v. Warren, 2 Black, 599.

The construction put upon the provision of a state constitution by the highest courts of the state, is binding upon the United States courts. Nesmith v. Sheldon, 7 How. 812; Webster v. Cooper, 14 How. 488; State Bank v. Knoop, 16 How. 369; Amey v. Mayor, 24 How. 364; Gelpeke v. City of Dubuque, 1 Wall. 176; Nesmith v. Sheldon, 4 McLean, 375; Leavenworth Co. v. Barnes, 4 Otto, 70; South Ottawa v. Perkins, 4 Otto, 260; Mayor v. Cahalin, 7 Reporter, 327; Railroad Co. v. Georgia, 8 Otto, 359; Elmwood v. Marcy, 2 Otto, 289.

The courts of the United States, in all cases depending upon the meaning of the statue laws of states, will adopt the construction which has been given by the courts of the particular state to the same; unless the state is in conflict with constitution, laws or treaties of the United States. Meade v. Beale, Taney, 339; Fowler v. Haker, 4 Blatchf. 426; Union Works v. Lewis, 1 Abb. U. S. 518; McKeen v. Delancy, 5 Cranch, 22; Pope v. Wendell, 9 Cranch, 87; Olcott v. Fond du Lac Co. 4 Am. L. T. U. S. Cts. 47; Preston v. Browder, 1 Wheat. 115; Mut. Assurance Soc. v. Watts, 1 Wheat. 279; Gut v. State, 9 Wall. 35; King v. Wilson, 1 Dill. 555; Shipp v. Miller, 2 Wheat. 316; Thatcher v. Powell, 6 Wheat. 119; Shelby v. Grey, 11 Wheat. 361; Bell v. Morrison, 1 Pet. 351; Blossburg R. Co. v. Tioga R. Co. 5 Blatchf. 387; DeWolf v. Rabaud, 1 Pet. 476; Minor v. Bk. of Alexandria, 1 Pet. 64; Steele v. Spencer, 1 Pet. 559; Jackson v. Clark, 1 Pet. 634; Gardner v. Collins, 2 Pet. 58; Inglis v. Sailors' Snug Harbor, 3 Pet. 99; Smith v. Shriver, 3 Wall. Jr. C. C. 219; Pennock v. Dialogue, 2 Pet. 18; U. S. v. Morrison, 4 Pet. 124; Henderson v. Griffin, 5 Pet. 151; Bk. of U. S. v. Weisiger, 2 Pet. 349; Am. F. Co. v. U. S. 2 Pet. 368; Ross v. McLuny, 6 Pet. 283; Green v. Neal, 6 Pet. 291; McCluny v. Silliman, 3 Pet. 270; Marlatt v. Silk, 11 Pet. 1; Bk. of U. S. v. Daniels, 12 Pet. 32; Harpending v. Ref. D. Church, 16 Pet. 455; Porterfield v. Clark, 2 How. 76; Hughes v. Trustees, 6 Pet. 369; Barry v. Mercem, 5 How. 103; Pease v. Peck, 18 How. 595; Jackson v. Chew, 12 Wheat. 163; Sumner v. Hicks, 2 Black, 532; U. S. v. McDaniel, 7 Pet. 1; Springer v. Foster, 2 Story, C. C. 383; Neal v. Green, 1 McLean, 18; Woolsey v. Dodge, 6 McLean, 142; Boyle v. Ariedge, Hempst. 620; Griffin v. Gibb, McAll. 212; Mik v. The Samuel Strong, Newb. 187; 6 McLean, 387; Van Rensselaer v. Kearney, 11 How. 297; Beach v. Viles, 2 Pet. 675; Paine v. Wright, 6 McLean, 395; Pelk v. Chicago R. Co. 4 Otto, 164; Re The J. H. Starin, 8 Reporter, 293; Hawes v. Contra C. Water Co. 7 Rep. 100; East Oakland v. Skinner, 4 Otto, 255; Hall v. De Cuir, 5 Otto, 485; Goodrich v. Chicago, 4 Biss. 18; Oliver v. City of Omaha, 3 Dill. 368; Tioga R. R. Co. v. Blossburg, 20 Wall. 137; Townsend v. Todd, 1 Otto. 452.

The first case of which we have any knowledge, is Sinclair v. Singleton (Hughes, 92). The decision of the court was in favor of the validity of an entry which calls for the lines of a survey. The court is not in possession of the book in which the case is reported; but, judging from the references made to it in subsequent cases, the entry must have been made within twelve, and, probably, within three months of the date of the survey.

The next case in which the question was di- 161*] rectly *made, is Key v. Matson (Hardin, 70), decided in the fall term of 1806. The survey had not been made three months, at the date of the entry; and the court determined that it was not an object of notoriety. A rehearing was moved for, and, according to the course of the Court of Appeals of Kentucky, errors were assigned in the original decree. The first was, that "the court has decided that an entry dependent on a survey not made three months, is void; whereas, according to law and former decisions, such an entry ought to have been valid."

The court adhered to its first decision, and used expressions, which, though applied to a case in which the entry was made before the expiration of three months after the survey on which it depended, yet indicated the opinion that an entry, made after the expiration of three months from the date of the survey, would be equally invalid.

Moore v. Whitlege (Hardin, 89) and Respass v. Arnold (Hardin, 115), decided in the spring of 1807, were on the authority of Key v. Matson, and were also cases in which the entries were made a few weeks after the surveys. The case of Cartwright v. Collier (Hardin, 179), decided in the spring of 1808, was one in which the entry was made only fifteen days after the survey. In Ward v. Lee (1 Bibb, 27), decided in 1808, the entry called for a survey which had been made twenty-three days, of the return of which, to the office, there was no proof. The judge adds: "If it had been returned and 162*] recorded, *yet no person was entitled to a copy." This last observation is indicative of the opinion that a survey, though recorded, would not become an object of notoriety until a copy of it was demandable; but it was made in a case in which that point did not occur. The case of Cleland's Heirs v. Gray, decided at the same time, is of the same character. The survey was made sixteen days before the entry which called to adjoin it. The judge says: "It is clear that no description in this certificate of Evan Shelby's survey can aid Weeden's entry, because it does not appear that the certificate was even made out, or deposited in the surveyor's office, at the date of Weeden's entry. But if it had been recorded, yet it was inaccessible to holders of warrants. They were not entitled to a copy until twelve months after the making of the survey; nor was the surveyor himself bound to record it in less than three months after the survey was made."

In the case of Galloway v. Neale et al. (1 Bibb, 140), the judge who delivered the opinion of the court states the law thus: "If the holder of a warrant adopts a survey previously made upon another warrant as the basis of a location, he must prove the notoriety of the survey at that period, otherwise his location cannot be supported. If he has adopted such survey at a period earlier than that at which the law has opened the record thereof for copies, he must prove its notoriety by evidence aliunde."

This plain declaration of the opinion of the court on this point was, however, made in a *case in which it did not arise. The [*163 survey had preceded the entry which called for it, more than twelve months.

The cases of Davis v. Bryan, 2 Bibb. 113, and Davis v. Davis, 2 Bibb. 137, decided in the spring of 1810, were, each of them, cases in which surveys preceded the entries calling for them, less than three months.

It is, then, true, that from 1806 to 1810, inclusive, the prevailing opinion of the court of Kentucky was, that an entry could derive no aid from the description contained in the plat and certificate of a survey for which it called, until that survey had been made twelve months; but it is also true, that this opinion has been advanced only in cases in which the point did not occur.

The first case in which the point actually occurred, was Carson v. Hanway (3 Bibb, 160). The entry was made on the 9th of February, 1784, and called for a survey made on the 15th of February, 1783. The entry was supported on the principle that the plat and certificate of survey constituted a part of it. In delivering the opinion of the court, the judge said: "When the survey has been so long made that the law requires it to be of record, it will be presumed to be so, and a call for its lines, in an entry, will render it a part of the description of such entry."

At the preceding term, before the same judges, the case of Bush v. Jamison (3 Bibb, 118) was argued, and the court determined that an entry could not be aided by the description contained in a survey which had been made only seven days *prior to the [*164 entry which called to adjoin it. In giving its opinion, the court says: "How far a subsequent adventurer would have been bound by a description given in the survey of its beginning corner, if the survey had been of record, is not material to inquire; for there is no proof that the survey was, in fact, of record; and, as the law did not require that it should have been recorded at the date of the entry, a presumption that it was cannot be indulged, according to any rule of probability or on any principle recognized in former adjudications of this court."

These cases, decided so near each other, by the same judges, show clearly, by the terms in which they are expressed, that the distinction between a survey, neither recorded in fact, nor in presumption of law, was in the mind of the court; and that its former adjudications were considered.

Reed's Heirs v. Dinwiddie (3 Marsh. Rep. 185) was decided in the year 1820. In that case, an entry called for a survey which had been made six months, and the court determinded that the person claiming under this entry might avail himself of the notoriety contained in the certificate of survey, "which, from its date, must have been of record."

Jackman's Heirs v. Walker's Heirs (3 Litt.

Rep. 100) is the last case which has been cited. It was decided in 1823. The surveys were made about ten months before the entry, which called to adjoin them, and the court allowed to the entry all the aid which could be 165*] derived from the *description contained in the next certificate of survey; because, "from the length of time they had been made before the date of the entry in question, the law required them to be of record, and, of course, they must be presumed to be so."

From the year 1813, then, to the present time, the courts of Kentucky have uniformly decided that a survey must be presumed to be recorded at the expiration of three months from its date; and that an entry dependent on it is entitled to all the notoriety which is possessed by the survey. We must consider the construction as settled finally in the courts of the state, and that this court ought to adopt the same rule, should we even doubt its correctness.

We think, then, that the entry under which the plaintiff claims, is aided by the notoriety of the surveys which it calls to adjoin, if those surveys have been made three months anterior to its date.

This depends on the question whether it is to date from April or July, 1784. The defendants insist that the amendment, or explanation, of the first of July, does not change the ground originally occupied, and is, therefore, not to be considered as having any influence on the date of the entry, or as connecting it with the surveys mentioned in the amendment or explanation.

We cannot think so. This amendment would be seen by subsequent locators, and would give them as full notice that the entry adjoined the surveys of Duncan Rose, James Kemp, and John Lewis, as they would have received had 166*] the *original entry been made on that day. Were, it then, to be conceded that the original entry, calling for Greenville Smith's line, instead of James Kemp's, would have been construed to cover the same ground which it now covers, still we perceive no substantial reason for refusing to the change made in its terms any advantage belonging to the date of that change.

We think, then, for the purpose of the present inquiry, the entry is to be considered as if made on the first of July, 1784, and is entitled to all the notoriety of the surveys for which it calls.

This being established, we do not understand that any controversy remains on the question of notoriety. Some of the objects called for in the surveys are so well known as to fix incontrovertibly the beginning of the entry made by Walker Daniel; and its validity is not questioned on any other ground.

The validity of the plaintiff's entry being established, it remains to consider the other objections which are made to a decree in his favor.

2. It is contended that he is a tenant in common with others, and ought not to be permitted to sue in equity, without making his co-tenants parties to the suit.

This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by *the court itself [*167 and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of court, because it has no jurisdiction over his cause; but, being introduced by the court itself, for the purposes of justice, is susceptible of modification for the promotion of those purposes. In this case, the persons who are alleged to be tenants in common with the plaintiffs, appear to be entitled to a fourth part, not of the whole tract, but of a specially described portion of it, which may, or may not, interfere with the part occupied by the defendants. Neither the bill nor answers allege such an interference, and the court ought not, without such allegation, to presume it. Had the decree of the Circuit Court been in favor of the plaintiff, and had this objection to it been deemed sufficient to induce this court to reverse it, and send back the case for the examination of this fact, it could never have justified a dismission of the bill without allowing the plaintiff an opportunity of showing that he was the sole owner of the lands in dispute. In addition to these observations, it may be proper to say that the rule which requires that all persons concerned in interest, however, remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But, if the case may be completely decided *as between the litigant parties, [*168 the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of some other state, ought not to prevent a decree upon its merits. It would be a misapplication of the rule, to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do.[1]

3. The third point in the defense is, the length of time which has elapsed since the plaintiff's equitable title accrued.

His patent was issued on the 11th of February, 1794, and those of the defendants are of prior date. His bill was filed on the 28th of December, 1815. Several of the defendants, in their answers, claim the benefit of the length of time.

From the earliest ages, courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims, especially where the legal estate has been transferred to purchasers without notice. Although the statutes of limitations do not, either in England, or in these states, extend to suits in chancery; yet the courts in both countries have acknowledged their obligation. Their application, we believe, has never been controverted; and in the recent case of Thomas v. Harvie's Heirs,[2] decided at this term, it was expressly recognized. But the statute of limitations, which *bars an [*169

1.—As to who are necessary parties to a bill in equity, vide ante, Vol. VIII. p. 451, note 1.
2.—Vide ante, 146.

ejectment after the lapse of twenty years, constitutes no bar to a writ of right, even where the tenant counts on his own seisin, until thirty years shall have elapsed. Whether a court of equity considers an equitable claim to land as barred when the right of entry is lost, or will sustain a bill as long as the mere right may be asserted, is a question of some difficulty, and of great importance. The analogy of a bill in equity to actions founded on a right of entry, seems to derive some title to consideration, from the circumstance that the plaintiff does not sustain his claim on his own seisin, or that of his ancestor, but on an equity not necessarily accompanied by seisin, whereas seisin is an indispensable ingredient in a writ of right. But the case must depend upon precedent, and if the one rule or the other has been positively adopted, it ought to be respected.

In the case of Jenner v. Tracy (3 P. Wms. 287, in a note) the defendant demurred to a bill to redeem mortgaged premises, of which the defendant had been in possession more than twenty years, and the demurrer was sustained; the court observing, that "as twenty years would bar an entry or ejectment, there was the same reason for allowing it to bar a redemption. It is added, that "the same rule was agreed in the case of Belch v. Harvey, by the Lord Talbot. In 3 Atk. Rep. 225, the court expressed an opinion unfavorable to a demurrer in such a case, because the plaintiff ought to be at liberty, in his replication, to show that he is within the exceptions of 170*] *the statute; but supported the bar when pleaded. The same principle is recognized in 3 Atk. Rep. 313. The rule appears to have been laid down in 1 Ch. Cas., and to have been observed ever since.

In 3 Johns. Ch. Rep., Chancellor Kent said: "It is a well-settled rule, that twenty years' possession by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to a redemption, unless the mortgageor can bring himself within the proviso in the statute of limitations."

These decisions were made on bills to redeem mortgaged premises; but as no reason can be assigned why an equity of redemption should be barred in a shorter time than any other equity, they appear to us to apply with equal force to all bills asserting equitable titles. We have seen no dictum asserting that the rule is not applicable to other equitable rights, and we should not feel justified in drawing a distinction which has never heretofore been drawn. But we think the rule has been applied to equitable rights generally.

In the second volume of Eq. Cas. Abr. title "Length of Time," it is said generally, "that possession for more than twenty years, under a legal title, shall never be disturbed in equity." The case of Cook v. Arnham (3 P. Wms. 283), was a bill brought to supply the want of a surrender of copyhold estate to the use of the will; and it was objected, that the application to the court had been unreasonably delayed. The Lord Chancellor said that "the 171*] length of time was not above *fourteen years, which, as it would not bar an ejectment, so neither could it bar a bill in equity."

The case of Bond v. Hopkins et al. (1 Sch. & Lef., 413) was a suit brought by a person claiming to be the heir, to set aside a will alleged to be obtained by fraud, to obtain possession of title papers, and to remove impediments out of the way in a trial at law. Length of possession was set up as a bar to the relief prayed for in the bill; and the question, which was discussed at the bar by very eminent counsel, was profoundly and deliberately considered by Lord Redesdale. The testator died in November, 1754, and the bill was filed in June, 1792, so that thirty-eight years had elapsed between the death of the testator and the filing of the bill. As this time was not sufficient to bar a writ of right, no question could have arisen respecting the act of limitations, had the rule of granting relief in equity depended on the ability of the plaintiff to maintain a writ of right. But the rule was clearly understood, both at the bar and by the court, to be, that the equitable rule respecting the length of time had reference to twenty years, the time during which the right of entry was preserved, not to the time limited for maintaining a writ of right. In the very elaborate and very able opinion given by the chancellor, in this case, in which he investigates thoroughly the principles which govern a court of equity in its decisions on the statute of limitations, it is not insinuated that it acts in any case from *analogy to a writ of [*172 right, but is assumed as an acknowledged and settled principle that it acts from analogy to a writ of ejectment. In this case, a suit had been instituted by John Bond, the grandfather of the plaintiff, as early as 1755, and a decree pronounced in 1770. The full benefit of this decree was not obtained, and John Bond took forcible possession of a part of the property, of which he was dispossessed by order of the court, on a bill for that purpose, brought by the defendant. The said John Bond died in prison, in 1774, having first devised the property in dispute to his son Thomas, then an infant, for life, with remainder to his first, and other sons, in strict settlement. Soon after his death, an ejectment was brought by the defendant, to recover part of the property in possession of Bond; and in 1776, a bill was filed by Thomas Bond, then a minor, to enjoin the defendants from proceeding in their ejectment, and to have the will delivered up. Various orders were taken; and in June, 1792, an original bill, in the nature of a bill of revivor, was filed by Thomas Bond and his eldest son, Henry. In discussing this case, so far as respected length of time, no doubt was entertained that the plaintiffs would have been barred of all relief in equity, by a quiet acquiescence in the possession of the defendants for twenty years. It was a strong case of fraud, but an acquiescence of twenty years would have closed the Court of Equity against the plaintiffs. This was not questioned; but it was insisted that the pendency of suits, from the year 1755, when John *Bond, the son and heir of the [*173 testator, returned from America, had preserved the equity of the plaintiffs, unaffected by the lapse of time; and of this opinion was the court.

The case of Howenden v. Lord Annesly (2 Sch. & Lef. 607) was a bill filed in May, 1794,

to set aside a conveyance made in July, 1726, alleged to have been fraudulently obtained. There were some circumstances on which the plaintiff relied, as relieving his case from the laches justly imputable to him for permitting such a length of time to elapse; but they need not be noticed, because they were deemed insufficient by the chancellor, and the bill was dismissed. In discussing this point, Lord Redesdale reviewed the cases which had been determined, and said, "that it had been a fundamental law of state policy, in all countries, and at all times, that there should be some limitation of time, beyond which the question of title should not be agitated. In this country, the limitation has been fixed (except in writs of right, and writs depending on questions of mere title) at twenty years." "But it is said that courts of equity are not within the statute of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered." After reasoning for some time on this point, and citing several cases to show "that wherever the legislature has limited a period for law proceedings, equity 174*] will, in analogous *cases, consider the equitable rights as bound by the same limitation." he says, "a court of equity is not to impeach a transaction on the ground of fraud, where the fact of the alleged fraud was within the knowledge of the party sixty years before. On the contrary, I think the rule has been so laid down, that every right of action in equity, that accrues to the party, whatever it may be, must be acted upon, at the utmost, within twenty years."

This question was fully discussed, and solemnly, and we think, finally decided, in the case of The Marquis Cholmondeley v. Lord Clinton et al. reported in 2d volume of Jacobs & Walker. In that case, the title accrued in December, 1791, and the bill was filed in June, 1812. Other points were made; but the great question on which the cause depended was the length of time which had been permitted to elapse; and this question, after being argued with great labor and talent at the bar, was decided by the court, upon a full review of all the cases which are to be found in the books. It was considered, and was treated by the court, as one of the highest importance; and the opinion was unequivocally expressed, that "both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must, within that period, have made his claim in a court of law, had it been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by 175*] analogy to the statute of limitations, *if, during all that period, the possession has been held under a claim unequivocally adverse and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the adverse possessor." Upon this ground alone the bill was dismissed. The plaintiff appealed to the House of Lords, and the decree was affirmed.

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The Lord Chancellor, in delivering his opinion in the House of Lords, took a distinction, as to length of time, between trusts, "some being express, and some implied." "In the case of a strict trustee, it was his duty to take care of the interest of his cestui que trust, and he was not permitted to do anything adverse to it; a tenant also had the duty to preserve the interests of his landlord; and many acts, therefore, of a trustee, and a tenant, which, if done by a stranger, would be acts of adverse possession, would not be so in them, from its being their duty to abstain from them."

In a case of actual adverse possession, however, as was that before the House, his lordship considered twenty years as constituting a bar. Lord Redesdale was of the same opinion, and, in the course of his address, remarked that "it had been argued that the Marquis Cholmondeley might, at law, have had a writ of right. That was a writ to which particular privileges were allowed, but courts of equity had never regarded that writ, or writs of formedon, or others of the same nature. They had always considered the provision in the statute of James, which applied *to rights, and [*176 titles of entry, and in which the period of limitation was twenty years, as that by which they were bound, and it was that upon which they had constantly acted."

This is not an express trust. The defendants are not, to use the language of the Lord Chancellor in the case last cited, "strict trustees, whose duty it is to take care of the interest of cestuis que trust, and who are not permitted to do anything adverse to it." They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred, did the plaintiff possess a legal title.

This point has been decided in the same manner by the courts of Kentucky. The counsel for the plaintiff insist that those decisions are founded on the peculiar opinions entertained by that court respecting writs of right. We do not think so. Their doctrine on that subject is, indeed, used as an auxiliary argument; but it is merely auxiliary to an opinion formed without its aid.

The decree of the Circuit Court is to be reversed, and the cause remanded to that court, with instructions that the entry under which the plaintiff claims is valid; but that the adversary possession of the defendants, respectively, constitutes a complete bar to the plaintiff's bill, *wherever it would constitute [*177 a bar to an ejectment, did the plaintiff possess a legal title.[1]

1.—Although, in general, length of time is no bar to an express trust, clearly established to have once existed, yet, as length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transactions, it operates, by way of presumption, in favor of innocence, and against the imputation of fraud. It was therefore held by this court that the lapse of forty years, and the death of all the original parties, would discharge and extinguish a trust, proved once to have existed by strong circumstances; by analogy to the rule of law, which, after the lapse of time, presumes the payment of a debt, surrender of a deed, and extinguishment of a trust, where cir-

178*] *Decree.—This cause came on, etc. On consideration whereof, this court is of opinion that there is error in the decree of the 179*] said Circuit *Court, in this, that the said court determined that the entry in the bill mentioned, made by Walker Daniel, on the first 180*] day of April, 1784, *and explained on the first day of July of the same year, on which the plaintiff's title is founded is invalid; Whereas, this court is of opinion 181*] *that the same is a valid entry. It is therefore ordered and decreed that the decree of the said Circuit Court, dismissing the plaintiff's bill, ought to be, and the same is hereby, reversed and annulled. And this court is further of opinion that in cases of adversary title, such an adversary possession as would bar an ejectment. did the plaintiff possess the legal title, constitutes also a bar to a bill in equity. It is therefore further ordered and decreed that this cause be remanded to the said Circuit Court, with instructions to take such further proceedings therein, conformably to this opinion, as may be agreeable to equity and good conscience. All which is ordered and decreed accordingly.

[Chancery.]

CARNEAL et al., Appellants,

v.

BANKS, Respondent.

BANKS, Appellant,

v.

CARNEAL et al., Respondents.

The joinder of improper parties, as citizens of the same state, etc. will not affect the jurisdiction of the circuit courts in equity, as between the parties who are properly before the court, if a decree may be pronounced as between the parties who are citizens of the same state.

A decree must be sustained by the allegations of the parties, as well as by the proofs in the cause, and cannot be founded upon a fact not put in issue by the pleadings.

The treaty of 1778, between the United [*182 States and France, allowed the citizens of either country to hold lands in the other; and the title, once vested in a French subject, to hold lands in the United States, was not devested by the abrogation of that treaty, and the expiration of the subsequent convention of 1800.

Bill to rescind a contract for the exchange of lands dismissed under the special circumstances of the case.

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cumstances require it. Prevost v. Gratz, (ante Vol. VI. p. 481, 497.) In the case of Hillary v. Waller, 12 Ves. 265, the whole subject of presumptions from the lapse of time is gone fully into by Lord Erskine, both as applicable to incorporeal hereditaments, and where there is a written title. He states the doctrine to be founded in reason, the nature and character of man, and the result of human experience. "It resolves itself into this: that a man will naturally enjoy what belongs to him." "It has been said you cannot presume, unless you believe. But it is because there are no means of creating belief or disbelief, that such general presumptions are raised upon subjects of which there is no record or written muniment. Therefore, upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, instead of belief, which must be the foundation of the judgment upon a recent transaction, where the circumstances are incapable of forming anything like belief, the legal presumption holds the place of particular and individual belief."

Although some of the principles laid down in this decision seem to be questioned by Mr. Sugden, in his treaties on the Law of Vendors and Purchasers (p. 250), yet it was cited with entire approbation, and its doctrine adopted by this court, in determining the above case of Prevost v. Gratz, ante, Vol. VI. p. 504.

In the case of Smith v. Clay (reported in 3 Bro. Ch. Rep. 639. note), and which is also cited and adopted by this court in the case of Thomas v. Harvie's Heirs, ante, p. 146, Lord Camden says: "A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." After applying this principle to limit a bill of review and appeals, by analogy to the statute concerning writs of error, he proceeds to cite the maxim, Expedit rei publicæ ut sit finis litium, and to state that it had prevailed in the Court of Equity, in all times, without the help of an act of parliament. "But as the court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances. But as often as parliament had limited the time of action and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For where the legislature had fixed the time at law, it would have been preposterous for equity, which, by its own proper authority, always maintained a limitation, to countenance laches beyond the period that law has been confined to by parliament. Therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar. Thus, the account of rents and profits, in a common case, shall not be carried beyond six years. Nor shall redemption be allowed after twenty years' possession in a mortgagee."

So, also, this court, in the case of Hughes v. Edwards (ante. Vol. IX., pp. 489, 497), adopted the same principle in relation to the effect of the lapse of time upon the respective rights of mortgageor and mortgagee, and of purchasers claiming under the former.

The great case of Cholmondeley v. Clinton, cited in the text, was that of an estate subject to a mortgage in fee, being in settlement with an ultimate limitation to the right heirs of S. R.; A., on the expiration of the previous estate, entered, claiming to be entitled, under the limitation; and he, and after his death, his son, continued in quiet possession, paying interest on the mortgage, for twenty years. It was finally determined, after much litigation, that the devisee of the person really entitled under the limitation, was barred by the length of time.

The case, as first decided in the Court of Chancery, will be found reported in 2 Meriv. Rep. 173, 357, where it was determined, by Sir W. Grant, M. R., that the lapse of time was no bar by analogy to the statute of limitations. Upon its afterwards coming on before his successor, Sir T. Plumer, the latter delivered a learned and elaborate judgment, which will be found reported in 2 Jacobs & Walker, 138, tending to show that wherever in the claim of a legal estate, the remedy is barred in a court of law by the statute of limitations, the remedy for an equitable estate will be equally barred, by the lapse of the same period of time, in a court of equity. An appeal was taken to the House of Lords, and in moving the judgment of the House, Lord Eldon adverted to the general principles adopted by courts of equity on the subject of length of time, and observed on "the vast difference between trusts, some being express, some implied; some, relations formed between individuals in the matter in which they deal with each other, and in which it could hardly be said, that one was trustee, and the other cestui que trust, and yet it could not well be denied that for some purposes they were so. Of this kind, he took the relation between a mortgageor and mortgagee to be. In the case of a strict trustee, it was his duty to take care of the interest of his cestui que trust, and he was not permitted to do anything adverse to it; a tenant, also, had a duty to preserve the interests of

THESE causes was argued by Mr. Jones for Banks, and by Mr. Bibb for Carneal and others.

Mr. Chief Justice Marshall delivered the opinion of the court:

These appeals are from a decree of the Circuit Court for the district of Kentucky, in which Carneal's heirs were decreed to pay Henry Banks $2,500, for failing to perform a contract entered into between Thomas Carneal, their ancestor, and the said Henry Banks.

The bill filed by Henry Banks, charges that his agent, Cuthbert Banks, entered into a contract with Thomas Carneal, whereby he agreed to transfer to Carneal the right of the said Banks in 30,000 acres of land purchased by him from John Harvie, for which right said Carneal "agrees to give a tract of 2,000 acres of land on Green River, patented for Philip Philips, which was sold out of a tract of 22,100 acres, by Philips, to Michael Lacassaign, deceased, by said Lacassaign to said Carneal, on the 30th of July, 1797, for which land said Carneal is to make a general warranty deed whenever thereunto required."

The bill further charges that Carneal was guilty of fraud in pretending to have a good 183*] title *to the said 2,000 acres of land, the whole being covered with better title, and in representing the land as much more valuable than it really is. The bill prays that the contract may be rescinded, and that the plaintiff may be re-instated in his rights to the said 30,000 acres of land, or have the value thereof in damages. And that the heirs of John Harvie, deceased, in whom the legal title to the said 30,000 acres remains, may be decreed to convey the same to him.

The heirs of T. Carneal deny all fraud in his representation of the value of the land sold to the plaintiff, and insist on their ability to convey the same. They admit that the deed from Lacassaign to him was not recorded within the time limited by law, one of the three subscribing witnesses then required for its proof, having died before it was offered to the court. In consequence of this circumstance, Carneal, in 1779, instituted a suit in chancery against Lacassaign, to perfect his title, which abated by his death. The law being so changed as to admit deeds to record on the oath of two subscribing witnesses, this deed was recorded in 1814, and the defendants are willing to convey, if directed so to do.

The defendants farther state that the plaintiff's original claim on the said 30,000 acres of land, was to only a moiety thereof, the other moiety being the property of the locator, which has been transferred to the defendants. The said Banks assigned the survey to J. Harvie, that the patent might issue in his name, in trust for the person entitled to the locator's moiety, and the title still *remains in [*184 Harvie's heirs, encumbered by debts due from Banks to Harvie, and by an obligation in which Harvie was bound to Thomas Madison, as surety for Banks, for the conveyance of military lands north-west of the Ohio. To obtain a title from Harvie, the said Carneal, in September, 1799, bound himself to pay the debt due from Banks, with Harvie as his security, to Madison, on condition that Banks would deliver him military land-warrants to the amount of 4,300 acres; and it was expressly stipulated that Carneal should retain the title to the said 2,000 acres of land until Banks should perform this contract. He requires the plaintiff to show how he has performed it. They understand that Harvie's heirs have a claim on the estate of their ancestor, of which they know nothing certain, and aver that the title to the locator's moiety of the said 30,000 acres of land remains in the said heirs. The defendants, then, pursuing a practice authorized by law in the state courts of Kentucky, pray that their answer may be received as a cross bill; and that Harvie's heirs, as well as Banks, may be made defendants to it, and may answer it; and that the whole controversy may be settled.

On the 20th of September, 1799, J. Harvie conveyed to T. Carneal the moiety of the said patent for 30,000 acres, which had been sold by the said banks to Carneal.

On the same day, the following agreement was entered into:

"Thomas Carneal agrees to pay John Preston or John Harvie, 3,200 acres of military land, *lying on the north-west side of the [*185 river Ohio, surveyed on or before the 10th day of October, 1795, to satisfy a bond executed by

his landlord; and many acts, therefore, of a trustee and tenant, which, if done by a stranger, would be acts of adverse possession, would not be so in them, from its being their duty to abstain from them. But the case of a mortgagee was different, he being at liberty to hold possession, and not becoming strictly a trustee until the money was tendered to him, and having a right, if he continued in possession for twenty years, without acknowledging the mortgage, to turn round on the mortgageor, and say that the estate was his own. His lordship could not agree to, and had never heard of, such a rule, as that adverse possession, however long, would not avail against an equitable estate; he meant, where there was no duty which the person who has it, has undertaken to discharge for him against whom he pleads adverse possession. The possession of Lord Clinton was adverse; it had been said that it was taken by consent, founded on mistake; but that did not make the possession the less adverse, because Lord Clinton took, and kept it for himself, where he owed, as it appeared to him, no duty to Lord Orford. He concluded by stating his opinion to be, that adverse possession of an equity of redemption for twenty years, was a bar to another person claiming the same equity of redemption, and worked the same effect, as disseisin, abatement, or intrusion, with respect to legal estate; and that, for the quiet and peace of titles, and the world, it ought to have the same effect. Lord Redesdale concurred, and the decree was affirmed.

Although, in general, lapse of time is not a bar to a direct trust, as between trustee and cestui que trust, so long as there is a continuing and subsisting trust acknowledged and acted upon between the parties, yet this must be understood as applying to such trusts only as are the creatures of a court of equity, or strict technical trusts, and not to those which are within the cognizance of a court of law; for, in regard to all those trusts which are the ground of an action at law, and where there is a concurrent jurisdiction at law, and in equity, the rule is the same, and the statute is a bar, both in a court of law and equity. Kane v. Bloodgood, 7 Johns. Ch. Rep. 90, 127. And, though in cases of trusts peculiarly and exclusively of equity jurisdiction, the statute does not apply, yet, if the trustee denies the right of the cestui que trust, and the possession of the property becomes adverse, lapse of time may constitute a bar in equity. Ib. And where a person takes possession of property in his own right, and is, afterwards, by evidence or construction, changed into a trustee, he may insist on the lapse of time as a bar. Decouche v. Savatier, 3 Johns. Ch. Rep. 190.

the said John Harvie, as security for Henry Banks, to Thomas Madison, deceased, dated the 6th day of December, 1795; provided the said Carneal shall receive from Cuthbert Banks, in Kentucky, 4,300 acres of military continental land-warrants, within ninety days after the said Carneal shall make demand of them of Cuthbert Banks, in Lexington, in Kentucky; and provided the said Carneal shall not receive the warrants, he will not, afterwards, be bound to take them unless he pleases. Henry Banks agrees that he will furnish the said 4,300 acres of military land-warrants, through the agency of Cuthbert Banks, within the time above mentioned; and if he fails to do so, and the said Thomas Carneal satisfy the bond for military land due the estate of the said Thomas Madison, as aforesaid, by the said H. Banks and J. Harvie, in such case the said H. Banks obliges himself to satisfy and pay off the said obligation, according to its true value, upon the application of the said Thomas Carneal, or still to give the 4,300 acres of military land-warrants, at the option of the said Carneal." Signed by H. Banks and T. Carneal.

There are letters from J. Harvie to T. Carneal, the last dated the 3d of March, 1802, not long before his death, urging T. Carneal to satisfy the debt to the estate of T. Madison.

The answer of Banks to what is termed the cross bill, states that he has sued Madison's representatives in Virginia, to compel them to 186*] receive *a compensation in money for the military lands he was bound to pay, there being no lands which are within the description of the obligation; and that the suit is still depending.

The parties agree that the debt to Madison is not satisfied, and that the representatives of J. Harvie hold an obligation of T. Carneal, deceased, for payment of the same, or as indemnification to H., as referred to in the answer and pleadings in the same.

In May, 1819, the plaintiff filed an amended bill, stating that Michael Lacassaign was an alien, and never became a citizen of the United States. That his deed, being proved by only two witnesses, could not pass the title to T. Carneal. That Carneal knew his title to be defective when he sold to Banks. That Lacassaign left no heirs in this country, and has made some person in France his residuary legatee. That there are debts and judgments against him to a large amount, which bind the land.

The answer admits Lacassaign to have been a Frenchman, but not an alien. That he emigrated early to this country, before and at the close of the war, and continued a citizen till his death. They insist that the legal title passed, by the deed of the said Lacassaign, and deny that the land is encumbered.

The Circuit Court was of opinion that the contract between Banks and Carneal required that the tract of 2,000 acres, which Carneal bound himself to convey to Banks, should be a tract lying on Green River, and that as the 187*] land did *not touch the river in any part, it did not correspond with, and could not satisfy the contract. The court therefore directed an issue to ascertain the average value of 2.000 acres, part of the land granted to Philips, to bind on the river; and on receiving the verdict of the jury, directed its amount, with interest thereon, to be paid to the plaintiff.

From this decree both parties have appealed; and the counsel for Carneal's heirs assign for error,

1. That the Circuit Court had no jurisdiction.

2. That there is no allegation that the land does not, in point of location, fit the description of it in the contract.

3. That the plaintiff has no right to relief in equity, until he releases Carneal's representatives from their undertaking to Harvie; and Carneal's heirs have a right in equity to retain the land as an indemnity for that undertaking.

4. If Banks can recover on the agreement, his remedy is at law.

5. The decree against the heirs personally is erroneous. They are not named in the contract, and the statute of Kentucky does not authorize a suit against them personally in such a case.

1. The objection to the jurisdiction of the court is founded on this: That Banks states himself, in his bill, to be a citizen of Virginia, and does not state the heirs of Harvie to be citizens of Kentucky. They are, in truth, citizens of Virginia.

*If the validity of this objection, so [*188 far as respects Harvie's heirs, be unquestionable, it cannot affect the suit against Carneal's heirs, unless it be indispensable to bring Harvie's heirs before the court, in order to enable it to decree against Carneal's heirs. This is not the case. Harvey had conveyed to Carneal, Banks's moiety of the 30,000 acre tract of land, so that his heirs have no lien upon it; and they never had a claim on the 2,000 acre tract. They are made defendants by Banks, under the idea that the title to the land sold by him to Carneal was in them; but this is a mistake. The title to that land was in Carneal's heirs; and Banks can have no claim on the locator's moiety, the title to which seems to have been retained by Harvie. The bill, therefore, as to Harvie's heirs, may be dismissed, without in any manner affecting the suit against Carneal's heirs. That they have been improperly made defendants in his bill, cannot affect the jurisdiction of the court as between those parties who are properly before it. It is the matter contained in what is termed the cross bill, which may bring Harvie's heirs into the cause; and in that suit they would be proper parties, were they to appear, because the plaintiffs in it are all citizens of Kentucky, and the defendants appear to be all citizens of Virginia.[1]

2. The second error assigned has more weight. The variance between the location of the land *sold by Carneal to Banks, [*189 and the description of it in the contract, is not averred in the bill, and is, consequently, not put in issue. The maxim, that a decree must be sustained by the allegations of the parties, as well as by the proofs in the cause,

1.—Vide ante, Wormley v. Wormley, and note 1, Vol. VIII., p. 451; Kerr v. Watts, Vol. VI., p. 558; Cameron v. M'Roberts, Vol. III., p. 591; Russel v. Clark, 7 Cranch, 92.

is too well established to be disregarded. It is on this fact only, that the Circuit Court has rescinded the contract, and we do not think there is any other cause which would justify its being set aside. The alleged alienage of Lacassaign constitutes no objection. Had the fact been proved, this court decided, in the case of Chirac v. Chirac (reported in 2 Wheat. Rep., 259), that the treaty of 1778, between the United States and France, secures to the citizens and subjects of either power the privilege of holding lands in the territory of the other; and the omission to record the deed in time may involve the title in difficulty, but does not annul it. That circumstance might oppose considerable obstacles to a decree for a specific performance, if sought by Carneal's heirs, but does not justify a decree to set aside the contract. There is no subsequent purchaser, nor is it certain that the title which Carneal's heirs can make, will or can ever be disturbed by the creditors of Lacassaign. In such a state of things, there is, perhaps, no sufficient cause for the interference of a court of equity. Did this court, then, concur with the Circuit Court in its construction of the contract between Banks and Carneal, the decree could not be affirmed, because the parties have not put that fact in issue. But the majority is rather dis- [*190 posed *to the opinion that the words "lying on Green River," as used in this contract, with reference to a specific conveyance expressly mentioned, which contains within itself information which could not fail to suggest the idea that the land did not, in fact, bind on the river, may be satisfied with the land actually conveyed by Lacassaign to Carneal. The omission of Banks to charge Carneal with a misrepresentation in this respect, countenances this explanation. At all events, the fact, if relied upon by him, ought to have been put in issue, so as to give Carneal's heirs an opportunity of controverting it, and of bringing before the court such facts as might shed light upon it.

Were this construction to be established, and were there no equitable objections to allowing Banks the full benefit of his contract, a specific performance might be decreed; but the bill seeks to rescind the contract, and contains no prayer for general relief.

There are, too, on the part of Carneal's heirs, weighty objections to such a decree at this time.

3. The third error assigned is, that Banks has no right to relief in equity until he releases Carneal's representatives from their undertaking to Harvie; and Carneal's heirs have a right in equity to retain the title to the 2,000 acres of land, as an indemnity for that undertaking.

The testimony on this part of the cause is far from being satisfactory.

The contract of the 20th of September, 1799, is expressed in such vague terms as to leave it [*191 in *some measure doubtful whether Carneal would not have been discharged from the obligation it imposed, on the failure of Cuthbert Banks to deliver the military land-warrants for which it stipulates within ninety days after they should be demanded in Lexington. But it does not appear that they have ever been demanded; and the fact that Harvie's conveyance of the land sold by Banks to Carneal was executed on the same day with this contract, goes far in showing that the parties understood the obligation of Carneal to be absolute. The subsequent letters of Harvie to Carneal show his opinion that the obligation of the contract continued; and the admission of Banks, in the cause, goes to the same point. The court must therefore consider Carneal's heirs as still liable for the debt due from Banks, with Harvie as his security, to Madison's estate.

It is alleged that Banks agreed that the title to the 2,000 acres of land should remain in Carneal as an indemnity for this undertaking; but this allegation is totally unsupported by evidence.

Carneal's heirs also charge that they, or some of them, have purchased the interest of the locator in the 30,000 acre tract, and that Harvie's heirs retain the title till Madison's claim shall be adjusted; but of this there is no proof.

Since, however, the legal title to the land sold by Carneal to Banks remains in the heirs of the vendor, the court is not satisfied that equity will force it from them, or compel them to make compensation in money for any breach of the contract, *until Banks shall in- [*192 demnify them for the undertaking of their ancestor on his account.

It is unnecessary to proceed farther in the examination of this case, because the court is of opinion that for the errors already stated, the decree of the Circuit Court ought to be reversed, and the bill be dismissed without prejudice.

Decree reversed.

[Chancery. Res Adjudicata. Lex Loci.]

M'CORMICK et ux., et al., Appellants,
v.
SULLIVANT et al., Respondents.

The courts of the United States are courts of limited, but not of inferior jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgment and decrees may be reversed for that cause, on a writ of error and appeal; but, until reversed, they are conclusive evidence between parties and privies.

The title and disposition of real property is governed by the lex loci rei sitæ.

The title to lands can only pass by devise, according to the laws of the state or country where the lands lie. The probate in one state, or country, is of no validity as affecting the title to lands in another.

APPEAL from the Circuit Court of Ohio.

The appellants filed their bill in equity in the court below, setting forth that William Craw-

NOTE.—As to jurisdiction of federal courts, see notes to 1 L. ed. U. S. 489, 640; 2 L. ed. U. S. 435, 654; 3 L. ed. U. S. 36; 4 L. ed. U. S. 97, 124, 404.

That title and transfer of real property by will and devise are governed by laws of state or country where situated, see notes to 5 L. ed. U. S. 335; post, 290, 367, 583; 2 L.R.A.(N.S.)415.

193*] ford, *deceased, the father of the female appellants, being in his life-time a colonel in the Virginia line, on continental establishment, and, as such, entitled to the quantity of 6,666⅔ acres of land, to be laid off between the Scioto and Little Miami rivers, on the north-west side of the river Ohio, departed this life, having first duly made and published his last will and testament, bearing date the 16th of June, 1782, whereby he devised all his estate, not otherwise disposed of by said will, to be equally divided between his three children, John Crawford, and female complainants, and their heirs forever. That this will was proved and recorded in Westmoreland county, in the state of Pennsylvania, on the 10th of September in the same year. That a warrant for the above quantity of land was afterwards issued in the name of the said John Crawford, as heir-at-law of his father, under which the following entries were made: One for 800 acres, which was surveyed and patented to Lucas Sullivant, of which quantity 400 acres are claimed by Bernard Thompson; another for 955⅔ acres, which was surveyed and patented to John Armat, but then claimed by William Winship; another for 956 acres, patented to some person unknown, but claimed by Samuel Finley; another for 955 acres, patented to some person unknown, but believed to be claimed and possessed by Lucas Sullivant.

The bill then proceeds to interrogate the above parties, who are made defendants, severally, as to their knowledge of the above will, 194*] and of the *title of the female complainants, and requires of them to set forth and describe the lands severally claimed by them, from whom they purchased, at what time, and for what price the same was purchased, and when the purchase money was paid. The prayer is for a conveyance, by each defendant, of two-thirds of the land claimed by them respectively, and for possession.

The answer of the heirs of Winship states that the land to which they claim title was purchased, for a valuable consideration, of Thomas Armat, by their father, to whom a conveyance was made in the year 1807. That a bill was filed by the present complainants, against the said Thomas Armat, in the District Court of Ohio, exercising the powers and jurisdiction of a circuit court, for the land now in controversy, to which the said Armat filed his answer, asserting himself to be a bona fide purchaser of the land, for a valuable consideration, and without notice, and that, the cause coming on to be heard, the bill was dismissed without costs, after which decree the purchase was made of Armat by the defendant's father. They insist upon, and pray to be protected by the said decree.

Finley answers, and alleges himself to be a bona fide purchaser, for a valuable consideration, of 500 acres, part of the 956 acres mentioned in the bill, from one Beauchamp, who claimed as assignee of Dyal, who was assignee of John Crawford, for which he paid, and received a patent, before notice of the claim of the plaintiffs, or of the will of William Crawford.

195*] *The heirs of Thompson filed a plea in bar, alleging that the complainants, in the year 1804, filed their bill in the District Court of Ohio, exercising the powers and jurisdiction of a circuit court, against B. Thompson, their ancestor, under whom they claim, setting forth the same title, and, substantially, the same matters, as in their present bill, to which the said Thompson answered, and the complainants replied, and upon a hearing of the cause the bill was dismissed with costs, which decree is in full force, etc.

Sullivant filed a similar plea, and the bill was dismissed, as to him, by agreement.

A general replication was put in to the answers of Finley and Winship's heirs, and a special replication to the plea in bar, setting forth the record in the former suit, and alleging that the proceedings in that suit were coram non judice, the record not showing that the complainants and defendant in that suit were citizens of different states.

Upon the hearing, the bill was dismissed, and an appeal taken to this court.

Mr. **Doddridge**, for the appellants, argued that the former proceedings in the District Court of Ohio, pleaded in bar of the present suit, were absolutely null and void, the record not showing that the parties to that suit were citizens of different states, and, consequently, the suit was coram non judice. The courts of the United States are all courts of limited jurisdiction, and the presumption is, that a case is without their *jurisdiction until the [*196 contrary appears.[1] The jurisdiction must appear on the record, either as arising out of the character of the parties, or the nature of the controversy. If it arises from the character of the parties, as being citizens of different states, aliens, etc., the citizenship or alienage of the respective parties must be set forth.[2] He also contended that the probate of the will of W. Crawford, in Westmoreland county, now a part of the state of Pennsylvania, but then claimed by Virginia, as being within its territorial limits, was sufficient to pass the title to the lands in question; but if this were not so, that the probate and record of the will was notice to all the world, and affected, in the view of a court of equity, the consciences of the grantees, and all those claiming under them. He, however, concluded by asking, that in case the decree of the court below should be affirmed, that it might be without prejudice.

Mr. **Scott**, contra, insisted that the appellants had entirely failed in establishing any title to the lands in question, under the will of W. Crawford, they not having exhibited a probate either in the state of Virginia, or of Ohio, which then constituted a part of Virginia. By the law of Virginia, then in force, it was necessary that a will of lands should be duly proved, and admitted to *record in the court of [*197 the county where the testator had his residence at the time of his decease; or, if he had no place of residence in the state, then in the County Court of the county where the lands devised were situate; or, if the land was of a certain value, it might be proved in the General Court.[3] The will of W. Crawford, whether

1.—Turner v. Bank of North America, 4 Dall. 8.
2.—Bingham v. Cabot, 3 Dall. 282; Mossman v. Higginson, 4 Dall. 12; Abercrombie v. Dupuis, 1 Cranch's Rep. 343; Wood v. Wagnon, 2 Cranch's Rep. 1.
3.—Virginia Rev. Code, 1769, c. 3, p. 159.

executed in Virginia or elsewhere, could not have the effect to pass his real estate, situate in that state, unless made and proved in conformity with its laws. It belongs to the sovereign power of every state to prescribe the rules by which real property within its territory shall be transferred. No courts but those of Virginia or Ohio could have jurisdiction of this will, because the probate must depend upon the legality of the execution, and that again must depend upon the lex loci. The probate of a court of competent jurisdiction is, by the local law, conclusive evidence of the due execution of a will of real as well as personal estate. But the court of Westmoreland county could have no jurisdiction of the probate of this will, because that court was not established under the authority of Virginia, and because the lands did not lie in that county, nor was the testator resident there. A mere contested claim to the territorial jurisdiction could never lay the foundation to establish the validity of this probate, which was, in fact, made in a foreign country. It is laid down, by the text-writers on this subject, that "if a will be made in a foreign country, disposing 198*] of goods in England, *it must be proved there."[1] A fortiori, would it be required to be proved there (if by the English law probate of a will of lands were conclusive), where it related to real property.[2] If this will could not pass the legal title to the lands in controversy, neither could the respondents be affected with constructive notice by the probate in Pennsylvania. Had it been duly proved and recorded in the state where the lands are situate, it is so vaguely drawn as not to designate, with certainty, the particular lands in question. The claim of the appellants would, therefore, still be but a latent equity, and the purchaser from the heir would be protected.[3] He also insisted that the respondents were protected by the former decree in the District Court. Although the courts of the United States are courts of limited jurisdiction, so that their judgments will be reversed on error, unless the jurisdiction appears upon the face of the record, yet they are not inferior courts in a technical sense; and so long as their judgments remain unreversed, they are conclusive. Their judgments may be reversed in an appellate court for this cause; but they are not mere nullities.[4]

Mr. Justice Washington delivered the opinion of the court, and after stating the case, proceeded as follows:

199*] *The question which the plea of Thompson's heirs, and the answer of Winship's heirs, presents, is, whether the general decree of dismission of the bill in equity, filed by the present plaintiffs in the Federal District Court of Ohio, against the ancestor of these defendants, under whom they respectively claim title, is a bar of the remedy which is sought to be enforced by the present suit. The reason assigned by the replication, why that decree cannot operate as a bar, is, that the proceedings in that suit do not show that the parties to it, plaintiffs and defendants, were citizens of different states, and that, consequently, the suit was coram non judice, and the decree void.

But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities. This opinion was strongly intimated, if not decided, by this court, in the case of Kempe's Lessee v. Kennedy (5 Cranch's Rep., 185), and was afterwards confirmed by the decision made in the case of Skillern's Executors v. May's Executors (6 Cranch's Rep., 267). That suit came before this court upon a writ of error, where the decree *of the court [*200 below was reversed, and the cause remanded for further proceedings to be had therein. After this, it was discovered by that court that the jurisdiction was not stated in the proceedings, and the question was made, whether that court could dismiss the suit for that reason. This point, on which the judges were divided, was certified to the Supreme Court, where it was decided that the merits of the cause having been finally decided in this court, and its mandate only requiring the execution of its decree, the court below was bound to carry that decree into execution, notwithstanding the jurisdiction of that court was not alleged in the pleadings. Now, it is very clear that, if the decree had been considered as a nullity, on the ground that jurisdiction was not stated in the proceedings, this court could not have required it to be executed by the inferior courts.

We are therefore of opinion that the decree of dismission relied upon in this case, whilst it remains unreversed, it is a valid bar of the present suit as to the above defendants.

The next question is presented by the answer of Finley. At the death of William Crawford, in the year 1782, he was entitled to a certain quantity of land to be laid off between the rivers Scioto and Little Miami, under a promise contained in an act of the legislature of Virginia. His interest in this land was purely an equitable one. After his death, a warrant to survey the same was granted to John Crawford, his only son and heir-at-law, who assigned to one Dyal a certain *tract which had been surveyed under [*201 the warrant, and the defendant claims a part of the tract so surveyed, under Beauchamp, who purchased from Dyal. He alleges, in his answer, that he made the purchase bona fide, paid the purchase money, and obtained a grant for the land, before he had notice of the will of William Crawford, or of the claim of his daughters under it.

Crawford's will, under which the female complainants claim title, was proved in some court in the county of Westmoreland, in the

1.—Toller's Exec. 72.

2.—Robertson, Wills, 50; see also 11 Vin. Abr. 58, 59; 1 Vern. 391; 1 Ld. Raym. 251; 3 Mass. Rep. 518; 16 Mass. Rep. 441; Kerr v. Moon, 9 Wheat. Rep. 565, 570.

3.—Lewis v. Madison, 1 Munf. 303.

4.—Kempe v. Kennedy, 5 Cranch's Rep. 173.

state of Pennsylvania, and was there admitted to record; but it does not appear, nor is it even alleged, to have been at any time proved in the state of Virginia, or in the state of Ohio, where the lands in controversy lie.

At the time of the death of William Crawford, lands lying in Virginia were transmissible by last will and testament, in writing, the same being signed by the testator, or by some person in his presence, and by his direction, and if not wholly written by himself, being attested by two or more credible witnesses, in his presence. But to give validity and effect to such will, it was necessary that it should be duly proved, and admitted to record, in the court of the county where the testator had his residence at the time of his decease; or, if he had no place of residence in that state, then in the court of the county where the land devised lay, or it might be proved in the general court, where the land was of a certain value. Subsequent to the death of William Crawford, an act of Assembly was passed, which permitted authen- 202*] ticated *copies of wills, proved in any other state of the Union, or abroad, to be offered for probate in the general court, or in the Circuit, County, or Corporation Court, where the whole of the estate lies.

By the law of the state of Ohio lands lying in that state may be devised by last will and testament, or writing; but before such will can be considered as valid in law, it must be presented to the Court of Common Pleas of the county where the land lies, for probate, and be proved by at least two of the subscribing witnesses. If the will be proved, and recorded, in another state, according to the laws of that state, an authenticated copy of the will may be offered for probate in the court of the county where the land lies, without proof by the witnesses; but it is liable to be contested by the heir-at-law, as the original might have been.

It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. For the establishment of this doctrine, it will be sufficient to cite the cases of The United States v. Crosby, 7 Cranch's Rep. 115, and Kerr v. Moon, 9 Wheat. Rep. 565. It follows, therefore, that no estate could pass to the daughters of William Crawford, under his will, until the same should be duly proved according to the laws of Virginia, where the land to which he was entitled lay, at 203*] the time of his death, or *of the territory of Ohio, after the cession by Virginia to the United States, under the ordinance of Congress of the 13th of July, 1787, or according to the law of that state, which has already been recited. The probate of the will in the state of Pennsylvania gave it no validity whatever in respect to these lands, as to which this court is bound to consider Crawford as having died intestate, and, consequently, that they descended to John Crawford, his only son and heir-at-law, according to the law of Virginia, as it stood in the year 1782. The court below, then, could do no less than dismiss the bill as against this defendant, upon the ground that the complainants had shown no title whatever, legal or equitable, to the land in controversy.

4 L. ed.

This court might be induced to yield to the application of the counsel for the appellants, that, in case of an affirmance, it should be without prejudice, if we could perceive, from the record, that the complainants could, in another suit, present their case under a more favorable aspect. But this the answer of Findley will not permit us to anticipate; for, even if an authenticated copy of Crawford's will should hereafter be offered for probate, and admitted to record in the state of Ohio, still, the title to be derived under it could not be permitted to overreach the legal title of this defendant, founded, as it is, upon an equitable title, acquired bona fide, and for a valuable consideration paid, which purchase, payment and acquisition of legal title were made before he had either legal or constructive notice of the *will, or [*204 of the claim of the daughters, for we are all of opinion that the probate of the will in Pennsylvania cannot be considered as constructive notice to any person of the devise of the lands in controversy. The decree of the court below must therefore be affirmed generally, with costs.

[Devise.]

WRIGHT, Plaintiff in Error,
v.
DENN, ex dem. PAGE, Defendant in Error.

J. P., by his last will, after certain pecuniary legacies, devised as follows: "Item, I give and bequeath unto my loving wife M., all the rest of my lands and tenements whatsoever, whereof I shall die seized in possession, reversion, or remainder, provided she has no lawful issue. Item, I give and bequeath unto M., my beloved wife, whom I likewise constitute, make and ordain my sole executrix of this my last will and testatment, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed," etc. "and I make my loving friend, H. J., executor of this my will, to take care, and see the same performed, according to my true intent and meaning," etc. The testator died seized without issue, and, after the death of the testator, his wife M. married one G. W., by whom she had lawful issue. Held, that she took an estate for life only under the will of her husband, J. P.

Where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate.

To make a pecuniary legacy a charge upon lands devised, there must be express words, or a plain implication from the words of the will.

*ERROR to the Circuit Court of New [*205 Jersey.

This was an action of ejectment brought in the court below. The sole question arising upon the state of facts in the cause, was upon the construction of the will of James Page, made on the 15th of February, 1774. By that

NOTE.—Legacies when chargeable on the realty. Where the testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, the realty will be charged with the payment of the legacies. Lewis v. Darling, 16 How. 1; Rom. Cath. Ch. v. Wachter, 42 Barb. 43; Hassell v. Hassell, 2 Dick. 526; Brudenell v. Boughton, 2 Atk. 268; Lupton v. Lupton, 2 John.

will, after the usual introductory clause, the testator proceeds as follows: "Item, I give and bequeath unto my beloved sister, Rebecca, £100, proclamation money, to be paid in four years after my decease.

"Item, I give and bequeath unto my beloved sister Hannah, the sum of £50, proclamation money, to be paid when she is of age.

"Item, I give and bequeath unto my sister, Abigail, the like sum of £50 proclamation money, to be paid when she arrives at age.

"Item, I give and bequeath unto my loving wife Mary, all the rest of my lands and tenements whatsoever, whereof I shall die seized, in possession, reversion or remainder, provided she has no lawful issue.

"Item, I give and bequeath unto Mary, my beloved wife, whom I likewise constitute, make and ordain my sole executrix of this my last will and testament, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed; and I do hereby utterly disallow, revoke and disannul all and every other former testaments, wills, legacies and bequests, by me in any way before named, willed and bequeathed, ratifying and confirming this, and no other, to be my last will and 206*] testament. And I make *my loving friend, Henry Jeans, of the county and province aforesaid mentioned, executor of this my will, to take care and see the same performed, according to my true intent and meaning; and for his pains," (leaving the sentence incomplete.) "In witness whereof," etc., (in the common form of attestation). The testator was seized of the land in controversy at the time of the will, and died seized, without issue, on the 10th day of October, 1774, leaving his wife Mary, the devisee, who afterwards married one George Williamson, by whom she had lawful issue still living and died in the year 1811. The lessor of the plaintiff is the brother of the testator, and his only heir-at-law. The defendant claims title to the premises as a purchaser under Mary, the wife of the testator.

The title of the testator to the premises was derived from a devise in the will of his father, John Page, dated the 11th of November, 1773. That will, among other things, contained the following clause: "Item, I give and devise unto my son James, one equal half part of my land (comprising the land in controversy), with all my plantation, utensils, etc., etc., to him, his heirs and assigns, forever." He then gives the other moiety of the land to his son John, to him, his heirs and assigns. He then bequeaths several legacies to his daughters, Sarah and Mary, and adds: "Item, I give and bequeath to my three daughters, Rebecca, Hannah, and Abigail, Rebecca the sum of £50, Hannah and Abigail the sum of £50 each of them. Likewise *it is my will, that my son James do [*207 pay Hannah and Abigail the said sum of fifty pounds each, when they come of age." He then concludes his will by appointing an executor, and revoking all former wills, etc.; and died soon afterwards. James (the son) left no other real estate than that devised to him by this will. What personal estate he or his father left, at the times of their decease, was not found in the case; and, therefore, it did not appear whether or not it was sufficient to pay the legacies in their wills.

The court below gave judgment for the lessor of the plaintiff, who was the heir-at-law of the testator, and the cause was brought, by writ of error, to this court.

Mr. Wood, for the plaintiff in error, contended that Mary, the wife of the testator, took a fee-simple under the devise.

It was admitted that a devise of land, without any technical words of limitation, or explanatory words, gives only an estate for life. But the intention of the testator will supersede this rule, and is the polar star to guide in the construction of wills. The local legislature were so impressed with the good sense of this principle, that, in 1783, a few years after the making this will, they passed a statute, declaring that a devise of lands should pass a fee, unless it was expressed to be for life only. Courts ought, therefore, to be liberal in considering the explanatory words and circumstances relied on to show an intention to devise the fee; by so doing, they further the intention *of the testator.[1] Greater [*208 certainty is not attained by a rigid than by a liberal construction of devises. The only mode of arriving at certainty is, by admitting a general devise to pass a fee, or by requiring strict technical words of limitation. The

1.—Richardson v. Noyes, 2 Mass. Rep. 59 Doe v. Richards, 3 Term. Rep. 359; Willes' Rep. 140; Goodright v. Allen, 2 W. Bl. 1042.

Ch. 614; Bench v. Biles, 4 Madd. 187; Aubrey v Middleton, 2 Eq. C. Ab. 479; Goddard v. Pomeroy, 36 Barb. 546; Cole v. Turner, 4 Russ. 376; Shulters v. Johnson, 38 Barb. 80; McLaughlin v. McLaughlin, 30 Barb. 459; Mirehouse v. Schaife, 2 Myl. & Craig. 695.

Legacies in money may be charged upon real estate without express direction of the will, if the intention of the testator to do so can fairly be gathered from all the provisions of the will, and extraneous circumstances may be considered in aid of the terms of the will. Hoyt v. Hoyt, 12 N. Y. Week. Dig. 279.

Where, on a devise of land, the devisees were required to pay specific legacies, they were held to be a charge on the land. Moraney v. Quarles, 1 McLean, 194.

A devise to the testator's son, with a provision that his son "shall pay all just debts out of the estate herein given to him as aforesaid," creates a charge on the estate in the hands of the devisee. Potter v. Gardner, 12 Wheat. 498.

The words "after my debts and funeral charges are paid, I devise and bequeath as follows," etc., amount to a charge upon the real estate of the testator for payment of his debts. Fenwick v. Chapman, 9 Pet. 461; Wright v. West, 1 Cranch, C. C. 303; McCulloch v. McLain, 1 Cranch, C. C. 304.

Where a testator devised to one of his two sons in fee two-third parts of a certain farm, with the limitation that all his just debts should be paid out of said estate, held, that the debts were not merely a charge on the devisee, but were also a charge on the land devised. Gardiner v. Gardiner, 3 Mass. 178; Sands v. Champlin, 1 Story, C. C. 376; Toser's Appropriation, 9 Watts & S. 103; Taft v. Morse, 4 Metc. 523; Veazey v. Whitehouse, 10 N. Hamp. 409.

Though the real estate be charged, yet the personal estate is in general the proper fund for the payment of debts and legacies, and is to be applied before resorting to the real property. Lupton v. Lupton, 2 John. Ch. 614; McKay v. Green, 3 John. Ch. 56; Hawley v. James, 5 Paige, 318, 448, 469; Hunter v. Hunter, 17 Barb. 25.

It has been declared in many cases in this country that the real estate is never to be charged with the payment of the legacies, unless the intention of the testator so to charge it, is either expressly declared or fairly and satisfactorily to be inferred from the language of the will. Stevens v. Gregg, 10 Gill. & John, 148; Tessier v. Wyse, 3 Bland.

notion that descent is the general rule, and devise the exception, is more specious than solid. They are both distinct, co-ordinate rules.

He would first examine the clauses of the devise in question separately, and then consider their combined operation.

The words, "all the rest of my lands and tenements, whatsoever, whereof I shall die seized, in possession, reversion or remainder," etc., are sufficient to pass a fee. The words "rest," and "in reversion or remainder," ought not to be rejected, if a meaning can be discovered for them. The devise of all the rest of his lands to his wife, clearly imports that the previous pecuniary legacies shall be a charge on the lands, and that his wife shall be entitled to whatever interest remains after the legacies are paid. A charge on lands may be implied in a will.[1] An estate tail in lands may be created by implication from a proviso,[2] a fortiori, a charge may be 209*] implied. *These lands were already charged in the hands of the testator with the payment of other legacies, by the will of his father, John P., and which were not then due. The clause in question then is, as it purports to be, a general residuary clause, in which the testator means to devise all his remaining interest in his real property. He could not have meant the rest of his lands by way of local description, for he had devised none before; but he meant all the remaining interest in the lands after the legacies were deducted. Wherever it appears that the testator intended to devise all his interest in land, a fee-simple passes.[3] This rule applies with increased force to residuary clauses, in which a greater latitude of construction is allowed.[4] Though the words "lands and tenements" are strictly descriptive of locality, yet, in connection with other expressions, especially in a residuary clause, they may refer to the quantity of interest or estate.[5] The words, "in remainder or reversion," aid the construction. Though the testator might not have been acquainted with the precise technical distinction between them, yet he must have known they *meant an estate in expectancy. [*210 The case of Norton v. Ladd[6] is very analogous to the present, and shows that a fee was intended.

If it be established that the testator referred to his interest or estate in the farm in question in this clause, it carries all his interest, i. e., a fee-simple, because it is residuary, and the language is broad and comprehensive enough for the purpose.

Again, the proviso, "provided she has no lawful issue," shows an intention in the testator to give a fee to his wife. This is a condition precedent to take effect at the time of his death. (1) Because the terms used ordinarily import a condition precedent. Where there is nothing in the nature of the proviso, or in respect to the time of its performance, to show that a condition subsequent was intended, it is always construed a condition precedent. (2) All the circumstances of the case show that the testator intended the condition to take effect at his death, and to be precedent; for then the issue the devisee might have would be his own child and heir. If it be contended that this proviso refers to children the devisee might have by a future husband, the testator is made guilty of the absurdity of intending that, if his wife should marry again, she might retain the land, but if she should have issue by such marriage, she should forfeit it. The devise to the wife in this case was intended to be a substitute for the descent to the *heir. Whenever a [*211 devise of land is intended as a substitute for a fee, the substituted devise is a fee.[7] A court may discover, in a condition, the effect of which is, in a certain event, to defeat the estate, an intent, when the estate actually vests, to enlarge the disposition to a fee. Thus, as before shown, a devise may be enlarged to an estate tail by the terms of a condition.[8]

1.—Smith v. Tinsall, 2 Salk. 685; 1 Ves., Jun., 440; Prec. in Ch. 480; Alcock v. Sparhawk, 2 Vern. 229; 2 Dall. 131.

2.—Chapman's case, Dyer, 333; Ring v. Rumbal, Cro. Jac. 448.

3.—Lambert's Lessee v. Paine, 3 Cranch's Rep. 97; Sargent v. Town, 10 Mass. 305.

4.—Lessee of Willis v. Bucker, 2 Binn. 464; Lambert's Lessee v. Paine, 3 Cranch's Rep. 129; Hogan v. Jackson, Cowp. Rep. 299; Grayson v. Atkinson, 1 Wils. Rep. 333.

5.—Cooke v. Gerard, 1 Lev. Rep. 212; Ludcock v. Willows, Carther's Rep. 50; 2 Ventr. Rep. 285; Wheeler v. Waldron, Allen's Rep. 28; Chester v. Chester, 3 P. Wms. 46; Strode v. Russell, 2 Vern. Rep. 621; Rooke v. Rooke, Ibid 461.

6.—Lutw. Rep. 755.

7.—Moore v. Heaseman, Willes' Rep. 152; Green v. Armstead, Hob. 65; Ibbetson v. Beckwith, Cas. temp. Talb. 157.

8.—Chapman's case, Dyer, 333; King v. Rumbal, Cro. Jac. 448.

28; Garnett v. Macon, 2 Brock. 185; Foster v. Crenshaw, 3 Munf. 514; Lewis v. Thornton, 6 Munf. 87; McCampbell v. McCampbell, 5 Lit. 97; Harris v. Fly, 7 Paige, 421; Luckett v. White, 10 Gil. & John. 480; Bugbee v. Sargent, 23 Me. 270, 271.

The authorities are very numerous which illustrate the subject, and the distinctions are often extremely nice. See 2 Story, Eq. Jur. s. 1245, s. 1246; Dover v. Gregory, 10 Sim. 393; Parker v. Marchant, 1 Young. & C. N. S. 290; Lupton v. Lupton, 2 John. Ch. 623; Graves v. Graves, 8 Sim. 43, 54–56; Clanmorris v. Bingham, 1 Moll. 514; Morancey v. Quarles, 1 McLean, 194; Hines v. Spruill, 2 Dev. & Bat. Eq. 101; Caldwell v. Kincaid, 1 B. Mon. Eq. 229; Andrews v. Sparhawk, 13 Pick. 397; Lewis v. Thornton, 6 Munf. 87; West v. Biscoe, 6 Harr. & J. 460.

Doubtful words in a will are not to operate the exemption of the testator's personal property from the payment of debts, and the charging them on the real estate. Seaver v. Lewis, 14 Mass. 83.

Where two estates are blended, the real estate is equally chargeable with the personal. Adams v. Brackett, 5 Metc. 280; Bench v. Miles, 4 Madd. 187; Hassanclever v. Tucker, 2 Binn. 525; Whitman v. Norton, 6 Binn. 395; Tracy v. Tracy, 15 Barb. 503.

In order to charge the real estate with the payment of legacies there must be something, either in the terms of the will itself, or in the proof of extrinsic circumstances, in addition to the usual formula of the residuary clause, by which the intention is expressly declared, or from which it is to be clearly and satisfactorily inferred. Unaided and alone the words "all the rest and residue of my real and personal estate not before disposed of" are insufficient for that purpose. Babcock v. Stoddard, 3 Thomp. & Cook, N. Y. 207; Myers v. Eddy, 47 Barb. 264; Gridley v. Andrews, 8 Conn. 5; Lupton v. Lupton, 2 John Ch. 614. See Keeling v. Brown, 5 Ves. 361; Kightley v. Kightley, 2 Ves. 328; Roper on Legacies, 6; Markant v. Twisden, Gilb. Eq. 30; Reynolds v. Reynolds, 16 N. Y. 127; Taylor v. Dodd, 2 Thomp. & Cook, N. Y. 88.

While the general rule is that the personal estate of the testator is to furnish the fund for the payment of legacies, it may be entirely exonerated, or the real estate may be made to aid, if there be express directions to that effect in the will, or if that be the clear intent to be gathered from its provisions. Taylor v. Dodd, 58 N. Y. 335.

But, to leave no doubt of his intention, the testator, in the next sentence, gives the devisee his land, "to be by her freely possessed and enjoyed." He drops the peculiar phraseology of the former clause, and takes up new language, manifestly for the purpose of enlarging the subject of his bounty. A life estate is susceptible only of a partial and limited enjoyment. The words "freely to be enjoyed," have been held sufficient to carry a fee.[1] The idea that these words, as used in the present case, give a life estate dispunishable for waste, is wholly inadmissible. It would be creating a state of things which would make the interest of the tenant at variance with the permanent improvement of the soil, and, consequently, of the best interests of the country. It would be his interest to commit waste, and to destroy the property. The testator could not have meant 212*] that the devisee should hold the lands *as tenant for life, dispunishable for waste merely; for that would only exempt the property devised from one kind of restriction, when he manifestly contemplates a free enjoyment generally, without any restriction whatever. The free enjoyment is not annexed to the estate devised, but to the land. It is the land which is to be freely enjoyed. The estate is only the technical medium through which that free enjoyment is secured, and the court will see that the devisee takes such an estate as is compatible with a free enjoyment.

But even supposing these different clauses, taken separately, should be deemed inadequate to pass a fee, yet, taken conjointly, they form a body of evidence, strong and conclusive, to show that the testator intended to devise his entire interest in the lands. It is impossible to suppose that a plain man would have used such phraseology merely to give his farm to his wife for her life. All the clauses may be taken together, and receive their full, combined effect. Juncta valent.[2]

Mr. Webster and Mr. Cox, contra, contended that under the will of James Page, nothing more passed to the devisee than an estate for life. The plaintiff below claimed as heir-at-law. The title was, prima facie, in him. It was admitted on all hands that the devise contains no words of limitation sufficient to pass the inheritance. It is a general rule, that in or- 213*] der to create an estate in *fee, words of inheritance, as "heirs," must be employed. Wherever an estate is granted, either specifically for the life of the grantee, or without any limitation, the legal presumption is, that the design was to create an estate for life only. In wills a greater latitude has been allowed. The intention of the testator, expressed in clear, unambiguous terms, will carry the fee. But the rules of conveyance at common law still operate, although not so rigorously, even in regard to wills; and, before the heir can be disinherited, there must be, not merely an intention, but an intention legally preceptible, in an instrument legally executed. The only difference between wills and deeds is, that in the latter, certain specific technical terms are essential; in the other, any words legally indicating the clear intention of the testator, are sufficient.

The intent must be clearly expressed, for it is a fundamental rule in the construction of wills, that the heir cannot be disinherited without express words, or necessary implication.[3] This intention must also be expressed in language at least quasi technical; for it is perfectly immaterial how plain it may be that the design of the testator was to pass a larger estate, unless that intention be manifest to the legal eye.[4]

As the construction now contended for by the plaintiff in error would disinherit the heir-at-law, *and vest the inheritance in a stran- [*214 ger, it is incumbent upon him to establish one or the other of these two propositions:

1. That there are express words creating an estate in fee in the devisee (which is not pretended, and which, if actually existing, would preclude all argument), or,

2. An intent so clearly expressed as to require, by necessary implication, that such an estate should pass.

The circumstance that no words exist in this will, which, by their intrinsic force, carry any larger estate than for life, raises a legal presumption that no larger interest was intended to pass. If the testator had designed the heirs or issue of his wife as the objects of his bounty, some language indicating such an intention would have been used. If, in addition to this negative circumstance, we find that these persons in that capacity were present to the mind of the testator, and yet are not made objects of his bounty, it superadds a positive weight to the legal presumption that they were not designed to be so, and that their omission was not merely accidental.

There being, then, no express words carrying the fee, let us examine those particular expressions which are relied upon to show the actual intent that the fee should pass. These words are: (1) "All the rest of my lands and tenements." (2) The words "reversion or remainder." (3) The words "freely to be possessed and enjoyed."

1. As to the words, "all the rest of my lands *and tenements." One of the earliest [*215 cases in which the effect of similar words came under consideration, was that of Wilkinson v. Maryland.[5] There, A, being seized of divers lands in A, B and C, the lands in C being in him by mortgage forfeited, devised the lands in A and B to several persons, and then devised "all the rest of the goods, chattels, leases, estates and mortgages whereof he was possessed" to his wife, after his debts and legacies paid, made his wife executrix, and died. The question was, whether the fee passed to the wife by this devise; and it was held that an estate for life only passed. In that case, there were several circumstances rendering it stronger in favor of a fee than the present. (1) There was a previous clause devising part of the property, and there was, therefore, an antecedent to which the word "rest" could relate. Here there is no such prior clause, and the word "rest" is senseless, or the testator attaches to it his own pe-

1.—Lovencre v. Blight, Cowp. 352; Willis v. Bucker, 2 Binn. Rep. 464.

2.—Frogmorton v. Holiday, 1 H. Bl. 540.

3.—Cro. Car. 368; 2 Bl. Rep. 839; 2 Bos. & Pull. 247; Dougl. 786; Cowp. 235.

4.—1 Cowp. 355, 3 T. R. 359; 5 Bos. & Pull. 349.

5.—Cro. Car. 447, 323.

culiar signification. (2) The devise of the real property is there in the same clause which contains a bequest of the personalty; and, therefore, the inference as to the testator's intention was irresistable, that he designed to give the same interest, i. e., an absolute interest, in all the subjects of the devise. (3) In the case cited, the word "estate" is employed as the descriptive term, which is a word frequently held sufficient of itself, proprio vigore, to carry a fee.

216*] *The case of Canning v. Canning,[1] is very similar to the present. There the words of the will were: "All the rest, residue and remainder of my messuages, lands or hereditaments, etc., after my just debts, legacies, and funeral expenses first paid, I give to my executors in trust for my daughters." It was adjudged that the executors took only an estate for life; and, notwithstanding the general character of Mosely, as an inaccurate reporter, this case has been frequently recognized as law.[2] This is evidently a much stronger case than the one now before the court. (1) It is properly a residuary devise; this is not. (2) It contained the term "hereditaments," emphatically embracing the inheritance, according to the opinion of many eminent lawyers. (3) The estate was devised "after debts, legacies, and funeral expenses first paid." Yet, under all these circumstances, it was held that the words "rest, residue and remainder of my messuages, lands or hereditaments," so much stronger and more comprehensive that those of the present testator, were merely descriptive. The ground of that determination was, that the words "rest, residue and remainder," being unaccompanied by any words of limitation, could not operate on the inheritance.[3] This applies, with at least equal force, to the present case. In Peiton v. Banks,[4] where one devised to his wife for life,

217*] and the *reversion to A and B, to be equally divided, etc., it was decreed that they were tenants in common for life only. That case, and the one referred to by Sergeant Maynard, were stronger than the present, since the freehold having been already disposed of, it might have been plausibly argued that the term "reversion" there used, ex vi termini, necessarily included the inheritance. In this case no such argument would apply, the word "rest" being without an antecedent, and being a term more appropriate, as descriptive of the subject than of the quantity of interest. In Doe v. Richards,[5] where, after bequeathing a certain leasehold estate, the testator devised "all the rest, residue and remainder of my messuages, lands, tenements, hereditaments, goods, chattels and personal estate whatsoever," the court held that these words were not sufficient to carry the fee. The property thus devised being, however, made subject to a charge, this circumstance was held sufficient, although the propriety of that part of the decision seems to have been questioned.[6] But the authority of the case, so far as it determines that these words were insufficient, of themselves, to pass the fee, has never been controverted. In that case, the clause was properly a reversionary clause, a previous devise having been made, leaving a reversionary interest to be disposed of. There also the word "hereditament" was used; neither of which circumstances exist here.

*The next case is that of Den v. [*218 Moor,[7] which deserves the more weight as an authority, because a second action was afterwards brought on the same title; the judgment rendered in the K. B. reversed in the Exchequer;[8] and that judgment afterwards reversed in the House of Lords, and the original judgment in the K. B. affirmed.[9] It may therefore be presumed to have been thoroughly examined and considered. In that case, the testator having first devised a life interest in a copyhold messuage, then uses these words: "All the rest of my lands, tenements and hereditaments, either freehold or copyhold, whatsoever and wheresoever, my goods, chattels and personal estate, of what nature or kind soever, after payment of my just debts and funeral expenses, I give, devise, and bequeath the same unto my wife, S. C., and I do hereby nominate and appoint her, my said wife, sole executrix of this my will." In delivering the opinion of the twelve judges, Macdonald, C. B., states the question arising under that will to be: "Whether the words are materially distinguishable from those used in other wills, and which have been held not to denote an intention so expressed by the testator, as to enlarge that which would otherwise be an estate for life only, into a fee." He then states that this would depend upon the effect of the word "rest," of the word "hereditaments," and of the provision "after payment of my just debts *and funeral expenses." He considers [*219 Canning v. Canning as decisive of the question on the two first words. These two cases must therefore be considered as decisive in settling the construction to be given to this part of the present will; in which the phraseology used is still less indicative of an intent to pass the inheritance. The word "hereditaments," found there, is wanting here; a word which, in Lydcott v. Willows, Powell, J., considered as sufficient to carry the fee, and this opinion was unanimously confirmed in the Exchequer Chamber.[10] So, also, Lord Holt considered it as sufficient to pass the fee, in Smith v. Tindal;[11] and in Frogmorton v. Wright, Lord (C. J.) De Gray held it might have that operation.[12]

Notwithstanding these decisions, however, the law, as recognized in Canning v. Canning, is considered as settled in Westminster Hall, and the word "hereditaments" is now held insufficient to pass the fee.

The case of Markant v. Twisden,[13] is, in many respects, analogous to that now before the court. A, having settled all his freeholds on his wife for life, as a jointure, bequeathed several legacies, and then says: "All the rest and resi-

1.—Mosely, 240.
2.—2 Bos. & Pull. 251.
3.—2 Bos. & Pull. 251, per Macdonald, C. B.
4.—1 Vern. Rep. 65.
5.—3 Term. Rep. 356.
6.—5 Bos. & Pull. 349.
7.—5 Term. Rep. 558.
8.—1 Bos. & Pull. 558.
9.—2 Bos. & Pull. 247.
10.—2 Ventr. Rep. 285.
11.—11 Mod. Rep. 103.
12.—3 Wils. Rep. 418.
13.—Gilb. Eq. Rep. 30.

due of my estate, real and personal, I give to my wife, whom I make sole executrix." Held, that the reversion of the jointure lands did not pass, but the personal estate only. The reason 220*] assigned *appears decisive of the present question, "for, as the testator devised no real estate, there could be no residue." So, in the present case, the whole effect of the words "rest," "remainder" and "reversion." If it should be thought that in themselves tney have any to denote an estate larger than one for life) is destroyed: (1) By the circumstances that there was no previous disposition of any real estate in the will, and, therefore, this is not a residuary clause. (2) By the circumstance that the testator was seized of no estate in reversion or remainder, which could pass under these words, and, therefore, they are wholly inoperative. (3) It is perfectly manifest that the words in question were used simply as descriptive of the subject-matter, and not of the interest in that subject-matter. In this view the case has a strong resemblance to Pettiward v. Prescott,[1] where the testator devised as follows: "I give to R. P. my copyhold estate at P., consisting of three tenements, and now under lease to A. B." The master of the rolls, after showing, from a variety of adjudged cases, that the word "estate" is sufficient to carry the fee in general, yet decides that the devisee took only a life interest, on the ground that the testator, by the word in that case, did not mean to speak of the quantity of the legal interest, but merely of the corpus or subject in the disposition.

As corroborating the construction of the words "reversion and remainder," now in- 221*] sisted on, it may *be observed, in the statute of wills of the 32d Hen. VIII., c. 1, it was enacted, "that all and every person and persons having manors, lands, tenements or hereditaments, may give and dispose of them," etc. Afterwards, the stat. 34 and 35 Hen. VIII., c. 5, entitled, "An act for the explanation of wills," was passed. This statute recites that several doubts, questions and ambiguities had arisen upon the previous statute, and enacts, that "all and singular persons having a sole estate, or interest in fee-simple, etc., of or in any manors, lands, tenements, rents or other hereditaments, in possession, reversion, remainder, etc., shall have full and free liberty to give, dispose, will," etc. In the first statute, it seemed to be thought that the language implied a present vested estate in the devisor, in order to give validity to this form of disposition. The ambiguity was removed by the second statute, which gave the right, whether the party was seized in possession or in expectancy. The statute, then, authorizes a testator to devise an estate in which he has no present, but only a reversionary interest; but the same language must be used to carry the fee, as if the estate were in possession. The subjects capable of being devised are enlarged, but the form of the instrument is not altered. A reversionary interest, like a possessory interest, may be for life, for years, in tail, or in fee; and it is equally important that these different quantities of interest should be designated by the will in the one case as in the other. The *case [*222 of Ager v. Poole,[2] shows this construction to be correct; and Pelton v. Banks,[3] is to the same effect. Both of these cases are stronger than the present, for in each of them the testator had such a future interest as he described.

As to the words, "provided she has no lawful issue," the argument on the other side is, that they imply a condition precedent. To this it is answered, (1) that if a condition precedent to the vesting of any estate in the wife, the proviso should be entirely at variance with the whole design of the testator. He evidently intended an immediate interest to pass to the wife, which could not take place if the fact that she should have no lawful issue is to be a condition precedent. That could only be ascertained by her dying without issue. (2) If it be a condition precedent, she took no estate, because she, in point of fact, had lawful issue. To obviate these conclusions, an interpolation is made in the will, and the testator is presumed to have said, lawful issue by himself. The answer is, that such a presumption is not warranted by the language employed. The case of Norton v. Ladd turns upon the extent to be given to the expression "whole remainder," after a disposition of a life estate in all the lands, and the interest of an heir-at-law was not involved. Lambert's Lessee v. Paine turns upon the meaning to be attached to the word "estate." Wheeler v. Waldron is deprived of *much of its authority by a remark [*223 made in a note to Chester v. Chester.[4]

As to the second clause of the will, which contains the words, "to be by her freely possessed and enjoyed," the legal signification of this phraseology has been frequently settled. In Loveacres v. Blight,[5] is a clause to this effect: "Item, to my two sons, T. M. and R. M., whom I make and ordain my sole executors, all my lands and tenements freely to be possessed and enjoyed alike." In this case there were: (1) Introductory words, which Lord Mansfield always considered as entitled to much weight. (2) There was a charge, and he thought it but reasonable to infer an intention to pass a fee, because that alone would enable the devisees to comply with the testator's directions fully and completely. (3) Freely to be enjoyed, he considered, in that case, as meaning absolutely, because, having charged the estate, it could not mean free from incumbrances. None of these circumstances exist here, and, therefore, the case is not analogous, and cannot warrant the same construction. The case of Goodright v. Barron,[6] more nearly resembles the case before the court. There, after the introductory words, "as touching my worldly estate," the testator devised to B, whom he made his executrix, "all and singular his lands, messuages and tenements, by her freely to be possessed and enjoyed. These are the identical words here employed, and no other distinction *exists between the cases, [*224 than that here are no introductory words (sometimes so important), yet the court held that the fee did not pass.

The only other ground on which it can be

1.—7 Ves. Rep. 541.
2.—3 Dyer, 371.
3.—1 Vern. 65.
4.—3 P. Wms. 56.
5.—Cowp. 352.
6.—1 East, 220.

presumed that the testator intended a fee, is the circumstance that this devise is after certain legacies; and it is said that "all the rest," etc., means that the devisee was to take the real estate subject to the payment of these legacies. Admitting that wherever the testator employs language of an indefinite kind, prescribing no limits to the estate devised, and burthens the devisee with a gross, but certain charge, that the fee will pass, that rule of construction is inapplicable here, because, (1) there is no disposition of the personal estate, the appropriate fund for the payment of legacies. (2) There is, at most, only an implied charge upon the real estate; and it seems unreasonable to require the court to imply a charge, for no other purpose than to furnish a ground for raising another implication still more serious.

Admitting the verbal construction of the opposite counsel to be correct, the case of Jackson v. Harris[1] is decisive against the conclusion they would infer from it. If a charge at all, it is a contingent charge. The personal property is applicable in the first instance, and there is only a possibility that it will prove insufficient. A contingent charge is not sufficient to carry a fee. Besides, supposing 225*] the whole of these legacies *to be payable out of the real estate, the conclusion contended for would not result. The rule of law is, that where the charge is upon the estate, and not upon the person of the devisee in respect of the estate, no fee passes by implication.[2] So much of the estate as is sufficient to raise the sum required, is not given to the devisee at all. The residue is devised perfectly unfettered. Canning v. Canning, Den v. Moore and Den v. Allen, were all cases in which the real estate was given after payment of debts, etc., and yet held not a fee.

Mr. Justice Story delivered the opinion of the court, and after stating the case, proceeded as follows:

The principal question arising in this case is, what estate Mary, the wife of James Page, took under his will; whether an estate for life or in fee. If the former, then the judgment of the Circuit Court is to be affirmed; if the latter, then it is to be reversed.

Some reliance has been placed upon the will of John Page, the father, to show the predicament of the land in the possession of his son James, and thence to draw aid in the construction of the will of the latter. Without doubt, James took a fee in the moiety devised to him by his father (which includes the land in controversy), for it is given "to him, his heirs 226*] and assigns." *But it is argued that the land came into his hands charged with the legacies payable to his sisters Hannah and Abigail, and as these legacies were not payable until they came of age, they remained a charge upon the land in the hands of James at his death. Whether the sisters were of age at his death or not, or had received their legacies or not, does not appear from the statement of facts, and nothing can be presumed either way. But what is there to show that these legacies were a charge on the land? The direction in the will is, that "James do pay Hannah and Abigail the said sum of £50 each when they come of age;" but it is not said or implied anywhere in the will, that these legacies shall be a charge on the land. The direction is personal, and must be a charge on the person only, unless it can be shown, from other parts of the will, that the testator intended a charge on the land. A testator may devise lands with a view to legacies, and make them a charge on the land, or on the person of the devisee, or on both;[3] and whether a particular legacy be in either predicament, must depend upon the language of the will. In the large class of cases which have been decided on this subject, and which has principally arisen from questions respecting the quantity of the estate taken by the devisee, the ground assumed has been that the will must speak expressly, or by fair implication, *that the testator in- [*227 tends the legacies to be a charge on the land. When, therefore, the testator orders legacies to be paid out of his lands, or where, subject to legacies, or after payment of legacies, he devises his lands, courts have held the land charged with the legacies upon the manifest intention of the testator. But here there is no such language. There is no direction that the devisee shall pay the legacies out of the land. The charge is personal; and the case falls directly within the authority of Reeves v. Gower, in 11 Mod. Rep. 208.

We may, then, proceed to the consideration of the will of James Page, inasmuch as that of his father affords no light to guide us in the construction. The grounds mainly relied on to establish that Mary, the wife of the testator, took a fee, are, that the legacies given to his sisters are a charge on his real estate in the hands of his widow; that all the rest of his "lands and tenements," in possession, reversion or remainder, are given; that the devise is subject to the proviso, "that she has no lawful issue," which is not a condition merely, but a substitution for an estate intended for his children; and, finally, that the lands, etc., are devised to her "freely to be possessed and enjoyed," which words are best satisfied upon the supposition of a fee.

Before proceeding to the particular examination of the legal effect of these different clauses in the will, it is necessary to state that, where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an *estate for life only, [*228 unless from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. We say a plain intention, because, if it be doubtful or conjectural upon the terms of the will, or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that inten-

1.—8 Johns. Rep. 141.
2.—Jackson v. Ball, 10 Johns. Rep. 148; Den v. Allen, 8 Term. Rep. 497; Merson v. Blackmore, 2 Atk. 341.
3.—See Roe, ex dem. Peter v. Day, 3 M. & S. 518; 5 East's Rep. 87; 4 East's Rep. 495.

tion only when it is put in a clear and unambiguous shape.

In the present case, there is no introductory clause in the will expressing an intention to dispose of the whole of the testator's estate. Nor is it admitted that such a clause, if it were inserted, would so far attach itself to a subsequent devising clause, as per se to enlarge the latter to a fee, where the words would not ordinarily import it. Such a doctrine would be repugnant to the modern as well as ancient authorities. The cases of Frogmorton v. Wright, 2 W. Bl. 889, Right v. Sidebottom, Dougl. 759, Child v. Wright, 8 D. & E. 64, Denn v. Gaskin, Cowper, 657, Doe v. Allen, 8 D. & E. 497, and Merson v. Blackmore, 2 Atk. 341, are full to the point. The most that can be said is, that where the words of the devise admit of passing a greater interest than 229*] for life, courts will lay *hold of the introductory clause, to assist them in ascertaining the intention. The case of Hogan v. Jackson, Cowper, 297, admits this doctrine. That case itself did not turn upon the effect of the introductory clause, but upon the other words of the will, which were thought sufficient to carry the fee, particularly the words, "all my effects, both real and personal." The case of Grayson v. Atkinson, 1 Wils. Rep. 333, admits of the same explanation; and, besides, the inheritance was there charged with debts and legacies.

There is no doubt that a charge on lands may be created by implication, as well as by an express clause in a will. But then the implication must be clear upon the words. Where is there any such implication in the present will? The testator has not disposed of the whole of his personal estate, which is the natural fund for the payment of legacies; non constat, how much or how little he left. For aught that appears, the personal estate may greatly have exceeded all the legacies; and if it did not, that would be no sufficient reason to charge them on the land. It is not a sound interpretation of a will, to construe charges which ordinarily belong to the personalty, to be charges on the realty, simply because the original fund is insufficient. The charge must be created by the words of the will. Now, from what words are we to infer such a charge in this case? It is said, from the words "all the rest;" but "all the rest" of what? Certainly not of the personal estate, 230*] because the words immediately *following are, "of my lands and tenements," which exclude the personalty. The words "all the rest" have, then, no appropriate meaning in reference to the personal estate, for the connection prohibits it. Can they then be supposed to import "all the rest of my lands, etc., after payment of the legacies," and so be a charge on them? This would certainly be going much farther than the words themselves authorize, and much farther than any preceding clause requires or justifies. A charge of legacies on land would not be a devise of the real estate in the ordinary understanding of men, nor in the contemplation of law. It would make them a lien on, and payable out of, the land; but it would still be distinguishable from an estate in the land. But it is sufficient for us to declare that we cannot make these legacies a charge on the land, except by going beyond, and not by following, the language of the will; we must create the charge, and not merely recognize it. The case of Markant v. Twisden, Gilb. Eq. Rep. 30, was much stronger than the present. There, the testator had settled all his freeholds on his wife for life, as a jointure; and by his will be bequeathed several legacies, and then followed this clause, "all the rest and residue of my estate, chattels, real and personal, I give to my wife, who I make sole executrix." But the court held that the wife did not take the reversion of the jointure by the devise, for as the testator had not in the preceding part of the will devised any *real estate, there [*231 could be no residue of real estate on which the clause could operate.

But, admitting that the present legacies were a charge on the lands of the testator, this would not be sufficient to change the wife's estate into a fee. The clearly established doctrine on this subject is, that if the charge be merely on the land, and not on the person of the devisee, then the devisee, upon a general devise, takes an estate for life only. The reason is obvious. If the charge be merely on the estate, then the devisee (to whom the testator is always presumed to intend a benefit) can sustain no loss or detriment in case the estate is construed but a life estate, since the estate is taken subject to the incumbrance. But if the charge be personal on the devisee, then if his estate be but for life, it may determine before he is re-imbursed for his payments, and thus he may sustain a serious loss. All the cases turn upon this distinction. Canning v. Canning, Moseley's Rep. 240, Loveacres v. Blight, Cowp. Rep. 352; Denn, ex dem. Moor v. Mellor, 5 D. & E. 558, and 2 Bos. & Pull. 227; Doe v. Holmes, 8 D. & E. 1; Goodtitle v. Madden, 4 East's Rep. 496, all recognize it. And Doe & Palmer v. Richards, 3 D. & E. 356, proceeds upon it, whatever exception may be thought to lie to the application of it in that particular case. We are then of opinion that there is no charge of the present legacies on the land; and, if there were, no inference could be drawn from this circumstance to enlarge *the estate of the wife to a fee,[*232 since they are not made a personal charge upon her.

The next consideration is, whether the words, "all the rest of my lands and tenements," &c., import a fee. In the first place, this clause is open to the objection that it is not a residuary clause in the will, for no estate in the lands is previously given, and, consequently, if it operates at all on the fee, it gives the entire inheritance, and not a mere residuum of interest. And if a devise of "all the rest and residue of lands," in a clear residuary clause, was sufficient to carry a fee by their own import, it would follow that almost every will containing a residuary clause would be construed, without words of limitation, to pass a fee. Yet, the contrary doctrine has most assuredly been maintained. In Canning v. Canning, Moseley, 240, the testator devised as follows: "All the rest, residue and remainder of my messuages, lands, etc., after my just debts, legacies, etc., are fully satisfied and paid, I give to my executors in trust for my daughters;" and the question was, whether these words passed an estate in fee, or for life, to the executors. The

court decided that they passed a life estate only. The authority of this case was fully established in Moor v. Denn, ex dem. Mellor, 2 Bos. & Pull. 247, in the House of Lords where words equally extensive occurred; and the authority of this last case has never been broken in upon.

The cases which seem at first view to interfere with and control this doctrine, will be 233*] *found upon close examination to turn on other points. Thus, in Palmer v. Richards, 3 D. & E. 356, where there was a devise of "all the rest and residue of the testator's lands," etc., his legacies and personal expenses being thereout paid, Lord Kenyon admitted that the words "rest and residue," etc., were not sufficient to carry a fee; but he relied on the subsequent words, "legacies, etc.," being thereout paid," which he considered as creating a charge upon the lands in the hands of the devisee, of such a nature as to carry a fee. In this opinion the court concurred; and, though this case has been since questioned, on its own circumstances, its general doctrine remains untouched. So, in the case of Norton v. Ladd, 1 Lutw. 755, 759, where the devise was to A. C., his sister, for life, of all his lands, etc., after the decease of his mother; then to J. C., his brother, the whole remainder of all those lands and tenements," given to A. C. for life, if he survived her; and if not, then "the whole remainder and reversion of all the said lands, etc., to his sisters, C, E and A, and their heirs forever;" the court held that a fee passed to J. C., under the devise, upon the ground, that taking the whole will, the words "whole remainder" properly referred to the estate or interest of the testator undisposed of to his sister A. C.; and that the words could not relate to the quantity of lands which the testator intended to devise to his brother, J. C., for he had plainly devised all his lands to his sister, A. C., and all the lands he had devised 234*] to A. C. he had devised to J. C.; *so that the words naturally and properly had relation to the quantity of estate which the testator intended to give J. C., that is, all the remainder, which is the same in effect as all his estate. If the words were merely to be referred to the lands he intended to devise to J. C., they would be ineffectual, for it was impossible that he could have any remainder of lands, when he had devised all to A. C.; so that they must refer to the estate in the lands. Such is the substance of the reasoning of the court, upon which it is unnecessary to say more than that the case turned upon the supposed incongruity of construing the testator's words otherwise than as importing the whole remaining interest in the lands, upon all of which lands a life estate was already attached. And the final devise over, which carried a plain fee to the sisters, being a substitution for the former estate to J. C., in the event of his death before the testator, greatly fortifies this interpretation. This case has been much relied on by the plaintiff in error upon the present argument; but it is very distinguishable from that before the court. There, a life estate was given, and the terms, "whole remainder," had a natural meaning, as embracing the whole remaining interest. Here, on the contrary, there is no preceding interest given in the real estate, and therefore the terms "all the rest" are not susceptible of that sense. There, a substituted estate, in fee, was clearly given; here no clause occurs, leading necessarily to such a conclusion. All that the case in Lutwyche, taken as the fullest authority, *estab- [*235 lishes, is, that the words "rest and residue" may, in certain connections, carry a fee.[1] This is not denied or doubted; but then the words attain their force from their juxtaposition with other words, which fix the sense in which the testator has used them. In Farmer v. Wise, 3 P. Wms. 294, the residuary clause was of "all the rest of his estate, real and personal," and the word "estate" has long been construed to convey a fee. This court have carried the doctrine still farther, and adjudged a devise of "all the estate called Marrowbone," to be a devise of the fee, construing the words, not as words merely of local description, but of the estate or interest also in the land. Lambert's Lessees v. Paine, 3 Cranch's Rep. 79; Murray v. Wise, 2 Vern. Rep. 564; S. C. Prec. in Ch. 246, contained a devise, after a legacy, of all the residue of his real and personal estate, and rests on the same principle as do Beachcroft v. Beachcroft, 2 Vern. Rep. 690, and Ridart v. Paine, 3 Atk. Rep. 486. In Willows v. Lydcott, Carth. Rep. 50; 2 Vent. 285, the residuary devise was to A and her assigns forever, which latter words indicate a clear intention to pass a fee. In Grayson v. Atkinson, 1 Wils. Rep. 333, there was an introductory clause, purporting the intention of the testator to dispose of all his temporal estate, then several legacies were given, and a direction to A to sell any part of his real and *personal estate for payment [*236 of debts and legacies; and then the will says, as to the rest "of my goods and chattels, real and personal, movable and immovable, as houses, gardens, tenements, my share in the copperas works, &c., I give to the said A." Lord Hardwicke, after some hesitation, held it a fee in A, relying upon the introductory clause, and the charge of the debts and legacies on the land, and upon the language of the residuary clause. Whatever may be the authority of this decision, it certainly does not pretend to rest solely on the residuary clause; and its containing a mixed devise of real and personal estate was not insignificant in ascertaining the testator's intention.

It may also be admitted that the words, "lands and tenements," do sometimes carry a fee, and are not confined to a mere local description of the property. But, in their ordinary sense, they import the latter only; and when a more extensive signification is given to them in wills, it arises from the context, and is justified by the apparent intention of the testator to use them in such extensive signification. The cases cited at the bar reach to this extent and no farther. Their authority is not denied; but their application to the present case is not admitted.

We may, then, take it to be the general result of the authorities, that the words "all the rest of my lands" do not, of themselves, import a devise of the fee; but, unless aided by the context, the devisee, whether he be a sole or a residuary *devisee, will, if there be no [*237 words of limitation, take only a life estate.

1.—See Lord Harwicke's comments on this case in Ballis v. Gale, 2 Vesey's Rep. 48.

We next come to the effect of the words, "in possession, reversion or remainder," and, as incidental thereto, the effect of the word "tenements." That the term "remainder," may, in some cases connected with other clauses, carry a fee, has been already admitted, and was the very point in 1 Lutw. 755. The same is true in respect to the word "reversion." This is affirmed in the case of Bailis v. Gale, 2 Ves. Rep. 48, where the devise was, "I give to my son, C. G., the reversion of the tenement my sister now lives in, after her decease, and the reversion of those two tenements now in the possesion of J. C." Lord Hardwicke, in pronouncing judgment, relied on the legal signification of the word "reversion," and that its use by the testator was fairly to be inferred to be in its legal sense, as the whole right of reverter; and he adverted to the circumstance that the devise was to a child, to whom it could scarcely be presumed the parent intended to give merely a dry reversion, or to split up his interest in it into parts. But, in that case, as in 1 Lutw. 755, there were antecedent estates created or existing in the land; and the devise was of a "reversion," and not, as in this case, of "all the rest of my lands, etc., in reversion," etc. The land now in controversy was not held by the testator as a reversionary estate, but as an estate in possession; and in no way, therefore, can the doctrine help the present case. But there are cases which are contrary to Bail-
238*] is v. Gale, and somewhat *clash with its authority. In Peiton v. Banks, 1 Vern. Rep. 65, the case was, that a man devised his lands to his wife for life, and he gave the reversion to A and B, to be equally divided betwixt them. The court decided that A and B took an estate as tenants in common for life only. And Sergeant Maynard stated a similar decision to have been made about twenty years before that time. It is not material, however, to enter upon the delicate inquiry, which of these authorities is entitled to most weight, because the present case does not require it.

In respect to the word "tenements," it is only necessary to observe that it has never been construed in a will, independently of other circumstances, to pass a fee. In Canning v. Canning, Moseley's Rep. 240, and Doe, ex dem. Palmer v. Richards, 3 D. & E. 356, Denn, ex dem. Moor v. Miller, 5 D. & E. 558, S. C. 2 Bos. & Pull. 247, the same term occurred, as well as the broader expression, "hereditaments;" in neither case was the term "tenement" supposed to have any peculiar effect; and the argument, attempting to establish a fee upon the import of the word "hereditaments," even in a residuary clause, was deliberately overruled by the court. The same doctrine was held in Hopwell v. Ackland, Salk. Rep. 239.

If, then, it is asked what interpretation the court put upon the words "all the rest," in connection with "lands and tenements," the answer is, that no definite meaning can, in this
239*] will, be *annexed to them. It is our duty to give effect to all the words of a will, if, by the rules of law, it can be done. And where words occur in a will, their plain and ordinary sense is to be attached to them, unless the testator manifestly applies them in some other sense. But, if words are used by him which are insensible in the place where they occur, or their common meaning is deserted, and no other is furnished by the will, courts are driven to the necessity of deeming them as merely insignificant or surplusage, and to find the true interpretation of the will without them. In the present case, the words, "all the rest of my lands and tenements" stand wholly disconnected with any preceding clause. There is nothing to which "the rest" has relation, for no other devise of real estate is made. We have no certain guide to the testator's intention in using them. We may indulge conjectures; but the law does not decide upon conjectures, but upon plain, reasonable, and certain expressions of intention found on the face of the will.

The next clause is, "provided she has no lawful issue." The probable intention of this proviso was, "provided she has no lawful issue" by me. Men do not, ordinarily, look to remote occurrences in the structure of their wills, and especially unlearned men. The testator was young, and his wife young, and it was natural for them not to despair of issue, although, at the time of the will, he was in ill health. In case of leaving children, posthumous or otherwise he might *think [*240 that the gift to his wife of the whole of his real estate would be more than conjugal affection could require, or parental prudence justify. In that event, he might mean to displace the whole estate of his wife, and to leave her to her dower at the common law, and the children to their inheritance by descent. This interpretation would afford a rational exposition of the clause, and, perhaps, ought not to be rejected, although there is no express limitation in the words. In this view, it is not very material whether it be considered as a condition precedent or subsequent, though the general analogies of the law would certainly lead to the conclusion that it was in the latter predicament. But even in this view, which is certainly most favorable to the plaintiffs in error, it falls short of the purposes of the argument. As a condition, in the event proposed, the prior estate to the wife would be defeated; but there would be no estate devised to the issue. They would take by descent as heirs, and not by devise. It would be going quite too far to construe mere words of condition to include a contingent devise to the issue; to infer from words defeating the former estate an intent to create a new estate in the issue, and that estate a fee, and a clear substitute for the former. No court would feel justified, upon so slender a foundation, to establish so broad a superstructure. Nor can any intention to give a fee to the wife be legally deduced from the proviso, in any way of interpreting the terms, because it is as perfectly consistent with the intention *to defeat a life estate, as a [*241 fee in the whole of the lands. The testator, with a limited property, might justly think it too much to take from his own issue the substance of their inheritance during a long minority, in favor of a wife, who might live many years, and form new connections. In such an event, leaving her to the general provision of law, as to dower, would not be unkindness or injustice. But it is sufficient to say that the words are too equivocal to enable the court to

ascertain from them the clear purpose of establishing a fee. And if the proviso refers to any lawful issue by any other husband, then it must be deemed a condition subsequent; and in the events which have happened, the estate of the wife, whether it be for life or in fee, has been defeated, and the plaintiffs in error are not entitled to reverse the present judgment. Quacunque via data est, the proviso cannot help the case.

It remains now to consider the succeeding clause of the will, in which the testator repeats his devise, and gives to his wife "all his lands," etc., dropping the words "the rest," and, therefore, showing that he did not understand them as having any other or stronger import than the will presented without them. Then follow the words "by her freely to be possessed and enjoyed," upon which great stress has been laid at the bar. If these words had occurred in a will devising an estate for years, or for life, or in fee, in express terms, they would not, probably, have been thought to have any distinct auxiliary signification, but to be merely a more 242*] full annunciation *of what the law would imply. Occurring in a clause where the estate is undefined, they are supposed to have a peculiar force; so that, "freely to possess and enjoy," must mean to possess and enjoy without any limitation or restriction as to estate or right. The argument is, that a tenant for life is restricted in many respects. She can make no permanent improvements or alterations; she is punishable for waste, and is subject to the inquisition of the reversioner. But, if this argument is admitted, it proves, not that a fee is necessarily intended, but that these restrictions on the life estate ought to be held to be done away by the words in question. They admit of quite as natural an interpretation, by being construed to mean free of encumbrances; and, in this view, are just as applicable to a life estate as a fee. Perhaps the testator himself may have entertained the notion that the legacies in his will, or that of his father, were encumbrances on the estate; and if so, the words would indicate an intention that the wife should be disencumbered of the burthen. But in what way are we to reconcile the argument deduced from this clause, with that drawn on the same side from the preceding proviso? How could the testator intend that the wife should "freely possess and enjoy" the lands in fee, when, in one event, he had stripped her of the whole estate, and that by a condition inseparably annexed as an encumbrance to her estate? We ought not to suppose that he intended to repeal the proviso under such a general 243*] phrase. The *case of Loveacres v. Blight, Cowp. Rep. 352, has been supposed to be a direct support of the argument in favor of a fee. In that case, the testator made the following devise: "As touching such worldly estate wherewith it hath pleased God to bless me in this life, I give," etc., "in the following manner and form: First of all, I give and bequeath to E. M., my dearly beloved wife, the sum of five pounds, to be paid yearly out of my estate, called G., and also one part of the dwelling-house, being the west side, with as much wood craft, home at her, as she shall have need of, by my executors hereafter named. I give," etc., "unto my son, T. M., the sum of five pounds, to be paid in twelve months after my decease. I give unto my granddaughter, E., the sum of five pounds, to be paid twelve months after my decease. Item, I give unto J. M. and R. M., my two sons, whom I make my ——— and ordain my sole executors," etc., "all and singular my lands and messuages, by them freely to be possessed and enjoyed alike." The question was, whether, by this clause, the sons took an estate for life or in fee. The court held that they took a tenancy in common in fee. Lord Mansfield, in delivering the opinion of the court, admitted that, if the intention were doubtful, the general rule of law must take place. But he laid stress upon the circumstance that the estate was charged with an annuity to his wife, so that the testator could not mean by the word "freely," to give it free of encumbrances. He thought the free enjoyment must, therefore, mean free from all *limitations, that is, the absolute prop- [*244 erty of the estate. He also thought the introductory clause not unimportant; and that the blank after "my" was intended to be filled with "heirs;" and it can scarcely escape observation that it was a case where the sons of the testator were the devisees. These considerations may well lead to a doubt whether Lord Mansfield intended to lay down any general principle of construction in relation to the words, "freely to be enjoyed," etc. But, if he did, the subsequent case of Goodright v. Barron, 11 East's Rep. 220, has manifestly interfered with its authority. In that case, there was an introductory clause, "as touching such worldly estate wherewith it hath pleased God to bless me," etc.; and the testator then proceeded as follows: "I give and bequeath to my brother T. D., a cottage house, and all belonging to it, to him, and his heirs, forever, W. C. tenant. Also, I give and bequeath to my wife E., whom I likewise make my sole executrix, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed." The court held that the wife took an estate for life only; that the words, being ambiguous, did not pass a fee against the heir, but might mean free from encumbrances or charges, free from impeachment for waste; and that the introductory clause could not be brought down into the latter distinct clause to aid it, though, if joined, it might have had that effect. The court distinguished that case from the case before Lord Mansfield, because, in the latter, as the testator had already *encumbered [*245 the estate, the words must have meant to pass a fee, or they would have no meaning at all. Mr. Justice Le Blanc added, that the words used were not inconsistent with a life estate only; and he distinguished between them and the words "freely to be disposed of," admitting that the latter would pass a fee. So that, taking both these cases together, the fair deduction is, that the words, "freely to be possessed," etc., are too uncertain, of themselves, to raise a fee, but they may be aided by other circumstances.

The case before us is far less strong than either of the foregoing cases, for there is no introductory clause showing an intention to dispose of the whole property, as there was both in Goodright v. Barron and Loveacres v. Blight; nor is there any encumbrance created by the

testator on the land, which was the decisive circumstance that governed the latter.

Upon the whole, upon the most careful examination, we cannot find a sufficient warrant in the words of this will to pass a fee to the wife. The testator may have intended it, and probably did, but the intention cannot be extracted from his words with reasonable certainty; and we have no right to indulge ourselves in mere private conjectures.

Judgment affirmed with costs.

246*] [*Remission of Forfeiture. Pleading.]

THE UNITED STATES
v.
MORRIS, Marshal of the Southern District of New York.

The Secretary of the Treasury has authority, under the remission act of the 3d of March, 1797, c. 361 (LVII.), to remit a forfeiture or penalty accruing under the revenue laws, at any time, before or after a final sentence of condemnation or judgment for the penalty, until the money is actually paid over to the collector for distribution.

Such remission extends to the shares of the forfeiture or penalty to which the officers of the customs are entitled, as well as to the interest of the United States.

In a plea of justification by the marshal, for not levying an execution, setting forth a remission by the Secretary of the Treasury, of the forfeiture or penalty on which the judgment was obtained, it is not necessary to set forth the statement of facts upon which the remission was founded.

ERROR to the Circuit Court for the Southern District of New York.

This was an action brought against the defendant, in the court below, as marshal of the southern district of New York, for a misfeasance in neglecting to proceed on a venditioni exponas issued out of the District Court of the United States for the district of Maine, requiring him to sell the goods and chattels of Andrew Ogden, Abraham K. Smedes, and Thomas C. Butler, which he had levied upon by virtue of certain executions issued against them, in favor of the United States, on a judgment recovered in the said District Court of Maine, and which goods and chattels remained in his 247*] hands for want *of buyers, according to his return on said executions. The misconduct, or neglect of duty, alleged against the marshal, was, that he did not sell the property so levied upon, according to the command of the writ, but delivered the same up to the defendants, discharged from the execution. The declaration stated the judgment to have been recovered in the September term of the court, in the year 1817, for $22,361.75, damages, and which, in part, to wit, in the sum of $11,180.87, remained in full force, not reversed, paid off or satisfied, to the plaintiffs, and that execution to that amount remains to be done. The venditioni exponas, as was alleged, was put into the hands of the marshal on the 13th day of August, 1819.

The pleadings in the cause show that Andrew Ogden, of the city of New York, in or about the month of June, in the year 1813, imported into Portland, in the district of Maine, certain goods and merchandise in the brig Hollen, which vessel, as well as the goods, belonged to him. These goods, together with the brig, were thereupon seized as forfeited to the United States, on the ground that the goods had been imported in that vessel, in violation of the non-intercourse acts then in existence. The goods and vessel were libeled in the District Court of Maine, on the 6th of July, 1813, and on the 19th of the same month were delivered up to Andrew Ogden, after having been regularly appraised, upon his having executed, together with Abraham K. Smedes, and Thomas C. Butler, a bond for their appraised *value. The vessel [*248 and goods were afterwards, on the 27th of May, 1817, condemned as forfeited to the use of the United States. And such proceedings were thereupon had, that, in the following September term of the court, a judgment was entered upon the bond of appraisement for $22,361.75, with costs.

The defendant, Morris, pleaded the general issue, and a special plea in justification, that the forfeitures had been remitted by the Secretary of the Treasury, setting out in hæc verba, two warrants of remission, which were duly served upon him before the return day of the venditioni exponas, and averring a compliance, on the part of the defendants, with all the terms and conditions required by the warrants of remission. All which were duly set forth in the return on the venditioni exponas, before the commencement of the present suit.

To this special plea, a replication was filed, stating, in substance that at the time of the forfeiture, seizure and condemnation, of the brig Hollen, and the goods imported in her; and, also, at the time of their condemnation, and the entering up of the judgment on the bond for their appraised value, and of the issuing of the several writs of execution, and at the time of the making and issuing the said warrants of remission, and of the service thereof on the defendant, etc., Isaac Ilsley and James C. Jewett, were the collector and surveyor of the port of Portland, and, as such entitled to one-half of the said forfeiture; and that the said several executions *were issued for [*249 their benefit, and solely to collect the said sum of $11,180.87, for their own separate use, and that the defendant had notice thereof when the said several writs of execution were delivered to him to be executed; setting out, also, two indorsements on the execution, one signed by the district-attorney of Maine, notifying the defendant that the execution was for the benefit of the said collector and surveyor, and directing the marshal to collect the same by their order. The other was signed by the collector and surveyor, requiring the marshal to collect the execution forthwith, and deposit the money agreeably to the command of the writ, and notifying him that the property in the execution was in them, and directing him to receive orders from them, and from no other person whatsoever, in whatever related to the said execution. And it was then averred, that the present suit was for the purpose of enabling the collector and surveyor to recover their damages for the injury they had sustained by reason of the misfeasance of the defendant, in the declaration

mentioned, and not for the benefit, use or behoof of the said plaintiffs.

To this replication the defendant demurred specially, and stated the following causes of demurrer: (1) For that the replication is a departure from the declaration, in this, that the declaration proceeds upon a cause of action in favor of the United States; whereas the replication proceeds upon a cause of action in favor of the said Ilsley and Jewett, etc. (2) For that [*250] the *replication discloses no lawful and sufficient authority for the said Ilsley and Jewett, to prosecute the said action against the said T. Morris, etc., and in the name of the United States. (3) For that the declaration proceeds upon the ground that the several writs of execution, therein respectively mentioned, were issued upon a judgment obtained for the use of the United States, and, therefore, according to the act in such case made, etc., might lawfully run and be executed in any other state or territory of the United States, than the said district of Maine, in which the said judgment was obtained. Whereas the replication discloses the fact that the said judgment was not obtained for the use of the said United States, but for the use and benefit of the said Ilsley and Jewett, and, therefore, could not run and be executed in any other state, etc. (4) That the suit is prosecuted in the name of the United States, by an attorney, on record, other than the district-attorney of the United States for the southern district of New York.

A joinder in demurrer having been filed, judgment was given for the defendant in the court below, and the cause brought by writ of error to this court.

On the part of the plaintiff in error, it was contended that the judgment ought to be reversed,

1. Because the Secretary of the Treasury had no power to remit the share of the forfeiture which belonged to the custom-house officers.

2. Because the action was rightly brought in the name of the United States, by an attorney of *the court below, specially authorized [*251 to prosecute the suit by an order of the judges of that court.

3. Because the replication is not a departure from the declaration, proceeding upon a different cause of action from that stated in the declaration.

Mr. **Wheaton**, for the plaintiffs in error, stated the principal question in the cause to be, whether after a definitive sentence of condemnation, in a revenue cause, the Secretary of the Treasury has a right, under the remission act of the 3d of March, 1797, c. 361 (LXVII.),[1] to remit the forfeiture so as *to affect the [*252 right of the officers of the customs, under the collection act of 1799, c. 128 (CXXVIII.), ss. 89 and 91,[2] to a moiety of the fines, penalties and forfeitures, *recovered under the act. [*253 He insisted that the right of the collector, etc., accruing by the seizure, was consummated by the final sentence of condemnation, and became an absolutely vested right, which could not be devested by the remission after such sentence. This had been expressly determined in the Circuit Court for the first circuit;[3] and though the case had not hitherto been presented to this court, there were other analogous cases which settled the doctrine, that as between the representatives of a deceased collector and his successor in office, or as between a removed collector and such successor, the share of the forfeiture to which he is entitled attaches, and is

1.—Which provides, (s. 1), "That wherever any person or persons, who shall have incurred any fine, penalty, forfeiture or disability, or shall have been interested in any vessel, goods, wares or merchandise which shall have been subject to any seizure, forfeiture or disability, by force of any present or future law of the United States, for the laying, levying or collecting any duties or taxes, or by force of any present or future act, concerning the registering and recording of ships or vessels, or any act concerning the enrolling and licensing ships or vessels employed in the coasting trade or fisheries, and for regulating the same, shall prefer his petition to the judge of the district in which such fine, penalty, forfeiture or disability shall have accrued, truly and particularly setting forth the circumstances of his case; first causing reasonable notice to be given to the person or persons claiming such fine, penalty or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the remission or mitigation thereof, and shall cause the facts which shall appear upon such inquiry to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury of the United States, who shall thereupon have power to mitigate or remit such fine, forfeiture or penalty, or remove such disability, or any part thereof, if in his opinion the same shall have been incurred without wilful negligence, or any intention of fraud in the person of persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just." (s. 3), "That nothing herein contained shall be construed to effect the right or claim of any person to that part of any fine, penalty or forfeiture incurred by the breach of any of the laws aforesaid, which such person shall or may be entitled to, by virtue of the said laws, in cases where a prosecution has been commenced, or information has been given before the passing of this act, or any other act relative to the mitigation or remission of such fines, penalties or forfeitures; the amount of which right and claim shall be assessed and valued by the proper judge or court in a summary way."

2.—Which provides, (s. 89), "That all penalties accruing by any breach of this act, shall be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the trial of any fact which may be put in issue, shall be within the judicial district in which any such penalty shall have accrued; and the collector within whose district the seizure shall have been made, or forfeiture incurred is hereby enjoined to cause suits for the same to be commenced without delay, and prosecuted to effect; and is, moreover, authorized to receive from the court, within which such trial is had, or from the proper officer thereof, the sum or sums so recovered, after deducting proper charges, to be allowed by the said court; and on receipt thereof the said collector shall pay and distribute the same, without delay, according to law," etc. (S. 91) "That all fines, penalties and forfeitures, recovered by virtue of this act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed of as follows: One moiety shall be for the use of the United States, and be paid into the treasury thereof by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions to, the collector and naval officer of the district and surveyor of the port wherein the same shall have been incurred, or to such of the said officers as there may be in the said district; and in districts where only one of the aforesaid officers shall have been established, the said moiety shall be given to such officer," etc.

3.—The Margarita, 1 Gallis, Rep. 515, 522; The Hollen, 1 Mason's Rep. 431.

consummated by the sentence of condemnation.[1] This went upon the principle that it became an absolutely vested right, by relation back to the time of the seizure. If it were an absolutely vested right, it must be vested as against the government. It is not vested, even as against the government, at the time of the seizure. That only gives an inchoate right, which may never become absolute for want of a condemnation, or may be intercepted by a remission before condemnation. The forfeiture 254*] *has, for certain purposes, relation back to the commission of the offense. As between the offender and all persons claiming as purchasers of the property, and the government, the forfeiture attaches at the moment of delictum.[2] But this proceeds from the necessary strictness of all fiscal regulations, and does not prevent a remission before condemnation. The delictum does, indeed, devest the proprietary interest from the owner, so as to overreach the claims of subsequent purchasers; but it does not, therefore, follow that the share to which the officers of the customs may become entitled, vests in them eo instanti. Their title may never vest, by reason of three contingencies: (1) There may be no seizure. (2) There may be a remission after the offense, and before condemnation. (3) There may be no condemnation. If there be no seizure, of course no title vests. If there be a remission before condemnation, as no title has yet vested except against subsequent purchasers, it purges the offense entirely, by relation back to the delictum. If there be no condemnation, the inchoate title is never ripened into maturity. But if there be a remission after condemnation, the rights of the seizing officers have become absolute, and the remission purges the offense (if it has any effect at all) only so far as the government is concerned.

This would appear from the plain reading of the collection act of 1799, c. 128 (CXXVIII.); 255*] ss. *89, 90, 91, which directs the collector to prosecute for breaches of the revenue laws, and to receive the sums recovered, and to pay and distribute the same among the different persons entitled. It must be admitted, on all hands, that the right must absolutely vest at some period. The court have already rejected the notion that it does not vest until the actual receipt and payment over of the money.[3] There could, therefore, be no other epoch but that of the sentence of condemnation, which, if definitive, or unappealed from, fixes and ascertains the rights of all parties. Admitting, for the sake of the argument, that the government may afterwards remit, so far as its own rights are exclusively concerned, it cannot certainly be concluded, from the terms of the remission act, that the government intended to revoke its bounty, conferred absolutely upon its officers by a solemn statute for great purposes of public policy. It is immaterial what the Secretary of the Treasury intended to do. The question is, what was he authorized to do by the law under which he acted?

All the analogies of the common law would be found to repel the idea that the remission could devest the rights which had become ascertained and fixed by the sentence of condemnation. Pardon and remission are synonymous terms, and their legal effect upon the rights of parties must be the same. "Pardon" is defined to be "a work of mercy, whereby the King forgiveth any *offense, etc., right, title, [*256 debt, or duty."[4] The power which is given to the President by the constitution, of granting pardons for offenses, may, or may not, extend to revenue cases; but whether the pardon is granted by the President, or by his minister, is immaterial. It is still the act of the government, and it can have no greater effect in the one case than in the other. It is laid down that a pardon does not discharge the thing in which the subject has a property or interest; as if a suit be in the Spiritual Court for tithes, a legacy contract, or matrimony, etc.,[5] or for dilapidation.[6] So, if an incumbent accepts a plurality, the interest of the patron to present is not discharged by a general pardon.[7] A penalty, upon a conviction for deer-stealing, is not discharged by a pardon; for it is a forfeiture to the party grieved.[8] The King cannot, by his pardon, discharge an action commenced qui tam upon a penal statute, except for the King's moiety or part.[9] Nor penalties to be divided between the informer and the poor of the parish.[10] So, a pardon does not discharge a thing consequent or incident in which the subject has an interest vested in him; as costs taxed in the Spiritual Court, a pardon of the offense does not discharge the costs.[11] And this, though the party appeals after the taxation of costs, so that the sentence is suspended by the appeal.[12] So, if the party appeals *af- [*257 ter costs taxed, and then the pardon comes, and upon the appeal the former sentence is annulled, and costs given to the appellant; these costs are not discharged by the pardon; for the costs being taxed in the original suit, the party had a right of appeal, which was not taken away by the pardon; and, consequently, has a right to the costs.[13] So, on a proceeding in rem, in the Exchequer, the crown's share only of a forfeiture is pardoned, by an act of general pardon, but not the informer's on an information previously filed.[14] And in prize proceedings, the condemnation is held to vest the right in the captors so absolutely that the government cannot release. Thus, in the case of The Elsbe (one of the famous Swedish convoys), Sir W. Scott determined that the crown might interpose to release the captured vessels before, but not after, a final adjudication.[15]

As to the technical questions which had been raised by the special demurrer upon the pleadings, they were all involved in the question upon the merits. If the remission was void as to

1.—Jones v. Shore 1 Wheat. Rep. 462; Van Ness v. Buel, 4 Wheat. Rep. 74.
2.—8 Cranch's Rep. 398, 417.
3.—Jones v. Shore, 1 Wheat. Rep. 470.
4.—3 Inst. 233.
5.—5 Co. 51, a.
6.—3 Mod. Rep. 56.
7.—Cro. Car. 357, 358.
8.—1 Salk. Rep. 233, 234.
9.—3 Inst. 238.
10.—Str. Rep. 1272.
11.—5 Co. 51, b; Cro. Jac. 159; Cro. Car. 199.
12.—5 Co. Lit. 51, b.
13.—Cro. Car. 47.
14.—Parker, 280.
15.—5 Rob. 173.

the custom-house officers, they had a right to sue in the name of the United States; or, rather, the latter are suing in their own name, to give effect to their own bounty granted to those officers, who are prosecutors from the beginning in the name of the United States. They are not only privies, but parties, and are concluded by 258*] a sentence *of acquittal as well as of condemnation.[1] But they may also be considered as the assignees of the United States, and then the question whether they are to sue in their own name, or in that of the United States, will depend upon the forms of proceeding in analogous cases. By the civil law, on the cession of a debt, the assignor impliedly ceded to the assignee all his rights of action as incidental to the cession. The assignee became what was called procurator in rem suam, and sued in the name of his assignor. So, in England, and in this country, it has long since been settled that the assignee of a chose in action may sue in the name of the assignor, who has no right to interfere with the suit.[2] By the ancient common law, the King could assign a chose in action, though a subject could not. But the assignee of the King took it with all the high prerogative remedies. Thus, it is laid down that the King's grantee may sue an obligation, etc., granted to him, in his own name, or may prosecute in the King's name; "for the grant of the statute, or debt, is a warrant to him to prosecute process in the King's name."[3] Thus where a debt due to an outlawed person was granted by the King, held, that the grantee might levy it in his own name, or, by extent, in the King's name, "although he hath not 259*] any words in his *grant to sue it in the name of the King, as is usual in such cases."[4]

As to the alleged departure in pleading, which is relied on as one of the causes of demurrer, the objection is, that the replication sets up a cause of action in the custom-house officers, whilst the declaration proceeds on a cause of action for the United States. The answer is, that the suit being here brought in the name of the United States, whose duty and interest it is to prosecute for the benefit of the officers (who are their grantees), notwithstanding the remission, the cause of action stated in the replication is just as much in favor of the United States as that set up in the declaration. How, then, stand the pleadings? (1) The declaration setting up a cause of action in favor of the United States. (2) A plea of remission by the United States. (3) A replication, admitting the fact of remission, and affirming the cause of action in favor of the United States, as set up in the declaration, with a new circumstance, viz., a right of third persons, which invalidates the remission so far as they are concerned. This new matter is asserted, not by the officers, but by the United States themselves, who sue precisely as if the parties had not performed the conditions on which the remission was granted, and it had become totally void. It was not necessary that this new matter should have been stated in the *declaration. [*260 In declaring, it is only necessary to set out enough to maintain the action. In an action for not executing a writ of execution, it is sufficient to set out the judgment, execution, and facts of neglect or misfeasance. Even stating the judgment is merely inducement. It is sufficient to state concisely the circumstances which give rise to the defendant's particular duty or liability.[5] The remission was a matter of defense which was incumbent on the defendants to set forth. Successive pleadings are designed for this very purpose. The office of the declaration is to set forth the cause of action merely, of the plea to avoid it, and of the replication to avoid the plea. Thus, in debt on bond for the performance of covenants, the plaintiff declared for the penalty. The defendant craved oyer, and pleaded general performance. The plaintiff replied, setting forth particular breaches, and it was held good.[6] The declaration in the present case pursues the most approved forms, and with more circumstantiality than usual.[7] Departure is where the plea contains subsequent matter, which does not maintain or fortify the matter in the declaration.[8] But here it does maintain it, and, at the same time, avoids the bar. The bar is remission; the replication shows that it is no answer to the declaration. *In Winch v. Keeley,[9] in assumpsit, de- [*261 fendant pleaded that plaintiff had become a bankrupt, and assigned all his effects, under the statute, to his legal assignees; plaintiff replied that the suit was brought by him for the use of another party, to whom he had transferred the debt before the bankruptcy. The replication was held good, and the objection of departure was not even mentioned at the bar.

On the part of the defendant, it was insisted that the judgment ought to be affirmed, for the following reasons:

1. Because the Secretary of the Treasury had a right to remit the forfeiture in question, notwithstanding the judgment of condemnation previously rendered, as stated in the pleadings.

2. Because the whole case, on the part of the collector and surveyor of Portland, proceeds on the ground that the remission by the Secretary is binding upon the United States, and discharges their moiety of the forfeiture, but has not that effect on the other moiety claimed by them; thus giving a construction to the remission, inconsistent with its own terms and the act under which it was granted. According to that act, the remission must be valid to the whole extent of the power exercised under it, or not at all; as it is admitted, therefore, to be good in part, it follows that it is good for the whole.

3. Because such a remission is not like a pardon, nor is it to be governed by the same rules; *but is equivalent to the judgment or [*262 decree of a competent tribunal, that no forfeiture should be enforced, inasmuch as it was without wilful negligence, or any intention of

1.—Hoyt v. Gelston, 3 Wheat. Rep. 319.
2.—1 Johns. Cas. 411; 2 Johns. Cas. 121; 3 Johns. Rep. 425; Bottomley v. Brooke, 2 Bl. Rep. 1271; 1 Wheat. Rep. 233; 1 Term Rep. 619, 621, 622.
3.—Cro. Jac. 82.
4.—Cro. Jac. 179, 180; Com. Dig., tit. Assignment, d.
5.—1 Chitty's Plead. 369.
6.—Postmaster-General v. Cochran, 2 Johns. Rep. 413.
7.—See 2 Chitty's Plead. 208-246.
8.—Co. Litt. 304, a.
9.—1 Term Rep. 619.

fraud, in the person or persons incurring the same.

4. Because, as far at least as it relates to the act of Congress, vesting in the Secretary of the Treasury the remitting power, as therein mentioned, the custom-house officers have no vested rights in any forfeiture, until not only condemnation, but the receipt of the money produced by a sale of the forfeiture or collection of the bond substituted for it, before which time the Secretary has full power to remit; and, having exercised it in this case, the collector and surveyor of Portland are equally bound by it as the United States.

5. Because, if the said collector and surveyor of Portland had any vested rights in the forfeiture in question, notwithstanding the remission, then they ought to have enforced them by an action in their own name, and not in that of the United States.

6. Because the condemnation of the brig and goods being to the use of the United States, and the recovery in the bond being also in the name of the United States, they became trustees for the collector and surveyor of Portland, for whatever rights or interest they had therein; and these, whatever they were, were discharged by the remission of the Secretary, inasmuch as the release of a trustee is, at law, a 263*] *bar of the rights or interest of his cestui qui trust, and especially in a case where fraud is neither charged nor pretended.

7. Because, this being an action to recover damages for a misfeasance, if the United States themselves could sustain it, yet, it being, in its nature, incapable of assignment, they could not transfer to the said collector and surveyor such right of action, and authorize its prosecution in their name; much less can it be prosecuted without any such assignment or authority.

8. Because, if the United States could themselves sustain such an action, the said collector and surveyor would be entitled to no part of the damages recovered; for such damages would not be the forfeiture, nor the proceeds of the bond which was substituted for it; to a share of which only they are by law entitled. Of course, therefore, they cannot sustain the present action to recover damages for their own private benefit, in the name of the United States, which, if recovered by the United States, they would be entitled to no share of.

Mr. Emmett and Mr. D. B. Ogden, for the defendant, stated, upon the first point, that it was remarkable, and might be useful for interpreting the law, that the question as to the power of the Secretary to remit, after sentence, was never raised until subsequently to the judgment of this court in Jones v. Shore,[1] and more 264*] especially *until after what fell from Story, J., in The Margarita.[2] That no such doubt was conceived to exist at the bar before the case of Jones v. Shore, appears from the arguments of all the counsel in that case, which admit that the right was not so vested as not to be defeated by a remission. An expression there attributed to Mr. Pinkney,[1] as to the President's power of pardoning, leads to an examination of the distinction between this power of remission and the pardoning power. The power of pardoning is a prerogative given to the President by the constitution, analogous to that exercised by the British, and other sovereigns. It is an act of grace and mercy, founded on the fact of guilt and crime, but exercised from other considerations than those which govern a remission by the treasury. It is laid down, that "the King, by his prerogative, may grant his pardon to all offenders attainted or convicted of a crime, where he has hope of their amendment."[4] The remission proceeds on the ground of moral innocence, and is to be only a consequence of it. The Secretary of the Treasury has no power whatever, except where, in his opinion, from the judicial statements of facts, the forfeiture "shall have been incurred without wilful negligence, or any intention of fraud in the person or persons incurring the same." A pardon being an act of grace and mercy to an acknowledged criminal, it is but just *that it should not disturb [*265 the rights of others, founded on the fact of that guilt, and their industry in detecting it; but where the remission is founded on moral innocence, the justice of the case is the other way. In this respect, there ought to be no difference whether a condemnation was had or not; for, although a sentence of condemnation may establish a violation of the letter of the revenue laws, the remission proceeds on the ground that it establishes no guilt, and the petition for the remission must admit all the facts on which conviction could be founded. The remission is intended to be, and is, in fact, a judicial decision. It is the policy of the revenue laws to make certain acts subject to forfeiture and penalties. It adopts this course, in order to relieve the government from the onus of proving that those acts were coupled with a criminal intent; and to oblige the party suffering to prove the innocence of his mind, by such evidence as would satisfy the proper officer of the government itself. In analogy to the jurisdiction of a court of equity to take cognizance of a judgment at law, and relieve against it on principles which the courts of law could not have taken into consideration, the Secretary of the Treasury is empowered to administer equitable relief, on principles which the revenue courts could not apply; but which go to the entire destruction of all guilt, and ought, therefore, to go to the entire remission of all punishment. The preliminary proceedings are all judicial, by petition to the district judge, and by examinations before him; *and, like an [*266 analogous suit in equity, all parties interested are brought before the court to assert their rights, and contest the justice of the application. The officers of the customs, having notice, and the liberty of contesting the matter, are parties to the suit or application, and can no more complain that they are deprived of vested rights than they could where a court of equity decreed a perpetual injunction on a judgment at law.

The statute, having thus provided for making all persons interested parties to the suit, uses the most general language possible to cover the entire remission of the forfeiture. The

1.—1 Wheat. Rep. 462.

2.—2 Gallis. Rep. 516.

4.—Comyn's Dig. Pardon, (a.)

prayer of the petition extends to the remission of the whole, and the power given to the Secretary is to remit "such fines," etc. The proviso in the 3d section shows the extent to which it was intended to protect vested interests, or to consider them as vested, viz., where a prosecution had been commenced, or information given, before the passing of the act. Every information, seizure or prosecution, subsequent to the passing of the act, was followed up, subject to the provisions of that act. It formed a limitation upon the extent of vesting the interests of the prosecutors, or, to use the expression of one of the counsel, in Jones v. Shore,[1] "it is a condition originally attached by the law," and attached, whether the interest became originally vested by the seizure, the condemnation, or the recovery and receipt of 267*] the money. *To what extent is the vesting? It is decided in Van Ness v. Buel[2] that the collector acquires an inchoate right by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested title to his share in the forfeiture; and it is also determined in Jones v. Shore,[1] that the right to share in the forfeitures and penalties is given to the collector who made the seizure, and not to him in office on the receipt of the money. These adjudications were as between officers themselves, and not between an officer and the owner of the thing seized. But they establish the principle that the right made absolute by condemnation was that, and only that, which had become inchoate by seizure. That inchoate right was, under the statute, subject to be destroyed by remission according to its provisions, and therefore that made absolute must be subject to the same provisions.

But the vesting of the right, as laid down in the case of The Margarita[3] does not take place before a final judgment or sentence; and the same epoch is assigned in the case of The Elsebe,[4] for the vesting of prize interests in cases of capture. Now, prize courts can take notice of all equitable considerations, but a revenue court cannot. Notwithstanding condemnation, then, it remains to be inquired, whether there was any criminal intent. If innocence be alleged, and the proper proceedings founded on 268*] it to be institute, *until those proceedings are decided upon, there is no final adjudication, within the spirit and meaning of the act.

Another consideration shows that the remission must operate to extinguish the rights of the officers of the customs. They could maintain no action for the forfeiture as in their own names. The forfeiting party has nothing to do with them; he forfeits only to the United States, and it is only as between the United States and the officers that the latter have any claim. In this respect there is a material difference between our act and the British revenue laws. By the British statute, one-half is forfeited to the use of the crown, and the other to the use of the informer. In the Exchequer, the form of proceeding is to adjudge a moiety of the forfeiture to the seizors, or informer, by the sentence itself, and it becomes a vested right in them, by relation back to the filing of the information.[5] But in this country, the utmost that can be said is, that the United States are, pro tanto, trustees for them; but as to the forfeiting party, the government is the only legal actor. There must be a right of releasing somewhere. A release by the officers of the customs would not prevent the United States from recovering the whole penalty. Thus, in debt on a single bond made to A, to the use of him and B, the defendant pleaded a release made to him by B; on which the plaintiff demurred; and without difficulty, it was adjudged *for the [*269 plaintiff; for B is no party to the deed, and therefore can neither sue nor release it. But it is an equitable trust for him, and suable in the chancery, if A will not let him have part of the money; and the book of Edw. III., cited, that he might release in such case, was denied to be law.[6] Since there must be a power of releasing somewhere, and the officers could not do it, the power must reside in the United States, and the remission is such a release.[7]

Cases have been cited on the other side, in which courts of law have taken notice of equitable interests, and have permitted them to be pleaded or replied, so as to protect them. All these cases proceed on the ground of fraud and collusion, which cannot be charged here. As to Bottomley v. Brook, and Rudge v. Birch,[8] they are said by Mr. Maryatt, in Schooley v. Mears,[9] to have been overruled in the Exchequer, in the case of Lane v. Chandler; and in Wake v. Tinkler, Lord Ellenborough says: "I am much more inclined to restrain than to extend the doctrine of these cases." And Bailey, J., says, "we have nothing to do in this case with any other than legal rights." So in Bakerman v. Radenius,[10] Mr. Erskine (arguendo) states a case before Lord Mansfield, where an action was brought in the name of a nominal plaintiff by persons beneficially *inter-[*270 ested, for whom he was a trustee. At the trial, the defendant produced a release from the plaintiff, which Lord Mansfield held to be conclusive; but said the Court of Chancery, upon application, would make the trustee pay the principal, the debt, if well founded, and the costs of suit. And Lawrence, J., cites a case from Salkeld,[11] where Lord Holt said that if the plaintiff in ejectment, who is considered only as a trustee for the lessor, released the action, he might be committed for a contempt of the court; "but he did not say the release would not defeat the action." So, in Paine v. Rogers,[12] where the tenant, a nominal plaintiff, having given a release to the plaintiff, the court, on application of the landlord, ordered it to be given up; clearly, because if used it would defeat the action. And in Legh v. Legh, the obligor of a bond, after notice of its being

1.—1 Wheat. Rep. 467.
2.—4 Wheat. Rep. 74.
3.—2 Gallis. Rep. 522.
4.—5 Rob. Rep. 155, Am. ed.
5.—Weddel v. Thurlow, Parker, 280.
6.—Offly v. Warde, 1 Lev. 235; S. C., 2 Keb. 332.
7.—Bayley v. Lloyd, 7 Mod. Rep. 250.
8.—Cited in 1 Term Rep. 621, 622.
9.—7 East Rep. 153.
10.—7 Term. Rep. 602.
11.—Anony. Salk. 260.
12.—Dougl. 407.

assigned, took a release from the obligee, and pleaded it to an action brought by the assignee, in the name of the obligee. The court, on motion, set the plea aside, Eyre, C. J., saying, "the only question is, whether the assignee must not seek relief in a court of equity." Clearly showing, as the whole case does, that the plea could not be replied to at law.

But why should the custom-house officers be entitled to maintain this action in the name of the United States, notwithstanding their release, and having no possible interest in the re- 271*] sult? *Why should they have the benefit of not being liable to costs for a false action? They are not assignees of the United States, if that would protect them. There can be no assignment of a test. The injury by the marshal's return is directly to themselves, and the United States have barred themselves from regarding it as an injury to them by the remission. The right to sue in the name of another only existed where the action would not lie in the name of the party actually interested. But, in every case where the unlawful act of one person does an injury to another, an action on the case lies for the injury. Can the United States, who are not injured, sustain this action? If they could, is such a right of action assignable? Here, however, is no actual assignment; and it can only be considered as analagous to the consignment of a chose in action. But how can the real plaintiffs entitle themselves to the damages recovered in the name of the United States, without such assignment? The law only gives them half the forfeiture or proceeds. How, then, can they, notwithstanding the release or remission by the United States, recover, in their name, damages which they are not legally entitled to participate in? and do so for their own benefit, when, if they have sustained damages, they may sue in their own name?

And this brings us to consider some of the special causes of demurrer. The replication is a departure from the declaration, not only by not bringing forward matter pursuant to it, and fortifying it, but by bringing forward 272*] matter showing *no right of action in the plaintiffs, and showing, that if it exists anywhere, it exists in third persons; and that this matter was known, and might be made available, before action brought. Departure is defined to be, "when the second plea containeth matter not pursuant to his former, and which fortifieth not the same, and, therefore, it is called decessus, because he departeth from his former plea."[1] Thus, where the defendant pleads in bar a lease for fifty years made by a corporation, plaintiff replies that it was made while a former lease was in existence, and shows the statute 21 Hen. VIII., and that the lease for fifty years was void; not setting forth the proviso making such leases good for twenty-one years. Defendant, in his rejoinder, pleads the proviso of the statute 21 Hen. VIII., which makes such leases good for twenty-one years. Held, that this pleading of the proviso was a departure, because it neither goes with, nor enforces the bar before.[2] So, in a præcipe quod reddat, the tenant pleads that the land was devised to him, and the plaintiff replies that the devisor was an infant. To this the defendant says that, by the custom, infants may devise; and, per Curiam, this is a departure, for he ought to have pleaded the special matter first.[3] So, in Doctr. Plac. 124, per Keble, nota, where general matter is pleaded, and where the special matter might have been *pleaded at the commencement, [*273 the party, afterwards, shall not maintain the general matter with the special matters. And if the defendant justifies by distress for rent, and the plaintiff replies that he used and sold them, to which the defendant rejoins that he sold the distress pursuant to the statute 2 W. & M., it will be a departure; for it should have been alleged so at first.[4] Defendant, in a plea, justified taking cattle damage feasant, and afterwards rejoined that they were taken surcharging the common; held to be a departure; and one of the reasons was, that the surcharge might have been pleaded first, because the defendant then knew the plaintiff's right.[5] So, when a man, in his former plea, pleadeth an estate made by the common law, in the second plea, regularly, he shall not make it good by an act of Parliament. So, when, in his former plea, he entitleth himself, generally, by the common law, in his second plea he shall not enable himself by a custom, but should have pleaded it at first.[6]

As to the third clause of demurrer, the statute only enables the issuing of a writ of execution to another district, upon judgments "obtained for the use of the United States." The present judgment was obtained in their name, but for the use of other parties. It is contended that if the judgment was for the use of the United States, the execution need not be so. But the privilege *obviously at- [*274 taches to the execution, and not to the judgment. It was for the benefit of the government, and was not intended to be communicable to citizens in cases where the United States have no interest. All the rules for construing statutes will bear out this interpretation.[7]

Mr. Webster, for the plaintiffs, in reply, insisted that the authority to sue in the name of the United States could not be disputed by the defendant in this court. The government was here represented by the Attorney-General, and if he did not interfere with the suit, it might well be maintained. It was novel doctrine that an appearance by a wrong attorney was a ground of demurrer. If it had been intended to take advantage of that objection, a summary application should have been made to the court below, by whom the attorney on the record had been appointed to prosecute this suit, the district-attorney having refused to prosecute it. The discretionary power exercised by the court below in this instance, was essential to the administration of justice, whenever the district-attorney refuses to act, or is interested, or in case of his death. But, even if this court should be of opinion that the order

1.—Co. Litt. 304, a; Doctr. Plac., tit. Departure, 119.

2.—Fulmarston v. Stuard, Dyer, 102, b., 103, a.

3.—Doctr. Plac. 123; 37 H. VI., 5.

4.—Com. Dig. Pleader, a. 8.

5.—Ellis v. Rowles, Wilkes, 638.

6.—Co. Litt. 304, a.

7.—Bac. Abr., tit. Statute, j. 5 Plowd. 18.

made in the present case was irregular, it would not, on that account, give judgment against the sufficiency of the plaintiff's replication as pleaded. It would merely direct the pleadings to be amended by inserting the name 275*] *of the district-attorney in the place of the present attorney on the record. The plaintiff's declaration is admitted to be good, and it is unnecessary to consider the replication, since the plea contains the first fault (if any) in the pleadings. It cannot be pretended that it is a good plea, because the plaintiff has declared by a wrong attorney. If this judgment be affirmed, it is a perpetual bar as against the United States, and all others interested. While the cause is allowed to stand on the calendar, the rights of the parties, as stated in the pleadings, must alone be regarded. But the officers of the customs have a right to use the name of the United States. The cases cited in the opening sufficiently show it. Wherever the subject has an interest in a prosecution in which the King's name is necessary as a formal party, the subject has a legal right to use it. All cases of information, not ex officio, are of this sort, such as those by the Master of the Crown Office, in quo warranto, of intrusion to office, etc. The prerogative of the supreme magistrate is held, not for purposes of ostentation, but for the substantial benefit of society, and its aid may be invoked as often as necessity requires it.

The plea is bad, because the marshal, who is a mere ministerial officer, was not a competent judge of the validity or effect of the remission. He is the officer of the court, and not of the treasury. He is to collect the money, and bring it into court. When it is received in the registry, distribution is to be made of it ac- 276*] cording to *law; or if the forfeiture has been remitted, the conditions of the remission are to be complied with under the directions of the court. If the marshal had levied the money upon the execution, and no remission had been obtained, he could only be compelled to pay it over by a motion to compel him to return the process. If the remission had been unconditional, and could devest the share of the custom-house officers, he had nothing to do with carrying it into effect. It is by the court only that the rights of the parties are to be ascertained, and their respective claims to be satisfied.

The plea is also bad, because it does not set forth, with proper averments, the facts and circumstances stated in the petition to the Secretary of the Treasury, upon which the remission of the forfeiture was granted. It is an inflexible rule of pleading, that whenever a justification is set up under a special or limited authority, everything should be set forth to show the case to be within the protection of the authority relied on. The statement of facts on which the remission was grounded, is essential to be known, in order to see whether the Secretary of the Treasury, who also acts merely as a ministerial officer, has pursued his authority. It has, indeed, been argued that the Secretary acts judicially in those cases, and that his decision is an adjudication binding on all the world, and especially on the officers of the customs, who are both parties and privies. But how can that be a judicial power which is merely of executive discretion? 277*] The *Secretary may remit under the statute, whenever it is proved to his satisfaction that the offense was committed "without wilful negligence, or an intention of fraud;" but he is not bound to remit even in case of innocence ever so clearly proved. All judicial power, under the constitution, is vested in one Supreme Court, and such inferior tribunals as Congress shall establish. How, then, can any portion of that power be vested in the treasury department, or in any other executive department?

The plea is bad, because it alleges the remission after a final sentence of condemnation, and a summary judgment upon the appraisement bond. The remission act of Congress was evidently copied from the British statute of the 27th Geo. III., c. 27; and under that statute the Commissioners of the Customs have never exercised the power of remitting a forfeiture after judgment.[1] This defect of authority having been found, in some respects, inconvenient, the power of remitting after judgment was expressly given (not to the Commissioners of the Customs, but to a higher authority) the Lords of the Treasury, by the 54th of Geo. III., c. 171. When it is said that the rights of the custom-house officers are vested from the time of the judgment or sentence, it is not meant that they are vested independent of the act of Congress, but under the act, and according to the act. If the law authorizes a remission after judgment, it is idle to speak of *rights being vested by [*278 the judgment. The question is, what does the act mean? And it is contended that it limits the power to cases before condemnation. Every clause and phrase of the act is applicable, and alone applicable, to such cases. The persons entitled to the benefit of the act, are those who "shall have incurred any fine, forfeiture or disability, or shall have been interested in any vessel, goods, wares or merchandise which shall have been subject to any seizure, forfeiture or disability," etc. This cannot refer to things already forfeited. Goods forfeited and condemned are not subject to forfeiture; they are actually forfeited. So the words, "incurred any forfeiture." No man incurs a forfeiture by a judgment against him. It is the offense by which the forfeiture is incurred. So, also, the summary inquiry which is to be made by the district judge, into the facts and circumstances of the case, shows that the law supposes that no trial had yet been had. It would be an absurd provision, upon any other supposition. The act authorizes the Secretary to direct the prosecution, if any shall have been instituted for the recovery of the forfeiture, to cease, and be discontinued. It supposes a prosecution either pending, or not yet brought. The prosecution cannot be said to be pending, in a general sense, after judgment. There is not a single expression in the act applicable to a judgment. But here are two successive judgments, one against the goods, and the other against the claimants, upon the appraisement bond. How can the remission discharge *this second judg- [*279 ment? Why was not the remission shown when the application was made for that judg-

1.—Chitty's Crim. Law. 798.

ment, so as to prevent its being entered? There is nothing in the act to authorize the remission of a judgment. The subjects to be remitted are, "fines, penalties, forfeitures and disabilities." Besides, the phraseology applicable to judgments would be, released or vacated; not remitted or mitigated. There must be some limit in point of time, and in the order of the proceedings, to the exercise of this power of remission. If the rights of all parties are not fixed and ascertained by the judgment, it will be difficult to discover when they are consummated. The receipt of the money by the officers may change the possession, but it cannot alter the right. That idea is expressly rejected by the court in Jones v. Shore.[1]

The argument on the other side, that there must be a power of releasing somewhere, and since the custom-house officers cannot do it, the power must reside in the United States, and may, therefore, be exercised by the Secretary of the Treasury, is founded upon an entire misapprehension of the distinct powers of the different branches of the government. There is no authority given by law to any department or officer of the executive government to release a debt due by judgment. The Secretary of the Treasury may remit a forfeiture or penalty before judgment, or may 280*] discharge the debtor as to his *person, but nothing short of the legislative power of Congress, specially exercised, can discharge the debt. The usual course of the Treasury has been to refuse to remit after judgment, and to refer to the President for the exercise of the pardoning power. It may well be doubted whether that power extends, under the constitution, to cases arising under the revenue laws. But the practice shows the sense entertained by the Treasury of the limitation to its authority. Whether the President's pardoning power extends to such cases or not, there is a close analogy between a pardon and a remission; and there is no more reason why one should affect private rights and interests actually vested more than the other. Both suppose legal guilt, and some consideration which makes it consistent with the public good that it should be forgiven. A pardon, as well as a remission, often supposes moral innocence.

As to the execution running out of the district of Maine, not only was the judgment "for the use of the United States," but the execution was for their use. If the forfeiture could not be remitted after judgment, the whole debt is still due, and the United States have a direct interest in a moiety of it. If the forfeiture might be remitted, so far as the share of the United States is concerned, they have still an interest in enforcing the demand, since it is intended to secure to their officers a part of their legal compensation. But this question cannot arise upon the pleadings. The defend- 281*] ant admits that he has *executed the process, so far as the remission did not prohibit it, and he is therefore estopped by his plea from insisting that it is a void process.

Mr. Justice Thompson delivered the opinion of the court, and after stating the case, proceeded as follows:

The judgment of this court being placed upon the validity of the plea, and the merits of the defense therein set up, it is unnecessary particularly to notice any other questions that have been discussed at the bar. To guard, however, against an inference, not intended by the court to be admitted, that the execution, in this case, was properly issued from the District Court of Maine to the marshal of New York, it is proper to observe that this must depend on the construction to be given to the act of Congress of the 3d of March, 1797, entitled, "An act to provide more effectually for the settlement of accounts between the United States and the receivers of public money." Independent of this act, it has not, and certainly cannot be pretended, that an execution from the District Court of Maine could run into any other state. The sixth section of that act declares, "that all writs of execution upon any judgments obtained for the use of the United States, in any of the courts of the United States, in one state, may run and be executed in any other state, but shall be issued from, and made returnable to, the court where the judgment was obtained. The pleadings in this case show conclusively, that although the *judgment is nominally in [*282 favor of the United States, yet it is substantially and beneficially for the use of the custom-house officers of Portland; and that the execution was issued solely and exclusively for their benefit, and not for the use of the United States. If it was necessary to decide this point, it might be difficult to maintain that this case came within the true intent and meaning of the act; but as the decision of the cause is put upon a point more extensive in its practical application, this is passed by without the expression of any opinion upon it. Nor is it deemed necessary to notice any objections taken to the replication. The argument has been confined principally to the plea, as being the first error on the record.

The plaintiff having replied, without taking any exceptions to the plea, he cannot now avail himself of any defect, that would not have been fatal on a general demurrer.

The objections to the plea may be considered under the following heads:

1. That it does not set forth, with proper averments, the facts and circumstances stated in the petition to the Secretary of the Treasury, and upon which the remission of the forfeiture was granted.

2. That the Secretary of the Treasury had no power to remit after condemnation.

The first objection supposes the case to fall within the rule that where a justification is set up under a special or limited authority, everything should be set out to show the case to be *within the jurisdiction of the author- [*283 ity whose protection is claimed and relied upon.

It may be observed, preliminarily, that this objection, coming so late, and at this stage of the cause, is not entitled to much indulgence. If well founded, and it had been made at an earlier day, the plea could have been amended, and much expense and litigation prevented. Every reasonable intendment, therefore, in favor of the plea, ought now to be made.

It by no means follows that, in order to sustain this plea, it is necessary to show that it

1.—1 Wheat. Rep. 470.

would have been held good on general demurrer. For it is a rule, founded in good sense, and supported by the settled doctrines of pleading that many defects are waived and cured, by pleading over, that might have been fatal on demurrer.

But it is far from being admitted that this plea would not have stood the test of a general demurrer. The defendant was a ministerial officer, and placed in a situation in which he was obliged to judge and determine, whether to obey the command of the execution, or that of the warrant of remission from the Secretary of the Treasury. The latter is set out in hæc verba in the plea, and upon its face refers to the law under which it was issued, which was a public act; and in which warrant the Secretary of the Treasury sets forth, that a statement of facts, with the petition of Andrew Ogden, touching the forfeiture, had been transmitted to him by the district judge of the district of Maine, pursuant to the statute of the Unit-
284*] ed States, entitled, "An *act to provide for mitigating or remitting the forfeitures, penalties and disabilities accruing in certain cases therein mentioned," as by the said statement of facts, and petitions remaining in the treasury department of the United States may fully appear; and that he having maturely considered said statement of facts, it appeared to his satisfaction that the said forfeitures were incurred without wilful negligence or any intention of fraud, and thereupon remitted all the right, claim and demand of the United States, and of all others whomsoever, upon certain conditions therein specified. This warrant, therefore, upon its face, contained everything required by the law, and which was necessary to bring the case within the cognizance of the Secretary of the Treasury; and to require anything more from a ministerial officer for his justification, would be imposing upon him great hardship.

This plea, by setting out the warrant at large, adopts and asserts all the facts therein set forth, and must be taken as alleging that a statement of facts had been made by the proper officer, and transmitted to the Secretary of the Treasury, and is, therefore, an averment of that fact. It is not, to be sure, a formal, but is a substantial, averment; which is nothing more than a positive statement of facts, in opposition to argument or inference.

It would be altogether useless, and mere surplusage, to set forth such statement of facts in the plea; they would not be traversable. It is not competent for any other tribunal, collaterally, to call in question the competency of the
285*] evidence, *or its sufficiency, to procure the remission. The Secretary of the Treasury is, by the law, made the exclusive judge of these facts, and there is no appeal from his decision. The law declares, that on receiving such statement, he shall have power to mitigate, or remit, such fine, forfeiture or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence, or any intention of fraud, in the person or persons incurring the same. The facts are submitted to the Secretary, for the sole purpose of enabling him to form an opinion, whether there was wilful negligence, or intentional fraud, in the transaction; and the correctness of his conclusion therefrom no one can question. It is a subject submitted to his sound discretion. It would be a singular issue to present to a jury for trial, whether the facts contained in such statement were sufficient or not to satisfy the Secretary of the Treasury that there was no wilful negligence or intentional fraud. If the plea, by setting out the warrant at large, contains, as I have endeavored to show, an averment that a statement of facts had been transmitted to the Secretary by the proper officer, as required by the law, it was all that was necessary. This gave the Secretary cognizance of the case, and which was sufficient to give him jurisdiction. But what effect that statement of facts would, or ought to have, upon his opinion, whether the forfeiture was incurred without wilful negligence, or any intention of fraud, is a matter that could not be inquired into.

But, should any doubt remain on this point, it *is removed by the admissions in the [*286 replication; which begins by saying, that although true it is that the said William H. Crawford, as such Secretary of the Treasury of the United States, did make and issue the said warrants of remission, as in the said plea of the said defendant is alleged, yet, etc., proceeding to set out facts and circumstances, to show that the legal effect and operation of such remission cannot take away the moiety of the custom-house officers, but affirming its validity as to the moiety of the United States, and thereby admitting the authority and jurisdiction of the Secretary of the Treasury, and placing the avoidance of the operation of the remission on the rights of the custom-house officers, on a totally distinct ground. The only purpose for which the statement of facts upon which the Secretary acted, could be required to be set out in the plea, would be to show his jurisdiction; and if the replication admits this, it must certainly work a cure, or waiver of the defect. It is laid down by Chitty (Chitty on Plead., 547), and for which he cites adjudged cases which support him, that, as a defective declaration may be aided at common law by the plea, so a defective plea may be aided, in some cases, by the replication. As if, in debt on bond, to make an estate to A, the defendant pleads that he enfeoffed another to the use of A (which is not sufficient, without showing that A was a party, or had the deed), yet, if the plaintiff reply that he did not enfeoff, this aids the bar. So, if the defendant plead an award without sufficient *certainty, and[*287 the plaintiff makes a replication which imports the award to have been made, it aids the uncertainty of the bar. And this rule is not confined to matters of form merely, but extends to matters of substance. Thus, in an action of trespass for taking goods, not stating them to be the property of the plaintiff; this defect will be aided, if the defendant, by his plea, admits the plaintiff's property. So, where several acts are to be performed by the plaintiff, as a condition precedent, and he does not aver performance of all, if it appear by the plea that the act omitted to be stated was, in fact, performed, the defect is cured. 6 Binney, 24; Chitty, 402. We may, then conclude that the plea is not, in the present

stage of the cause, to be deemed defective on account of the first exception taken to it.

And the remaining, and more important inquiry is, whether the Secretary of the Treasury had authority to remit the share of the forfeiture claimed by the custom-house officers. And this must depend on the construction to be given to the act under which the power was exercised. The authority of the Secretary to remit, at any time before condemnation of the property seized, is not denied on the part of the plaintiff; and it cannot be maintained that Congress has not the power to vest in this officer authority to remit after condemnation; and the only inquiry would seem to be, whether this has been done by the act referred to. 2 L. U. S. 585. The present case 288*] ought not, perhaps, to be considered *altogether as a remission after condemnation For it appears, by the warrant of remission, that the statement of facts, by the district judge, upon which the remission is founded, bears date on the 13th of June, 1814, and the condemnation did not take place until May, 1817; and although the remission was not actually granted until January, 1819, yet, as the facts on which it was founded were judicially ascertained three years before the condemnation, there would be some plausibility in maintaining that the remission should relate back to the time when the application was made to the Secretary. But we think a broader ground may be taken, and that the authority to remit is limited only by the payment of the money to the collector for distribution.

It may safely be affirmed that the question now presented has never received any judicial decision in this court. Nor has any case been cited at the bar, or recollected by the court to have been decided here, containing any principle at variance with the construction of the act now adopted.

In the case of Jones v. Shore's Executors, 1 Wheat. Rep., 462, no such question was involved. The United States there asserted no claim. Nor had the Secretary of the Treasury exercised any authority under the act in question. The money was in court for distribution, and the sole question before this court was, whether the then collector and surveyor were the actual incumbents in office, or the representatives of the late collector and surveyor, in 289*] right of their testator, *and intestate, were entitled to the money, and it was decided in favor of the latter. The same principle governed the case of Van Ness v. Buel, 4 Wheat. Rep., 75. But these cases decide no more than that the right of the custom-house officers to forfeitures, in rem, attaches on seizure, and to personal penalties on suits brought; and in each case this right is ascertained and consummated by the judgment, as between such officers and the party who has incurred the forfeiture or penalty. But they decide nothing with respect to the right, or the control of the United States, over such penalties and forfeitures. The rights and interests of these officers must necessarily be held subordinate to the authority of the United States over the subject. And that such is the light in which they are viewed, is evident from what fell from the court in the case of Gelston v. Hoyt, 3 Wheat. Rep. 319. It is there said, the seizing officer is the agent of the government from the moment of the seizure up to the termination of the suit. His own will is bound up in the acts of the government in reference to the suit. By the very act of seizure, he agrees to become a party to the suit under the government; for in no other manner can he show an authority to make the seizure, or to enforce the forfeiture. If the government refuse to adopt his acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates.

It is not denied but that the custom-house officers have an inchoate interest upon the seizure, *and it is admitted that this [*290 may be defeated by a remission at any time before condemnation. But, if this is not the limitation put upon the authority to remit, by the act giving the power, it is difficult to discover any solid ground upon which such limitation can be assumed. If the interest of the custom-house officers, before condemnation, is conditional, and subject to the power of remission, the judgment of condemnation can have no other effect than to fix and determine that interest as against the claimant. Those officers, although they may be considered parties in interest, are not parties on the record; and it cannot with propriety be said they have a vested right, in the sense in which the law considers such rights. Their interest still continues conditional, and the condemnation only ascertains and determines the fact on which the right is consummated, should no remission take place. This is evidently the scope and policy of the laws on this subject. The forfeiture is to the United States, and must be sued for in the name of the United States. 3 L. U. S., 221, s. 89. It is made the duty of the collector to prosecute, and he is authorized to receive the money, and on receipt thereof, is required to distribute the same according to law. In all this, however, he acts as the agent of the government, and subject to the authority of the Secretary of the Treasury, who may direct the prosecution to cease. And the act creating the right of the custom-house officers to a portion of the forfeiture, does not *vest any absolute right in them[*291 until the money is received. (S. 91.) It declares that all fines, penalties and forfeitures, recovered by virtue of this act, shall, after deducting all proper costs and charges, be paid, one moiety into the treasury, and the other moiety divided between the collector, naval officer, and surveyor. No part of the act warrants the conclusion that the right of these officers becomes absolute by the condemnation. But, on the contrary, the plain and obvious interpretation is, that the right does not become fixed until the receipt of the money by the collector. Unless, therefore, the act under which the remission is allowed (2 L. U. S., 585) limits the authority of the Secretary of the Treasury to the time of condemnation, the custom-house officers have no right to question the remission. That the act does not, in terms, so limit the power, is very certain; nor is such a construction warranted by the general object and policy of the law, which is intended to provide equitable relief where the forfeiture

has been incurred without wilful negligence or intentional fraud. It presupposes that the offense has been committed, and the forfeiture attached according to the letter of the law, and affords relief for inadvertencies, and unintentional error. And why should such relief be foreclosed by the condemnation? The law was made for the benefit of those who had innocently incurred the penalty, and not for the benefit of the custom-house officers. If any prosecution has been instituted, the Secretary 292*] has authority to direct it to cease *and be discontinued, upon such terms or conditions as he may deem reasonable and just. This enables him to do ample justice to the custom-house officers, not only by re-imbursing all costs and expenses incurred, but rewarding them for their vigilance, and encouraging them in the active and diligent discharge of their duty in the execution of the revenue laws. But, to consider their right to a moiety of the forfeiture as absolute, and beyond the reach of the law, after condemnation, would be subjecting the innocent to great and inequitable losses, contrary to the manifest spirit and intention of the law. The Secretary is authorized to direct the prosecution to cease and be discontinued. This, undoubtedly, gives him a control over the execution. The suit, or prosecution, does not end with the judgment, but embraces the execution, and it has so been considered by this court at the present term. And that such is the sense in which the term "prosecution" is used in these laws, is evident from the 89th section of the collection act, where the collector is required to cause suits to be commenced and prosecuted to effect. But the prosecution would be to very little effect unless it extended to and included the execution. The provision in the third section of the act under which the remission is allowed, affords a very strong inference that the rights of the custom-house officers are conditional, and subordinate to the authority to remit. It declares that nothing herein contained shall be construed to affect the right or claim of any per- 293*] son to that part of any *fine, penalty or forfeiture, to which he may be entitled, when a prosecution has been commenced, or information has been given, before the passing of this act, or any other act relative to the mitigation or remission of such fines, penalties or forfeitures; thereby clearly showing that before such power to remit was given, the right of the custom-house officers attached upon the commencement of the prosecution, and could not be devested; but that such right was now modified, and made conditional. This provision is contained in the first law which passed in the year 1790 (2 L. U. S., 103), giving authority to the Secretary of the Treasury to remit penalties and forfeitures. This act was temporary, but continued from time to time until the 8th of May, 1795, when it expired, and was not revived until March, 1797, leaving a period of two years, when the power to remit was not vested in the Secretary of the Treasury, and to which period the provision in the third section of the act of 1797 probably refers.

The powers of the Secretary of the Treasury have been supposed analogous to those of the Commissioners of the Customs in England, under the statute 27 Geo. III., c. 32, s. 15. But it is very obvious, on reference to that statute, that the authority of the Commissioners to remit was limited to the condemnation. These powers were afterwards, by statute 51 Geo. III., c. 96, extended, but still limited to remissions before condemnation. It was probably not deemed advisable to confer more enlarged powers *upon the Commissioners of [*294 Customs, but that a power somewhere to remit after judgment of condemnation was proper and necessary; and, accordingly, by statute 54 Geo. III., c. 171, this power is transferred to the Commissioners of the Treasury. The two former acts are recited, and the recital then proceeds thus: "Whereas, it is expedient that the provisions of the said acts should be further extended, and that the Commissioners of His Majesty's Treasury should be empowered to restore, remit or mitigate any forfeiture or penalty incurred under any laws relating to the revenue, or customs, or excise, or navigation, or trade, either before or after the same shall have been adjudged in any court of law, or by or before any commissioner of excise, or justice of the peace;" and it is then enacted, that the Commissioners of the Treasury may order any goods seized as forfeited, to be restored, on the terms and conditions mentioned in the order, and may mitigate or remit any penalty or forfeiture which shall have been incurred under the revenue laws, and upon such terms and conditions as to costs, or otherwise, as under the circumstances of the case shall appear reasonable. The enacting clause in this statute is general, like our act. It does not, in terms, give the power to the Commissioners of the Treasury to remit after condemnation, and yet there can be no doubt the power extends to such cases; and, if this be so, what becomes of the rights of informers, which have been supposed to become, by the judgment of condemnation, *so vested, as not to be de- [*295 vested even by a pardon?

The powers given by this statute to the Commissioners of the Treasury, are very analogous to those given by our act to the Secretary of the Treasury, and the phraseology employed to confer such powers is nearly the same in both. Neither the one nor the other, in terms, extends the power to remission after condemnation; and there can be no reason why the same construction should not be given to both. No vested rights of informers, or custom-house officers, are violated in either case. These rights are conditional, and subordinate to the power of remission, and to be provided for in the terms and conditions upon which the remission is granted.

The practical construction given at the treasury department to our act has not been particularly inquired into. It is understood, however, that until within a few years, remissions were granted as well after as before condemnation, but that latterly this power is not exercised after condemnation, nor will the remission be granted before condemnation, unless the petitioner will admit the forfeiture has been incurred. This practice is probably founded on the impression that the equitable powers of the Secretary ought not to be interposed until the legal guilt of the petitioner is ascertained. But the rights of the custom-house officers

would seem to be as much affected under such a practice, as to remit after condemnation. Those rights are said to be inchoate by the 296*] seizure, and to be consummated *by the condemnation. The confession of the forfeiture before condemnation, remaining on the record of the treasury department, although not a judicial condemnation, might well be said to consummate the rights of the custom-house officers, if they are to be considered as becoming absolute when the forfeiture is ascertained. The condemnation does no more than to determine that question, so far as respects the rights of those officers; for the condemnation is not to them, but to the United States; they are no parties to the judgment; and their rights must depend upon, and be governed and controlled by, the acts of Congress, which create and regulate such rights; and by these acts, those rights, in the opinion of the court, do not become fixed and absolute by the condemnation, but are subject to the power of remission by the Secretary of the Treasury until the money arising from the forfeiture is received by the collector for distribution. The warrant of remission, therefore, in this case, when served upon the marshal, operated as a supersedeas to the execution, and justified a discharge and restoration of the property levied upon, and exonerates him from all claim to damages by the custom-house officers.

Mr. Justice Johnson. I entirely concur with my brethren in the opinion that the power of the Secretary to remit extends as well to cases after as before judgment rendered. The question is one which I have had to consider repeatedly in my circuit, and which I so decided 297*] more than *twelve years ago. The reasons on which I then founded, and still adhere to this opinion, were briefly these:

I consider the contrary doctrine as neither consistent with the words nor the spirit of the act of 1797. The unavoidable consequence of it would be, that the suitor for grace is shut out of every legal defense; and it would be difficult to assign a reason why justice should be refused by the hand that tenders mercy. Many defenses are not only consistent with the claim for remission, but furnish in themselves the best ground for extending the benefit of the act to the party defendant. He who supposes his case not to come within the construction of a law, or that the law is repealed, expired, or unconstitutional, cannot be visited with moral offense, either in the act charged or the defense of it. Yet, how is the question of right ever to be decided, unless he is permitted to try the question before a court of law? In such a case, pertinacious adherence to his offense cannot be imputed to him, since resisting the suit on the one hand, while he sues for remission on the other, amount to no more than this, that he denies having violated the law; but if the court thinks otherwise, he then petitions for grace, on the ground of unaffected mistake; a point on which, of course, he must satisfy the Secretary, before he can obtain a remission.

If the question be tested by the letter of the law, it will be found, I think, to lead to the same conclusion. The words are, "whenever 298*] any *person, who shall have incurred any fine, penalty, forfeiture or disability, or shall have been interested in any vessel, goods, wares or merchandise which shall have been subject to any seizure, forfeiture or disability, by force of any present or future law of the United States, for laying or collecting any duties or taxes, or by force of any present or future act concerning the registering and recording of ships or vessels, etc., shall prefer his petition to the judge of the district in which such fine, penalty, forfeiture or disability shall have accrued, truly and particularly setting forth," etc., then, etc., the power of remission may be exercised by the Secretary, and the prosecution, if any, ordered to be staid.

On perusing this act, it must be conceded that the terms are sufficiently general to extend the powers of the Secretary, without limit, to the cases of fine, forfeiture or disability occurring under the several laws specified. The limitation, therefore, must be sought for either in some principal of construction, or in some principle aliunde, which is competent to impose such limitation.

But, with a view to construction, there will be found several considerations calculated to extend the power granted to cases wherein judgments have been obtained, rather than to restrain it to any pre-existing state of things. If the question be tested by the technical signification of the terms, in strictness the power would be confined to cases in which judgment had been obtained, rather than to those of a contrary description. *Fines, penalties [*299 and disabilities are not incurred, and do not accrue, in the technical sense of the terms, until judgment. With regard to disabilities particularly (and there is no discrimination made between the cases), I would notice that disqualification to hold any office under the United States, which is imposed upon a smuggler for seven years. Who can question that it must be counted from the day of judgment, and not from the day of the offense or information? Or who can suppose that it could be made a plea to the authority of a public officer at any time before conviction?

But, with regard to fines and forfeitures, also, there are various provisions of the United States laws which look positively to a trial as necessary to determining whether such fines and forfeitures have been incurred. I would notice particularly the 29th section of the collection law of 1799, under which, incurring the penalty for the offense there stated, is made to depend upon the master's not being able to satisfy the court, by his own oath, or other sufficient testimony, of certain facts, which, in the given case, prevent his incurring the fine.

So, also, of the 67th section of the same law, in which a forfeiture is made to accrue upon a state of facts which positively requires the intervention of a court of justice, and which, of consequence, cannot be said to have been incurred or accrued until judgment.

But other considerations present themselves upon this law, which lead to the same conclusion. *The words are, "shall prefer [*300 his petition to the judge of the district in which such fine, penalty, forfeiture or disability shall have accrued." That this word "accrued" meant something more than the term "incurred," used in the previous part of the section, is obvi-

ous from this consideration, that an offense might be committed in one district, and the offender prosecuted in another; but it never was imagined that the suit for remission could be going on in the district where the penalty was incurred, in one sense of the term, and the prosecution in another. The term "accrued," therefore, has been universally held to be here used with relation to the seizure, information, or suit for the penalty; and so far from its being held to have any effect in confining the time of prosecuting this claim for remission to the interval between information and judgment, that, practically, we know, in some of the most commercial districts, the construction adopted was, that the penalty did not accrue until conviction; and hence, suffering a decree or judgment to pass, was considered as essential to making up the case in which the suit for remission might be preferred. And there was some reason for this practice, since the necessary meaning of the term, as distinguished from the word "incurred," shows that there could hardly ever occur a case in which the suit for remission was not preceded by the suit for the penalty. But, if the defendant was compelled to confess that he had violated the law, and so the act requires, what reason could exist why judg- [*301 ment should not forthwith *pass against him? And if, under such circumstances, the judgment was a bar to the remission, the boon held out to them was all a fallacy; nay, more, it was a lure to ensnare him; for the law imposes no obligation on the judge to stay proceedings; and whether he would or not, rested with him, or with the district-attorney, until the Secretary should have time to act upon the application for remission.

The replication, however, exhibits the true ground on which the real plaintiff in this suit is compelled to rest his case; which is, that by virtue of the judgment, certain rights were vested in him, over which the remitting power of the Secretary does not extend. In making up this replication, the party ought to have felt the real difficulties of his case. It is generally true, that the rules of pleading furnish the best test of a right of action. The effect, in this case, was to introduce a new personage into the cause; and if I were disposed to get rid of the question, on a technical ground, I should find no difficulty in coming to the conclusion that there is a departure in this plea, and he has abated his writ. How, in fact, the name of the United States comes at all to be used in this cause, is to me a mystery. The very policy of the law in this part of its revenue system is avoided by it, and would be frustrated, if the practice could be countenanced. That the name of the United States should be used against its will, and an attorney for the United States nominated by a judge, to act where [*302 the attorney of the United *States refuses to act, and that without any authority by statute, I acknowledge has excited my surprise.

The principles asserted are, that an absolute interest as vested by law in the collector; that the United States are the trustees to their use; that the act of the trustee shall not defeat the interests of the cestui que use, and that he shall have the use of the trustee's name to vindicate his rights, that, too, in an action for damages.

The whole of this thing appears to me to be wrong. If the right was an absolute, substantive, individual right, why was not the suit brought in the name of the collector? If his interest is only an equitable interest, by what known rules of pleading can he avail himself of his mere equitable interest in a suit at law? or rather, can he make his appearance as party in the suit instituted by his trustee? and that, too, a suit for damages? It all results in a strong attempt to modify the operation of our laws, and to regulate the rights and powers of our officers, by some fancied analogy with the British laws of trade, and British revenue officers.

Our system is a peculiar system; and nothing is clearer to my mind, than that, in many particulars it is constructed with a view to avoid that very analogy which is here set up, and those consequences and embarrassments which might grow out of it. In the instance before us, relief was to be provided for a case of misfortune and of innocence, and nothing could have been more absurd than to suffer the vested rights of informers *and seizing offi- [*303 cers to embarrass the government in its benevolent and just views towards the objects of this law. Mercy and justice could only have been administered by halves. if collectors could have hurried causes to judgment, and then clung to the one-half of the forfeiture, in contempt of the cries of distress, or the mandates of the Secretary. Hence, according to our system, all the suits to be instituted under the laws over which the Secretary's power extends, are commenced in the name of the United States. No other party is permitted to sue; they are all made national prosecutions; all the legal actors are those who are bound in obedience to the government that prosecutes. Nothing is more untenable than the idea that at any one stage of the prosecution the government assumes the character of a trustee; an idea so abhorrent to the principles of the common law, that to make the King a trustee was to make him absolute proprietor. Nor is it until the character of prosecutor for offenses against itself is put off, that the law raises a state of things in which the relation of trustee and cestui que use actually can arise. This is when the money is paid into the hands of the collector. To him the law directs that it shall be paid, in order that it may be distributed. What right, I would ask, would any one of distributees here have to move the court that the money be paid to him, and not to the collector? There are cases in which other persons than a collector may be entitled in the capacity of informers, and it may then be necessary for the *court to decide on indi- [*304 vidual rights. But in no case, that I am aware of, arising under the collection law, can the court be called upon to pay the money in any other way than to the collector, to be by him distributed; and this distribution I consider as a mere boon from the government, which they may justly, and do practically, reserve a soverign control over, until so paid under their laws. The gift is from them, of a thing perfected to them, and they may modify and withdraw that gift, ad libitum. When

once paid away, according to legislative will. their control is at an end, and the right then and not till then, becomes vested and absolute. as between them and their officers, whom, to the last, the law regards as absolute donees. That such is the view of the legislature, and that in the exercise of that discretion, they still meant to be reasonable and just, and not to exercise an ex post facto power in such case, is all conclusively proved in the third section of this act, as had been very justly insisted on in argument. During two years, this power of the Secretary had remained suspended, and with regard to rights accruing during that time, the legislature declares that as the modification imposed upon the grant to the informer, or seizing officer, by virtue of that dispensing power. did not then exist, their proportions should not afterwards be subjected to it, but the court may assess their proportions in a summary manner. There cannot be a more explicit declaration of legislative understanding than this clause presents. inasmuch as it makes no dis-
305*] crimination *between the cases of judgment and other cases, but considers the right accruing to them the same before judgment as it is after.

There is one peculiarity in this case, which, in my opinion. precludes the possibility of recovery, independently of the general principle; which is, that this action is brought against the marshal for not executing process issuing from another state. It certainly presents a dilemma from which I think it impossible for the party plaintiff to escape. The right to issue such process originates in the 6th section of the "act more effectually to provide for the settlement of accounts between the United States and receivers of public money," by the words of which the power is explicitly confined to the case of executions on judgments obtained for the use of the United States.

The real plaintiff here, then, is reduced to this alternative: Either the judgment was for his use or it was not. If not for his use, then he cannot be damnified by the defendant in refusing to execute it. But if for his use, it cannot be for the use of the United States. and then the execution issued wrongfully, and was rightfully disobeyed. If it be replied, that the judgment, in the first place, was obtained for the use of the United States, it only brings us back to what I before observed, that so entirely is this true, as to raise no vested right in any one on the solitary ground of an eventual contingent interest.

Judgment affirmed.

306*] [*Prize. Non-commissioned Captor.]

THE DOS HERMANOS. Shields, Claimant.

Seizures made, jure belli, by non-commissioned captors, are made for the government, and no title of prize can be derived but from the prize acts.

A non-commissioned captor can only proceed in the prize court as for salvage, the amount of which is discretionary.

The appellate court will not interfere in the exercise of this discretion, as to the amount of salvage allowed, unless in a very clear case of mistake.

An appeal under the judiciary acts of 1789, c. 20, s. 22, and of 1803, c. 353 (XCIII.) prayed for, and allowed within five years, is valid, although the security was not given until after the lapse of five years.

The mode of taking the security, and the time for perfecting it, are within the discretion of the court below, and this court will not interfere with the exercise of that discretion.

APPEAL from the District Court of Louisiana.

This was the same case, reported ante, Vol. II., p. 76, where the decree of the court below, condemning the cargo as enemy's property, was affirmed by this court, reserving the question as to the distribution of the prize proceeds. The original capture was made by Mr. Shields, a purser of the navy, in the year 1814, in a barge armed and fitted out to cruise, but not regularly attached to the navy. The cause was remanded to the court below for further proceedings, and that court decreed the proceeds to be equally distributed between the United States and the captor, *without [*307 deducting the captor's expenses. From this decree the captor appealed to this court.

Mr. C. J. Ingersoll, for the appellants, stated that it had been generally considered by the text-writers, and courts of prize, that the right to captures, jure belli, was in the government, and that no individual could derive any rights of prize but from the express grant of the government.[1] But, on principle, every individual is in a state of war with the enemies of his country; and the common law certainly considers the law of nations as authorizing any subject of the belligerent state to seize enemy's property within the realm, or the property of other subjects previously captured by the enemy to the exclusion of the King, the admiral, and the owner, unless the latter came the same day they were taken, and claimed them ante occasum solis.[2] To the same effect is the case in the book of the 7th Edw. IV., 14.

The principle is, that personal effects, seized in war, are acquired to the taker by occupancy; and immovables, such as cities, lands, etc., to the public.[3] But the crown, always rapacious, and seeking to extend its final prerogative, subsequently introduced the doctrine of public title to personal things taken in war. Thus the statute *34 Edw. III., c. 1, declares that [*308 the crown was always seized of the forfeitures of war; and hence came the doctrine of the droits of admiralty.[4] It does not appear that this assumption has ever been expressly recognized by this court as a part of the law of this country; and, unquestionably, a non-commissioned captor may seize enemy's property,[5] and after a condemnation, as in this case, it must be adjudged to the captors. It is now too late for the government to interpose its claim. The act of the 23d of April, 1800, c. 189 (XXXIII.), s. 5, and the prize act of 1812, c. 430 (CVII.), gives the proceeds of vessels and goods, adjudged good prize, to the captors. But at all events, the captors are entitled to be repaid their expenses, and to a liberal salvage.[6]

1.—2 Wheat. Rep. App., Note I., p. 71.
2.—3 Reeves' Hist. Eng. Law, 371, 372.
3.—Wood's Inst. Imp. Law. 154, b. 2, c. 3.
4.—1 Ruffh. 302; 2 Reeves' Hist. Eng. Law, 454.
5.—2 Wheat. Rep. App., Note I., p. 7.
6.—The San Bernardo, 1 Rob. 178; The Haase, Id. 24.

The Attorney-General, contra, argued that it was established as an elementary principle in the law of prize, that all captures jure belli, enured to the public, and that the actual captors could only derive their title from the grant of the government. This was the case with commissioned captors, and still more emphatically as to non-commissioned captors; who, though they had a right to seize enemy's property, could claim no title to the proceeds upon adjudication, except what was derived from the bounty of the public.[1] Whatever might have [*309] been the ancient *common law doctrine in England, it had been long since settled in that country that all rights of prize were derived from the grant of the crown. Without entering into all the distinctions as to the capacity in which the crown took, whether in the King's office of admiral, or ure coronæ, it might be laid down as a general proposition, that non-commissioned captors, as a matter of strict right, were not entitled to any share of the prizes captured by them. Captures made by tenders or boats, sent out by officers of the navy, but not regularly attached by public authority to the navy, are condemned as droits of admiralty.[2] But in these, and all other cases of seizures by non-commissioned captors, it was usual to reward the takers with a liberal share of the property, in the discretion of the Court of Admiralty.[3] There was no reason why any different principle or mode of proceeding should be adopted in this country. It does not depend upon any peculiar municipal regulations, but grows out of a principle recognized by all the writers on public law: Bello parta cedunt reipublicæ.[4] In the present case, a moiety of the proceeds had been allowed to the actual captors as salvage; but the provisions in the prize acts for the distribution of prizes were confined to commissioned public and private armed vessels.

[*310] *Mr. Chief Justice Marshall delivered the opinion of the court, that whatever might have been the ancient doctrine in England in respect to captures in war, it is now clearly established in that kingdom, that all captures jure belli, are made for the government, and that no title of prize can be acquired but by the public acts of the government conferring rights on the captors. If the original law of England authorized an individual to acquire to his own use the property of an individual, without any express authority from the public, that law was changed long before the settlement of this country. It never was the law of this country. Before the revolution, all captures from the enemy accrued to the government, to be distributed according to law; and the revolution could not strip the government of this exclusive prerogative, and vest it in individuals. It is, then, the settled law of the United States, that all captures made by non-commissioned captors, are made for the government; and since the provisions in the prize acts, as to the distribution of prize proceeds, are confined to public and private armed vessels, cruising under a regular commission, the only claim which can be sustained by the captors, in cases like the present, must be in the nature of salvage for bringing in and preserving the property.

In the present case, the District Court have awarded one-half of the prize proceeds, or salvage, to the captors. It was an exercise of sound discretion; and this court would, with extreme reluctance, interfere with that discretion, unless *in a very clear case of mis- [*311 take. We perceive no such mistake in this case, and are well satisfied with the amount of the salvage as decreed by the District Court.

As to the question which has been made, whether the appeal was in due time, it appears that the appeal was prayed for within five years, and was actually allowed by the court within that period. It is true that the security required by law was not given until after the lapse of the five years; and, under such circumstances, the court might have disallowed the appeal, and refused the security. But, as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal. The mode of taking the security, and the time for perfecting it, are matters of discretion, to be regulated by the court granting the appeal; and when its order is complied with, the whole has relation back to the time when the appeal was prayed. We must presume the security was given, in this case, according to the rule prescribed by the District Court, and the appeal was therefore in time.

Decree affirmed with costs.

[*Slave Trade Acts. Instance Court.]
[*312

THE JOSEFA SEGUNDA.

Roberts et al., Claimants.

The district courts have jurisdiction, under the slave trade acts, to determine who are the actual captors, under a state law made in pursuance of the 4th section of the slave trade act of 1807, c. 77, and directing the proceeds of the sale of the negroes to be paid, "one moiety for the use of the commanding officer of the capturing vessel," etc.

In order to constitute a valid seizure, so as to entitle the party to the proceeds of a forfeiture, there must be an open, visible possession claimed, and authority exercised, under the seizure.

A seizure, once voluntarily abandoned, loses its validity.

A seizure, not followed by an actual prosecution, or by a claim, in the District Court, before a hearing on the merits, insisting on the benefit of the seizure, becomes a nullity.

Under the 7th section of the slave trade act of 1807, c. 77, the entire proceeds of the vessel are forfeited to the use of the United States, unless the seizure be made by armed vessels of the navy, or by revenue cutters, in which case distribution is to be made in the same manner as prizes taken from the enemy.

Under the act of the state of Louisiana of the 13th of March, 1818, passed to carry into effect the 4th section of the slave trade act of Congress of 1807, c. 77, and directing the negroes imported contrary to the act to be sold, and the proceeds to be paid, "one moiety for the use of the commanding officer of the capturing vessel, and the other moiety to the treasurer of the Charity Hospital of New Orleans, for the use and benefit of the said hospital;" no other person is entitled to the first moiety than the commanding officer of the armed [*313

1.—2 Wheat. Rep. App., Note I., p. 7, 71.

2.—The Melomasne, 5 Rob. 41; The Charlotte, Id. 280, and note.

3.—The San Bernardo, 1 Rob. 178; The Haase, Id. 286; The Amor Parentum, Id. 303.

4.—The Elsebe, 5 Rob. 173, 181.

vessels of the navy, or revenue cutter, who may have made the seizure, under the 7th section of the act of Congress.

APPEAL from the Circuit Court of Louisiana.

313*] *This is the same case which was reported ante, Vol. V., p. 338. It was a proceeding against the vessel, and the negroes taken on board of her, under the slave trade act of the 3d of March, 1807, c. 77, in which the vessel was condemned in the court below, and that decree was affirmed on appeal, by this court. After the condemnation of the vessel in the District Court, and before the appeal to this court, the negroes found on board of her were (under the 4th section of the act of Congress, and under an act of the state of Louisiana, passed on the 13th of March, 1818, in pursuance of the act of Congress) delivered by the collector of the customs for the port of New Orleans, to the sheriff of the parish of New Orleans, for sale according to law. A cross libel was afterwards filed by the alleged original Spanish owners, claiming restitution of the negroes, which was dismissed, and, on appeal, the decree affirmed by this court. By consent of all the parties in interest, the negroes were sold by the sheriff, and the proceeds lodged in the Bank of the United States, subject to the order of the court below. After the cause had been remanded to the District Court, a question arose in that court respecting the manner in which these proceeds, as well as those of the vessel and effects, were to be distributed, and the parties respectively entitled to them. Mr. Roberts, an inspector of the revenue, claimed a moiety of the proceeds as the original seizor or captor; Messrs. Gardner, Meade and Humphrey, respectively, made similar claims under subse-
314*] quent *military seizures alleged to be made by them; and Mr. Chew, the collector of the port of New Orleans, conjointly with the naval officer and surveyor of the port, filed a like claim as the true and actual captors and seizors, who made the last and only effectual seizure, and prosecuted the same to a final sentence of condemnation.[1]

315*] *It appeared, by the evidence, that Roberts, being employed as an inspector in a revenue boat at the Balize, near the mouth of
316*] the Mississippi, *on the 18th of April, 1818, boarded the vessel, and declared that he had seized her. He soon afterwards went on shore, and put a person on board to take charge of the vessel, which remained at anchor opposite the block-house, until the 21st of April, when Lieutenant Meade, with six soldiers in a boat, went from Fort St. Philip, in company with a custom-house boat, and Mr. Gardner, an officer of the customs, on board, took possession of the vessel, and brought her up under the guns of the fort. It appeared that Roberts afterwards came on board the vessel, but did not remain on board until her arrival at the city of New Orleans, he having left her in order to board another vessel in the river. On the 21st of April, Mr. Chew, the collector at New Orleans, acting on independent information which he had received, sent an armed revenue boat, with an inspector of the customs, down the river, with instructions to seize the vessel. On arriving at *Fort St. Philip, [*317 they found the vessel at anchor opposite the fort, with a sergeant's guard on board, which had been placed there by Major Humphrey, the commanding officer at the fort. The inspector received from that officer the ship's papers, and took possession of the vessel and negroes, the guard having been withdrawn, and brought them up to the city of New Orleans. Proceedings were commenced against the property at the instance of Mr. Chew, and the other officers of the customs, and though his name was not inserted in the libel, the prosecution was conducted by him until its final determination, and the other parties claiming as captors, or seizors, did not intervene until after the decree of this court on the appeal in the original cause.

The court below pronounced a decree, dismissing the claim of Messrs. Roberts, Humphrey, Meade and Gardner, and allowing that of the collector and other officers of the customs, and the cause was brought by appeal to this court.

Mr. Livingston, for the appellant, Roberts, insisted that he was entitled as the first seizor, under the act of Congress of the 3d of March, 1807, c. 77, s. 7, and the act of the legislature of Louisiana, passed on the 13th of March, 1818, in pursuance of the act of Congress, to a moiety of the proceeds of the vessel and negroes found on board. He exercised all the authority and control over the vessel he was capable of, with

1.—The act of Congress of the 3d of March, 1807, c. 77, s. 4, after providing a personal penalty for taking on board, receiving or transporting any negro, etc., from Africa, or any other foreign country, for the purpose of selling them as slaves, in any part of the United States, enacts, that "every such ship or vessel, in which such negro, mulatto or person of color shall have been taken on board, received or transported as aforesaid, her tackle, apparel and furniture, and the goods and effects which shall be found on board the same, shall be forfeited to the United States, and shall be liable to be seized, prosecuted and condemned, in any of the circuit courts or district courts in the district where the said ship or vessel may be found or seized. And neither the importer, nor any person claiming from or under him, shall hold any right or title whatsoever to any negro, mulatto or person of color, nor to the service or labor thereof, who may be imported or brought within the United States, or territories thereof, in violation of this law, but the same shall remain subject to any regulations not contravening the provisions of this act, which the legislatures of the several states or territories at any time hereafter may make, for disposing of any such negro, mulatto or person of color." s. 7. "That of any ship or vessel shall be found, from and after the first day of January, 1808, in any river, port, bay or harbor, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coasts thereof, having on board any negro, mulatto or person of color, for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States, contrary to the prohibition of this act, every such ship or vessel, together with her tackle, apparel and furniture, and the goods or effects which shall be found on board the same, shall be forfeited to the use of the United States, and may be seized, prosecuted and condemned in any court of the United States having jurisdiction thereof. And it shall be lawful for the President of the United States, and he is hereby authorized, should he deem it expedient, to cause any of the armed vessels of the United States to be manned and employed to cruise on any part of the coast of the United States, or territories thereof, where he may judge attempts will be made to violate the provisions of this act, and to instruct and direct the commanders of armed vessels of the United States, to seize, take and bring into any port of the United States,

the force at his disposition. The persons on board submitted to the seizure; and, as in cap-
318*] tures *jure belli, it is not necessary that there should be a physical superiority of force on the part of the captors.[1] He was afterwards compelled to abandon the possession; and such an abandonment, from the force and fear of another party, cannot invalidate the original seizure.[2] By the act of Congress (s. 7), the proceeds of the vessel and effects are to be divided equally between the United States and the officers and men who shall make the seizure; and by the act of Louisiana, the proceeds of the negroes are to be divided equally between the commanding officer of the capturing vessel and the Charity Hospital. The appellant, Roberts, is entitled to both capacities; and the revenue officers, who came in after the capture was complete, and dispossessed him who was the first seizor, can have no claim under either act.

Mr. Key, for the appellants, Gardner, Meade and Humphrey, argued upon the facts, to show that they were the real, meritorious captors.

The Attorney-General, for the respondents, insisted that if any of the parties before the court were entitled, the collector and other officers of the customs were the only parties entitled by law to be considered as the captors or seizors, they having made the first effectual seizure, and prosecuted it to condemnation, whilst the other claimants avoided all the ex-
319*] pense and *hazard of the prosecution, and did not intervene until its successful termination. The law does not mean to encourage that kind of seizure, where the captor lays his hand on the subject and takes it off again. That person is the seizor who informs and prosecutes. If any other person claims a title, he is bound to intervene before the first adjudication, and submit his claim to the decision of the court.[3] It may be doubted, whether, under the 7th section of the act of Congress, any person can be entitled, as a seizor, except the officers, etc., of the armed vessels and revenue cutters of the United States. If it be a casus omissus, none of the captors now before the court are literally within the terms of the act, and the whole of the forfeiture must be to the United States. But, if any are entitled, the collector is clearly to be preferred.

Mr. Justice Story delivered the opinion of the court.

The case of The Josefa Segunda, in which the present controversy had its origin, is reported in the fifth volume of Mr. Wheaton's Reports. It is only necessary to mention, that after the condemnation of the vessel, in the District Court of Louisiana, and before the intervention of the appeal to this court, the negroes seized on board of her, in pursuance of the act of Congress, and the act of Louisiana, which will be hereafter commented on, were delivered by Mr. Chew (the *collector [*320 of the customs) to the sheriff of the parish of New Orleans, to be sold according to law; and a few days afterwards a new libel, claiming the property of the negroes, having been filed by the Spanish owners (which was afterwards dismissed, and on appeal, the dismissal confirmed by this court), by consent of all the parties in interest the negroes were sold by the sheriff, and the proceeds lodged in the Bank of the United States, subject to the order of the District Court. The question now in contestation respects the manner in which the proceeds of this sale, as well as of the sale of the vessel and effects, are to be distributed, and the parties who are entitled to them. Mr. Roberts, who is an inspector of the customs, claims title as the original seizor or captor; Messrs. Gardner, Meade and Humphrey make a like claim under a subsequent military seizure made by them; and Mr. Chew, and the surveyor and naval officer of the port of New Orleans, a like claim as the true and actual captors and seizors, who made the last and only effectual seizure, and prosecuted the same to a final decree of condemnation.

Mr. Chew caused the original libel against the vessel to be brought, and though his name is accidently omitted in it as the officer through whose instrumentality the seizure was made, yet it is admitted, and indeed could not be denied, that he was the sole responsible prosecutor of the suit, until the final condemnation of the vessel, and the final dismissal of the second libel, *brought by the original Spanish [*321 claimants. The claims of all the other parties

1.—The Alexander, 8 Cranch's Rep. 179.

2.—The Mary, 2 Wheat. Rep. 123.

3.—Hargr. Law Tracts, 226, 227.

such ships or vessels, and moreover to seize, take and bring into any port of the United States, all ships or vessels of the United States, wheresoever found on the high seas, contravening the provisions of this act, to be proceeded against according to law," etc. "And the proceeds of all ships and vessels, their tackle, apparel and furniture, and the goods and effects on board of them, which shall be so seized, prosecuted and condemned, shall be divided equally between the United States and the officers and men who shall make such seizure, take or bring the same into port for condemnation, whether such seizure be made by an armed vessel of the United States or revenue cutters thereof; and the same shall be distributed in like manner as is provided by law for the distribution of prizes taken from an enemy: Provided, That the officers and men, to be entitled to one-half of the proceeds aforesaid, shall safe keep every negro, mulatto or person of color, found on board of any ship or vessel so by them seized, taken or brought into court for condemnation, and shall deliver every such negro, mulatto, or person of color to such person or persons as shall be appointed by the respective states to receive the same; and if no such person or persons shall be appointed by the respective states, they shall deliver every such negro, mulatto or person of color to the overseers of the poor of the port or place where such ship or vessel may be brought or found, and shall immediately transmit to the Governor, or Chief Magistrate of the state, an account of their proceedings, together with the number of such negroes, mulattoes or persons of color, and a descriptive list of the same, that he may give directions respecting such negroes, mulattoes, or persons of color." The act of the legislature of the state of Louisiana, passed on the 13th of March, 1818, after reciting the substance of the above 4th section of the act of Congress, proceeds to declare that the sheriff of the parish of New Orleans is authorized and required to receive any negro, etc., delivered to him in virtue of the act of Congress, until the proper court pronounces a decree of condemnation; and after such condemnation, it authorizes him to sell such negro, etc., as a slave for life; and then declares "that the proceeds of such sale shall, after deducting all charges, be paid over by the said sheriff, one moiety for the use of the commanding officer of the capturing vessel, and the other moiety to the treasurer of the Charity Hospital of New Orleans, for the use and benefit of the said hospital."

now before the court, adverse to that of Mr. Chew, have intervened since the final judgment pronounced in the Supreme Court in the cause.

The Josefa Segunda was finally condemned under the seventh section of the slave trade act of the 2d of March, 1807, ch. 77. It will be necessary to refer to the terms of that section at large, because the question here respects as well the distribution of the proceeds of the vessel (which must be made according to the rules prescribed in that section) as of the proceeds of the sale of the negroes, who were unlawfuly brought into the United States; and, in the progress of the discussion, it will materially aid us in the decision of the latter, to ascertain who, by the construction of that section, are the captors entitled to the distribution of the former.

The fourth section of the act of 1807 provides that "neither the importer, nor any person or persons claiming from or under him, shall hold any right or title whatsoever to any negro, etc., who may be imported or brought within the United States, or territories thereof, in violation of this law; but the same shall remain subject to any regulations, not contravening the provisions of this act, which the legislatures of the several states or territories, at any time hereafter, may make for disposing of any such negro," etc. Accordingly, the legislature of Louisiana, on the 13th of March, 1818, passed an act avowedly to meet the exigency of this section, which act, after 322*] *reciting the substance of the same section, proceeds to declare that the sheriff of the parish of New Orleans is authorized and required to receive any negro, etc., delivered to him in virtue of the act of Congress, until the proper court pronounces a decree of condemnation; and after such condemnation, it authorizes him to sell such negro, etc., as a slave for life; and then declares that "the proceeds of such sale shall, after deducting all charges, be paid over by the said sheriff, one moiety for the use of the commanding officer of the capturing vessel, and the other moiety to the treasurer of the Charity Hospital of New Orleans, for the use and benefit of the said hospital." There is no doubt that this act is not in contravention of the intention of the act of Congress, for the sixth section contains a proviso, recognizing the validity of such a sale, when made under the authority of a state law.

Some objection has been suggested as to the jurisdiction of the District Court of Louisiana to entertain the present proceedings, upon the ground that the distribution is to be made under this act by the sheriff of New Orleans. But upon a full consideration of the act of 1807, we are of opinion that the objection cannot be maintained. By the judiciary act of 1789, as well as by the express provisions of the act of 1807, the District Court has jurisdiction over seizures made under the latter act. The principal proceedings are certainly to be against the vessel, and the goods and effects 323*] found on board. But *the negroes are also to be taken possession of, for the purpose of being delivered over to the state governments, according to the provision of the act; and it is obvious that this delivery can only be after a condemnation has occurred, since it is only in that event that the state legislature can acquire any right to dispose of them. The proviso in the seventh section, that the officers to whom a moiety of the proceeds is given on condemnation, shall be so entitled only in case they safely keep and deliver over to the negroes according to the laws of the states, operates by way of condition to the completion of their title; but does not import any requirement that the delivery shall be until after the condemnation. On the contrary, as by a decree of restitution of the vessel and effects, the claimants would be entitled to a restitution of the negroes, the reasonable construction seems to be that they remain subject to the order of the District Court, as property in the custody of the law, though in the actual possession of the seizing officers. The possession of the latter is the possession of the court, as much in respect to the negroes as the vessel and cargo; and it must remain until the court, by pronouncing a final decree, directs in what manner it is to be surrendered. In the present case, the negroes were sold, and the proceeds substituted for them were in the custody of the court. It was therefore authorized to deliver them over to the parties who should be entitled, under the state law. In terms, the state law required the delivery to the sheriff to the *use of the parties; but who the par- [*324 ties were to whose use the sheriff must hold them, could not be ascertained by him, but must be awarded by the court, to whom, as an incident to the principal cause, it exclusively belonged. In what manner could any other court be authorized to ascertain who was the commanding officer of the capturing vessel? The decree of the court, in distributing the proceeds of the vessel and cargo, must necessarily involve this inquiry; and certainly it cannot for a moment be maintained in argument that any other person than the commander of the capturing vessel, who would share the proceeds of the prize and her cargo, could be within the meaning of the law of Louisiana. The common form of drawing up decrees, in cases of condemnation, is, that the proceeds be distributed according to law. But if any difficulty arises, upon petition, the court always proceeds to decide who are the parties entitled to distribution, and to make a supplementary decree. But it may do the same in the first instance, and make the particulars of the distribution a part of the original decree. In the present case, if the original decree had been drawn out at large, it ought to have been, that the negroes so captured be delivered over to the sheriff of New Orleans for sale, according to the act of Louisiana in this behalf provided, and that the net proceeds of the sale be afterwards paid over, viz., one moiety to A. B., adjudged by the court to be the commanding officer of the capturing vessel, and the other moiety to the Charity Hospital of *New Orleans. This course of proceed- [*325 ing is very familiar in prize causes; where the Court of Admiralty always ascertains who are the captors entitled to the prize proceeds; and the courts of common law will never entertain any jurisdiction over the proceeds until after such adjudication. Considering this cause

then, as a cause of admiralty and maritime jurisdiction, belonging exclusively to the courts of the United States, we are not aware how any other court could adjudge upon the question who were the captors or seizors entitled to share the proceeds; and we think that the District Court has jurisdiction over the present proceedings.

In respect to the claim of Mr. Roberts, we do not think that the evidence establishes that he ever made any valid seizure of the vessel. It is not sufficient that he intended to make one, or that, on some occasions, he expressed to third persons that he had so done. There must be an open, visible possession claimed, and authority exercised under a seizure. The parties must understand that they are dispossessed, and that they are no longer at liberty to exercise any dominion on board of the ship. It is true, that a superior physical force is not necessary to be employed, if there is a voluntary acquiescence in the seizure and dispossesion. If the party, upon notice, agrees to submit, and actually submits, to the command and control of the seizing officer, that is sufficient; for, in such cases, as in cases of captures jure belli, a voluntary surrender of authority, and an agreement 326*] to obey the captor, *supplies the place of actual force. But here, Mr. Roberts gave no notice of the seizure to the persons on board; he exercised no authority, and claimed no possession. He had no force adequate to compel submission; and his appearance in the vessel gave no other character to him than that of an inspector, rightfully on board, in performance of his ordinary duties. To construe such an equivocal act as a seizure, would be unsettling principles.

Messrs. Humphrey, Meade and Gardner, certainly did make a seizure, by their open possession of the vessel, and bringing her under the guns of Fort St. Philip. But there is this objection to the seizure, both of Mr. Roberts (assuming that he made one) and of the other persons, that it was never followed up by any subsequent prosecution or proceedings. The seizure of Messrs. Humphrey, Meade and Gardner, seems to have been voluntarily abandoned by them; and even that of Mr. Roberts, if he made one, does not seem to have been persisted in. Now, a seizure, or capture—call it which we may—if once abandoned, without the influence of superior force, loses all its validity and becomes a complete nullity. Like the common case of a capture at sea, and a voluntary abandonment, it leaves the property open to the next occupant. But what is decisive in our view is, that neither of these gentlemen ever attempted any prosecution, or intervened in the original proceedings in the District Court, claiming to be seizors, which was indispensable to consummate their legal right; and their 327*] claim *was, for the first time, made after a final decree of condemnation in the Supreme Court. This was certainly a direct waiver of any right acquired by their original seizures. It is not permitted to parties to lie by and allow other persons to incur all the hazards and responsibility of being held to damages in case the seizure turns out to be wrongful, and then to come in, after the peril is over, and claim the whole reward. Such a proceeding would be utterly unjust and inadmissible. If the parties meant to have insisted on any right, as seizors, their duty was to have intervened in the District Court before the hearing on the merits, according to the course pointed out by Lord Hale in the passage cited at the bar, where there are several persons claiming to be seizors of forfeited property.[1] In the present case, Mr. Chew actually advanced a considerable sum of money for the maintenance of these negroes during the pendency of the suit; and if it had been unsuccessful he must have exclusively borne the loss. Upon the plain ground, then, that Mr. Roberts, and Messrs. Humphrey, Meade and Gardner, have not followed up their seizure by any prosecution, such as the act of 1807 requires, we are *of opinion that there is no foundation, [*328 in point of law, for their claims.

That Mr. Chew, on behalf of himself, and the surveyor and naval officer of the port of New Orleans, did make the seizure on which the prosecution in this case was founded, is completely proved by the evidence; it is also admitted by the United States, in their answer to the libel of Messrs. Carricabera, etc., the Spanish claimants, and is averred by Mr. Chew, and his coadjutors, in their separate allegation and answer to the same libel. While the vessel lay at Fort St. Philip, armed boats, under revenue officers, were sent down by him, with orders to seize her, and bring her up to New Orleans for prosecution, which was done accordingly.

The remaining question, then, is, whether Mr. Chew, for himself and his coadjutors in office, is to be considered as entitled to the proceeds of the vessel under the act of Congress, and to the proceeds of the negroes, as "the commanding officer of the capturing vessel," within the sense of the Louisiana law.

If he is entitled to the proceeds of the vessel and cargo, under the 7th section of the act of 1807, then, we think, he must be fairly considered as within the spirit, if not the letter, of the act of Louisiana.

The 7th section is certainly not without difficulty in its construction. In the first clause it declares, that vessels found "in any river, port, bay or harbor, or on the high seas, within the jurisdictional limits of the United States, or *hovering on the coast thereof, having [*329 on board any negro, etc., for the purpose of selling them as slaves, etc., contrary to the prohibitions of this act, shall be forfeited to the use of the United States, and may be seized, prosecuted and condemned, in any court of the United States having jurisdiction thereof." Under this clause, standing alone, it cannot be doubted that any person might lawfully seize such a vessel at his peril, and if the United States should choose to adopt his act, and proceed to adjudication, he would, in the event of a condemnation, be completely justified. But

1.—Harg. Law Tracts (4to.), p. 227. "At common law, any person might seize uncustomed goods to the use of the King and himself, and thereupon inform for a seizure. But yet, if A seize goods uncustomed, and then B seize them for the same cause, he that first seizeth ought to be preferred as the informer. And therefore, if B, that seized after, first inform, and A also inform, A may be admitted to interplead with B. upon the priority of the seizure, before the merchant shall be put to answer either."

it may be considered as peculiarly the duty of the officers of the customs, to watch over any maritime infractions of the laws of the United States; and, by the collection act of 1799, ch. 128, s. 70, it is made the duty of all custom-house officers, as well within their districts as without, to make seizures of all vessels violating the revenue laws.

The section, then, in the next clause, authorizes the President of the United States to employ any of the armed vessels of the United States to cruise on any part of the coast, to prevent violations of the act, and to instruct and direct the commanders of such armed vessels, to seize all vessels contravening the act, "wheresoever found on the high seas," omitting the words, "in any river, port, bay or harbor," contained in the former clause. It then proceeds to declare that the proceeds of all such vessels, when condemned, "shall be divided equally between the United States, and the officers and men who shall make such 330*] *seizure, take or bring the same into port for condemnation, whether such service be made by an armed vessel of the United States, or revenue cutters thereof, and the same shall be distributed in like manner as is provided by law for the distribution of prizes taken from an enemy." In a strict sense, the present seizure was not made by an armed vessel of the United States, nor by a revenue cutter, which, by the act of 1799, ch. 128, s. 98, the President is at liberty to require to co-operate with the navy. But if we consider these cases as put only by way of example, or if we give an enlarged meaning to the words "revenue cutter," so as to include revenue boats, such as the collector is, by the act of 1799, ch. 128, s. 101, authorized to employ, with the approbation of the treasury department, then the seizure of Mr. Chew may be brought within the general terms of the act. The United States do not appear to have resisted this construction as to the proceeds of the sale of the Josefa Segunda. And, on the other hand, if we consider that the act meant to deal out the same rights to all parties who might seize the offending vessel, whether they were officers of armed vessels, or of revenue cutters, or merely private individuals, who may seize and prosecute to condemnation, then, under that construction, Mr. Chew may be properly deemed the seizing officer, entitled, with his crew, to the proceeds of the vessel. If such a construction is not admissible, within the equity of the act, then it is a casus 331*] omissus, *and the property yet remains undisposed of by law.

Upon the best consideration which we have been able to give the case, we are of opinion that it is a casus omissus, or rather, that all the beneficial interest vests in the United States. The first clause of the seventh section declares that all vessels offending against it, "shall be forfeited to the use of the United States," and may be seized, prosecuted and condemned, accordingly. The seizure may be made by any person; but the forfeiture is still to be, by the terms of the act, for the use of the United States. If the act had stopped here, no difficulty in its construction could have occurred. As nothing is given by it to the seizing officer, nothing could be claimed by him except from the bounty of the government. The subsequent clause looks exclusively to cases where the seizure is made by armed vessels of the navy, or by revenue cutters, and directs, in such an event, a distribution to be made in the same manner as in cases of prizes taken from an enemy. Correctly speaking, these cases constitute exceptions from the preceding clause, and take them out of the general forfeiture "to the use of the United States." It might have been a wise policy to have extended the benefit of these provisions much farther, or to have given, as the act of the 20th of April, 1818, ch. 85, has given, a moiety in all cases to the person who should prosecute the seizure to effect. But courts of law can deal with questions of this nature only so far as the legislature has clearly *expressed [*332 its will. Mr. Chew appears to be a very meritorious officer, and deserving of public respect for his good conduct on this occasion. But as the act has made no provision for his compensation, he must be left, in common with those who made the military seizure, to the liberality of the government.

The remarks which have been already made, dispose of the case, so far as respects the proceeds of the vessel, and we think they are decisive as to the claim to the proceeds of sale of the negroes. The case as to this matter is also a casus omissus in the act of Louisiana. That act had a direct reference to the act of Congress, and "the commanding officer of the capturing vessel," in the sense of the former, must mean the commanding officer of such an armed vessel, or revenue cutter, as is entitled to share in the distribution of the proceeds by the latter. It would be going very far to give a larger construction to the words than in their strict form they import; and since they admit of a reasonable interpretation, by confining them to the cases provided for by Congress, we are satisfied that our duty is complied with, by assigning to them this unembarrassed limitation.

The decree of the District Court, so far as it dismisses the claims of Messrs. Roberts, Humphrey, Meade and Gardner, is affirmed, and so far as it sustains the claim of Mr. Chew, and the naval officer and surveyor of the port of New Orleans, is reversed.

Decree accordingly.

[*Promissory Note. Payment.] [*332

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES.

v.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE STATE OF GEORGIA.

In general, a payment received in forged paper, or in any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand.

But this principle does not apply to a payment

made bona fide to a bank, in its own notes, which are received as cash, and afterwards discovered to be forged.

In case of such a payment upon general account, an action may be maintained by the party paying the notes, if there is a balance due him from the bank upon their general account, either upon an insimul computassent, or as for money had and received.

ERROR to the Circuit Court of Georgia.

This was an action of assumpsit, brought by the plaintiffs in error, the president, etc., of the Bank of the United States, against the defendants in error, the president, etc., of the Bank of the state of Georgia, in which the plaintiffs declared for the balance of an account stated, and for money had and received to their use. At the trial, the plaintiffs offered evidence to prove that mutual dealings existed between the parties, in the course of which, each being in the receipt of the bills of the other, they mutually paid in or deposited the bills of the other 334*] party, at intervals, as *each found the bills of the other party had accumulated to any considerable amount in their respective vaults; and upon each of such payments or deposits, the amount thereof was entered as so much "cash" in the customer's book of the party depositing, by the proper officer of the bank receiving the same; from which said book of the plaintiffs, which was given in evidence, it appeared that the sum of $6,900 was the balance due from the defendants to the plaintiffs, at the time of instituting this action. The plaintiffs also offered evidence, that the transactions between the parties were almost exclusively in the deposits of their respective bills as aforesaid. And the defendants, to maintain their said defense, offered evidence to prove that, in one of the said deposits so made by the plaintiffs, in the bank of the defendants, and so entered in the said book of the plaintiffs by the proper officer of the defendants, at the time the said deposit was made, to wit, on the 25th of February, in the year 1819, and which is one of the items comprised in the account upon which the balance was claimed by the plaintiffs, there were paid in 38 bills of the defendants' own issues or notes, of $5.00 each, which had been fraudulently altered by some person or persons unknown, from the denomination of 5 to that of 50; and 40 bills of the defendants' own issues or notes of $10.00 each, which had in like manner been fraudulently altered by some person or persons unknown, to that of hundreds, making together the sum of $5,900, demanded by the plaintiffs *in this action; which said [*335 bills or notes had been subsequently tendered by the defendants to the plaintiffs, before the institution of this action, and by the plaintiffs refused. The plaintiffs then offered evidence to prove that no notice or intimation of the said fraudulent alteration aforesaid was given by the defendants to the plaintiffs, until the 16th of March, 1819, and that the tender to return the said altered notes to the plaintiffs by the defendants, was not made until the 17th of March, 1819, nineteen days after the receipt of the said notes by the defendants from the plaintiffs, and the entry of the same in the customer's book of the plaintiffs. The defendants further offered evidence to prove that the said altered bills, so deposited by the plaintiffs and received by the defendants, had been received by the plaintiffs from the Planters' and Merchants' Bank of Huntsville, concerning which notes a correspondence had taken place between the plaintiffs and the said Planters' and Merchants' Bank of Huntsville, subsequently to the detection of the said fraudulent alteration, in the following words and figures, to wit:

Office Bank United States,
Savannah, 17th of March, 1819.

Edward Rawlins, Esq.,
Cashier Planters' and Merchants' Bank of Huntsville.

Sir—Upon a more minute investigation of the bills received last month from Mr. Hobson, of your bank, it turns out that 40 of the $100.00 notes of the state bank, of this place, were altered *from $10.00, and 58 of the $50.00 [*336 notes of the same bank were altered from $5 notes, producing against us a difference in the $100 notes of $3,600, and in the $50, $2,610, making the whole difference $6,210. By the person which we shall in a few days send to your place, as heretofore intimated, we will

NOTE—Payment in forged, or depreciated paper.

In general, payment in forged paper, spurious bills, base coin, or counterfeit money, is not good. Jones v. Ryde, 1 Marsh. 157; 5 Taunt. 488; Fuller v. Smith, 1 Ry. & Moo. 49; Eagle Bank v. Smith, 5 Conn. 71; Baker v. Bonesteel, 2 Hilt. N. Y. 397; Rumsdale v. Horton, 3 Penn. St. 330; Anderson v. Hawkins, 3 Hawks (No. Car.) 568; Semmes v. Wilson, 5 Cranch, C. C. 285; U. S. v. Morgan, 11 How. 154; Thomas v. Todd, 6 Hill. 340; Burrill v. Watertown Bk. 51 Barb. 105.

Where payment of a note is made in counterfeit bank bills, teh person making payment not knowing they were false, the payee may recover of him the amount of such bills. Markle v. Hatfield, 2 John. 455; Young v. Adams, 6 Mass. 182; 6 Mass. 321. But such bills must be offered back in reasonable time. Atwood v. Cornwall, 28 Mich. 336; S. C., 15 Am. Rep. 219; Gloucester Bank v. Salem Bank, 17 Mass. 33; Salem Bank v. Gloucester Bank, 17 Mass. 1; Simms v. Clark, 11 Ill. 137; Burrill v. Watertown Bk., 51 Barb. 105; Mudd v. Reeves, 2 Harr. & J. 368; Hargrave v. Dusenberry, 2 Hawks, 326; Keene v. Thompson, 4 Gill. & J. 463; Currier v. Pennock, 14 Serg. & R. 51; Bruce v. Bruce, 1 Marsh. 165; 5 Taunt. 495, n; Cocks v. Masterman, 9 Barn. & C. 902; Mudgate v. Neidlinger, 5 Ind. 520; Lawrenceburgh Bk. v. Stevenson, 51 Ind. 594.

6 L. ed.

Payment of the bills of an insolvent bank which has stopped payment, is not a satisfaction of a debt although at the time and place of payment the bills are in full credit and the parties to the transaction are wholly ignorant of such insolvency.

Ontario Bk. v. Lightbody 13 Wend. 101; Townsend v. Bk. of Racine, 7 Bis. 185; Magee v. Carmack, 13 Ill. 289; Frontier Bk. v. Morse, 22 Me. 88; White v. Guthrie, 1 J. J. Marsh. Ky. 503; Fogg v. Sawyer, 9 N. H. 365; Westfall v. Braley, 10 Ohio St. 188; Wainwright v. Webster, 11 Vt. 576. But see Ware v. Street, 2 Head. Tenn. 609; Scruggs v. Gass, 8 Yerg. Tenn. 175; Lowry v. Murrill, 2 Port. Ala. 280; Bayard v. Shunk, 1 Watts & S. 92; Edmunds v. Diggs, 1 Gratt. Va. 359.

Ordinarily, where bank bills are paid, there is an implied contract on the part of him who pays that they are correct and will pass readily in mercantile and business transactions, as money. Kottwitz v. Bagby, 16 Tex. 656.

A creditor is not compellable to receive, in satisfaction of his debts, currency which is at a discount in the place where the debt is payable. Howe v. Wade, 4 McLean, 319; Braydon v. Goulman, 1 T. B. Mon. Ky. 115.

But in Edmunds v. Digges, 1 Gratt. Va. 359, it is held that there is no implied warranty of the value of current money of the country, passing from hand to hand, in the course of trade, com-

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forward these altered bills for the purpose of getting you to exchange them for other money.

Eleazar Early, Cashier.

P. S.—Herein I enclose, for your future security, the official notice of the banks of Georgia, pointing out the difference between the genuine and altered bills. E. E. Cashier.

Office Bank United States,
Savannah, 25th March, 1818.

Le Roy Pope, Esq.,
President Bank Huntsville.

Sir—Will you suffer me to introduce to your acquaintance and kindness, the bearer, Mr. Heinemann, our teller, whose objects have already been imparted to you in my letters of 23d February and 13th inst. (copies in Mr. H.'s possession), and which, we doubt not, will receive every facility for your institution. Mr. Heinemann is also instructed to lay before you formal notice of a claim which we shall make on your bank for the spurious notes received from Mr. Hobson, in the event of our being cast in the suit about to be brought between the 337*] Bank of Georgia, and ourselves, *in the case. It has been deemed a better course than that proposed in our cashier's letter to Mr. Rawlins, your cashier, of the 17th inst., and will, no doubt, be more agreeable to you.

Your obedient servant,
R. Richardson, President.

Planters' and Merchants' Bank
of Huntsville, 4th May, 1819.

Sir—Your favor under date of the 25th has been handed me by Mr. Heinemann, wherein you give me notice that your bank holds this institution bound to make good the amount of the spurious notes which you say was received from Mr. Hobson, in the event of your being cast in a suit about to be brought between the Bank of Georgia and yourselves. I am directed by the board of directors to state to you, that they highly approve of the course your bank have adopted in regard to these spurious notes, and we shall cheerfully acquiesce with the decision of the court, let that be what it may.

I am, respectfully,
Your obedient servant,
Le Roy Pope, President.

R. Richardson, Esq.,
President Office Bank United States,
Savannah.

And the plaintiffs further offered evidence to prove that the officers of the defendants, at the time of receiving the said altered notes, had in their possession a certain book, called the bank *note register of the said bank of [*338 the state of Georgia, wherein were registered, and recorded, the date, number, letter, amount and payees' name, of all the notes ever issued by the said bank, by means of which, and by reference whereto, the forgeries or alterations aforesaid could have been promptly and satisfactorily detected; and further, that so far as related to the said notes purported to be the notes of $100, all the genuine notes of the defendants of that amount in circulation on the said 25th of February, 1819, were marked with the letter A, whereas twenty-three of the notes of $100 each, so received by the defendants as genuine notes, when in fact they were altered notes, bore the letters B, C, or D.

And the defendants further offered evidence to prove that the alteration in the said notes consisted in extracting the ink of certain printed figures and words which expressed the amount of said notes, and substituting therefor other printed figures and words; the signatures, and every other part of said notes, remaining unaltered. Whereupon, the parties having offered the above evidence, the plaintiffs prayed the court,

1. To instruct the jury, that if they believed the said evidence, the said plaintiffs were entitled to recover of the said defendants the whole sum of $6,900, being the balance so exhibited by their customer's book aforesaid, and as due from the said defendants to the said plaintiffs; which instruction the judges aforesaid, being divided *in opinion, refused [*339 to give; and the counsel for the plaintiffs excepted to the refusal.

2. The plaintiffs prayed the court to instruct the jury, that if they believed the evidence so given, the plaintiffs were entitled to recover of the defendants the sum of $690, being the original value of the altered notes; which instruction the said judges, being divided in opinion, did not give; to which refusal the said counsel for the plaintiffs excepted.

3. The plaintiffs prayed the court to instruct the jury, that if they believed the evidence so given, the plaintiffs were entitled to recover of the defendants the whole sum of $6,900, being the balance so exhibited by their customer's book aforesaid, as due from the defendants to

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merce and other business. And that this is true, not only of the money made by law a good tender in the payment of debts, but is equally so in regard to bank notes payable to bearer and circulated by delivery. See Ridenour v. Clurkin, 6 Blackf. Ind. 411. That a debt arose from the receipt of the bills of a bank chartered illegally, and were void at law, and finally proved worthless, is no defense where the bills were actually current at the time the defendant received them, and did not prove worthless in his hands, and he is not bound to take them back from persons to whom he paid them away. Orchard v. Hughes, 1 Wall. 73; Alexander v. Byers, 19 Ind. 301; Dakin v. Anderson, 18 Ind. 52.

But if the drawee of a forged bill accept and pay it, or pay it without acceptance, he cannot recover back the money from the person to whom it was paid, for the drawee is bound to know that the bill is genuine.

Price v. Neal, 3 Burr. 1354; 1 Bac. Abr. 413; Goddard v. Merchants' Bk., 4 Comst. 147; Bk. of Commerce v. Union Bk., 3 Comst. 230; Hortsman v. Henshaw, 11 How. 177; Ellis v. Ohio L. Co. 4 Ohio St. 628; Whitney v. Bunnell, 8 La. Ann. 429.

An acceptor is bound to know the drawee's hand-writing, and, if he accept a forged bill, he will, nevertheless be bound to pay it. Canal Bk. v. Bk. of Albany, 1 Hill, N. Y. 287; Peoria R. Co. v. Neill, 16 Ill. 269; Leach v. Buchanan, 4 Esp. 226; Smith v. Chester, 1 Term R. 654; Levy v. U. S. Bank, 4 Dall. 234; 1 Binn. 27; Jennings v. Fowler, 2 Strange, 946; Hoffman v. Bank, 12 Wall. 193.

Nor can the bankers of the drawee paying a forged bill on his account recover back the amount for the same reason. Smith v. Mercer, 6 Taunt. 76; but see Martin v. Morgan, 3 Moo. 635; Wilkinson v. Johnson, 3 Burr. & C. 428; Sanderson v. Coleman, 1 Mann. & G. 209; see 2 Daniel, Neg. Instrument, s. 1655–1657, for qualifications of this rule.

A reason of the above rule as to an acceptor is that an acceptance is an admission of the signature of the drawer. 1 Daniel, Neg. Instruments, s. 533; 2 Id., s. 1225.

the plaintiffs, with legal interest thereon from the day of instituting their action aforesaid; which instruction the judges aforesaid, being divided in opinion, refused to give; to which refusal the counsel for the plaintiffs excepted.

Judgment being rendered upon this bill of exceptions, for the defendants in the court below, the cause was brought, by writ of error, to this court.

It was insisted, on the part of the plaintiffs, that the judgment ought to be reversed, on the following grounds:

1. That what took place on the 25th of February, 1819, between the parties, was not only equivalent to payment, but was payment itself; and the defendants are, in all respects, to be 340*] considered *as if they were suing to recover back the money.

2. That if understood only as an acceptance, or agreement to pay, the principal would still be the same.

3. That, in either case, the plaintiffs were entitled to recover.

The cause was argued by Mr. Sergeant for the plaintiffs,[1] and by Mr. Berrien for the defendants.[2]

Mr. Justice Story delivered the opinion of the court:

This is a case of great importance in a practical view, and has been very fully argued upon its merits. The Bank of Georgia having 341*] originally *issued the bank notes in question, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States, as cash, by way of general deposit. The forgery was not discovered until nineteen days afterwards, upon which notice was duly given, and a tender of the notes was made to the Bank of the United States, and by them refused. Both parties are equally innocent of the fraud, and it is not disputed that the Bank of the United States were holders, bona fide, for a valuable consideration. Under these circumstances, the question arises, which of the parties is to bear the loss, or, in other words, whether the plaintiffs are entitled to recover, in this action, the amount of this deposit.

Some observations have been made as to the form of the action, the declaration embracing counts for the balance of the account stated, as well as for money had and received, etc. But, if the plaintiffs are entitled to recover at all, we see no objection to a recovery upon either of these counts. The sum sued for is the balance due upon the general account of the parties, and it is money had and received to the use of the plaintiffs, if the transaction entitled the plaintiffs to consider the deposit as money. It is, clearly, not the case of a special deposit, where the identical thing was to be restored by the defendants; the notes were paid as money upon general account, *and de- [*342 posited as such; so that, according to the course of business, and the understanding of the parties, the identical notes were not to be restored, but an equal amount in cash. They passed, therefore, into the general funds of the Bank of Georgia, and became the property of the bank. The action has, therefore, assumed the proper shape, and if it is maintainable upon the merits, there is no difficulty in point of form.

We may lay out of the case, at once, all consideration of the point, how far the defendants would have been liable if these notes had been the notes of any other bank, deposited by the plaintiff, in the Bank of Georgia, as cash. That might depend upon a variety of considerations, such as the usages of banks, and the implied contract resulting from their usual dealings with their customers, and upon the general principles of law applicable to cases of this nature. The modern authorities certainly do, in a strong manner, assert that a payment received in forged paper, or in any base coin, is not good; and that if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. To this effect are the authorities cited at the bar, and particularly Markle v. Hatfield, 2 Johns. Rep. 455; Young v. Adams, 6 Mass. Rep. 182, and Jones v. Ryde, 5 Taunt. Rep. 488. But, without entering upon any examination of this doctrine, it is sufficient to say that the present is not such a case. The notes in question were not the notes of another bank or the security of a third person, but *they [*343 were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner. They were treated as cash, and carried to the credit of the plaintiff in the same manner, and with the same general intent, as if they had been genuine notes or coin.

Many considerations of public convenience and policy would authorize a distinction between cases where a bank receives forged notes purporting to be its own, and those where it receives the notes of other banks in payment, or upon general deposit. It has the benefit of circulating its own notes as currency, and commanding thereby the public confidence. It is bound to know its own paper, and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions. In point of fact, it is well known that every bank is in the habit of using secret marks, and peculiar characters, for this purpose, and of keeping a regular register of all the notes it issues, so as to guide its own discre-

1.—He cited Bolton v. Richards, 6 Term Rep. 139; The Manhattan Company v. Lidig, 4 John's Rep. 377; Levy v. Bank of United States, 4 Dall. Rep. 234; S. C. 1 Binn. Rep. 27; Chitty on Bills, 483; Smith v. Chester, 1 Term Rep. 655; Bass v. Clive, 4 Maul. & Selw. 15; Master v. Miller, 4 Term Rep. 320; Barber v. Gignell, 3 Esp. N. P. 60; Jordain v. Lashbrook, 7 Term Rep. 604; Price v. Neal, 3 Burr. Rep. 1354; Jones v. Ryde, 5 Taunt. Rep. 488; Markle v. Hatfield, 2 Johns. Rep. 462; Gloucester Bank v. Salem Bank, 17 Mass. Rep. 33; Smith v. Mercer, 6 Taunt. Rep. 76; Meade v. Young, 4 Term Rep. 28; Jenys v. Fowler, 2 Str. Rep. 946.

2. He cited Gates v. Winslow, 1 Mass. Rep. 66; Meade v. Young, 4 Term Rep. 28; Kyd on Bills, 202, 203; Lambert v. Oakes, 1 Lord Raym. 443; Union Bank v. Bank U. S., 3 Mass. Rep. 74; 1 Johns. Cas. 145; 5 Johns. Rep. 68; 2 Term Rep. 366; Buller v. Harrison, Cowp. Rep. 565; Miller v. Race, 1 Burr. Rep. 457; 2 Evan's Pothier, 19, 495; Toby v. Barber, 5 Johns. Rep. 72.

tion as to its discounts and circulation, and to enable it to detect frauds. Its own security, not less than that of the public, requires such precautions.

Under such circumstances, the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty, which the public have a right to require. And in re- [*344 spect to persons *equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burthening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine is applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore, to confine the remedy to cases of that sort, would fall far short of the actual grievance. The law will, therefore, presume a damage actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility.

If, indeed, we were to apply the doctrine of negligence to the present case, there are circumstances strong to show a want of due diligence and circumspection on the part of the Bank of Georgia. It appears from the statement of facts, that all the genuine notes of [*345 that bank of the denomination *of $100, in circulation at this time, were marked with the letter A; whereas twenty-three of the forged notes of $100, bore the marks of the letters B, C, and D. These facts were known to the defendants, but unknown to the plaintiff; so that by ordinary circumspection the fraud might have been detected.

The argument against this view of the subject, derived from the fact that the defendants have received no consideration to raise a promise to pay this sum, since the notes were forgeries, is certainly not of itself sufficient. There are many cases in the law, where the party has received no legal consideration, and yet in which, if he has paid the money, he cannot recover it back; and in which, if he has merely promised to pay, it may be recovered of him. The first class of cases often turns upon the point, whether in good faith and conscience the money can be justly retained; in the latter, whether there has been a credit thereby given to or by a third person, whose interest may be materially affected by the transaction. So that, to apply the doctrine of a want of consideration to any case, we must look to all the circumstances, and decide upon them all.

Passing from these general considerations, it is material to inquire how, in analogous cases, the law has dealt with this matter. The present case does not, indeed, appear to have been in terms decided in any court; but if principles have been already established, which ought to *govern it, then it is the duty of the [*346 court to follow out those principles on this occasion.

The case has been argued in two respects: first, as a case of payment, and, second, as a case of acceptance of the notes.

In respect to the first, upon the fullest examination of the facts, we are of opinion that it is a case of actual payment. We treat it, in this respect, exactly as the parties have treated it, that is, as a case where the notes have been paid and credited as cash. The notes have not been credited as notes, or as a special deposit; but the transaction is precisely the same as if the money had been first paid to the plaintiffs, and instantaneously the same money had been deposited by them. It can make no difference that the same agent is employed by both parties, the one to receive, and the other to pay and credit. Upon what principle is it, then, that the court is called upon to construe the act different from the avowed intention of the parties? It is not a case where the law construes an act done with one intent to be a different act, for the purpose of making it available in law; to do that, cy pres, which would be defective in its direct form. Here the parties were at liberty to treat it as they pleased, either as a payment of money, or as a credit of the notes. In either way it was a legal proceeding, effectual and perfect; and as no reason exists for a different construction, we think that the parties, by treating it as a cash deposit, must be deemed to have considered it as paid in money, and then deposited; since that is the only *way in which it could legal- [*347 ly become, or be treated as cash. Nor is there any novelty in this view of the transaction. Bank notes constitute a part of the common currency of the country, and, ordinarily, pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord Mansfield observed, in Miller v. Race, 1 Burr. Rep. 457, they are not, like bills of exchange, considered as mere securities or documents for debts. If this be true in respect to bank notes in general, it applies, a fortiori, to the notes of the bank which receives them; for they are then treated as money received by the bank, being the representative of so much money admitted to be in its vaults for the use of the depositor. The same view was taken of this point in the case of Levy v. The Bank of The United States, 4 Dall. Rep. 234; S. C. 1 Binn. Rep. 27, where a forged check had been accepted by the bank, and carried to the credit of the plaintiff (a depositor) as cash, and upon a subsequent discovery of the fraud, the bank refused to pay the amount. The court there said: "It is our opinion, that when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it should be so taken. In the latter case, the bank would have appeared as plaintiffs; and every mistake which

could have been corrected in an action by them, may be corrected in this action, and 348*] none other." The case of Bolton *v. Richards, 6 D. & E. 138, is not, in all its circumstances, directly in point; but there the court manifestly considered the carrying of a check to the credit of a party was equivalent to the transfer of so much money in the hands of the banker, to his account.

Considering, then, the credit in this case as a payment of the notes, the question arises, whether, after a payment, the defendants would be permitted to recover the money back; if they would not, then they have no right to retain the money, and the plaintiffs are entitled to a recovery in the present suit.

In Price v. Neal, 3 Burr. Rep. 1355, there were two bills of exchange which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it became due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had unless it be against conscience for the defendant to retain it, and that it could not be affirmed that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said, "here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or 349*] paid it. *But it was not incumbent upon the defendant to inquire into it. There was notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up. The other bill he actually accepts, after which the defendant, innocently and bona fide, discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But, in this case, if there was any fault or negligence in anyone, it certainly was in the plaintiff, and not in the defendant." The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it before the time it was paid or acknowledged. So that there is no pretense to allege that there is any legal distinction between the case of a holder before or after the accepted. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of Neal v. Price 350*] *has never since been departed from; and, in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority. The case of Smith v. Mercer, 6 Taunt. Rep. 76, was a stronger application of the principle. There, the acceptance was a forgery, and it purported to be payable at the plaintiff's, who was a banker, and paid it, at maturity, to the agent of the defendant, who paid in account with the defendant. A week afterwards the forgery was discovered, and due notice given to the defendant. But the court (Mr. Justice Chambre dissenting) decided that the plaintiff was not entitled to recover. Two of the judges proceeded upon the ground that the banker was bound to know the handwriting of his customers; and that there was a want of caution and negligence on the part of the plaintiff. The Chief Justice, without dissenting from this ground, put it upon the narrower ground, that during the whole week the bill must be considered as paid, and if the defendant were now compelled to pay the money back, he could not recover against the prior indorsers; so that he would sustain the whole loss from the negligence of the plaintiff. The very case occurred in The Gloucester Bank v. The Salem Bank, 17 Mass. Rep. 33, where forged notes of the latter had been paid to the former, and, upon a subsequent discovery, the amount was sought to be recovered back. The authorities were there elaborately reviewed, both by the counsel and the court, and the conclusion to *which [*351 the latter arrived was, that the plaintiffs were not entitled to recover, upon the ground, that by receiving and paying the notes, the plaintiffs adopted them as their own; that they were bound to examine them when offered for payment, and if they neglected to do it within a reasonable time, they could not afterwards recover from the defendants a loss occasioned by their own negligence. In that case, no notice was given of the doubtful character of the notes until fifteen days after the receipt, and no actual averments of forgery until about fifty days. The notes were in a bundle when received, which had not been examined by the cashier until after a considerable time had elapsed. Much of the language of the court, as to negligence, is to be referred to this circumstance. The court said, "the true rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

Against the pressure of these authorities there is not a single opposing case; and we must *therefore conclude, that both [*352 in England and America, the question has been supposed to be at rest. The case of Jones v. Ryde, 5 Taunt. Rep. 488, is clearly distin-

guishable; as it ranged itself within the class of cases, where forged securities of third persons had been received in payment. Bruce v. Bruce, 5 Taunt. Rep. 495, is very shortly and obscurely reported; but from what is there mentioned, as well as from the notice taken of it by Lord Chief Justice Gibbs, in Smith v. Mercer, 6 Taunt. Rep. 77, it must have turned on the same distinction as Jones v. Ryde, and was not governed by Price v. Neal.

But if the present case is to be considered, as the defendant's counsel is most solicitous to consider it, not as a case where the notes have been paid, but as a case of credit, as cash, upon the receipt of them, it will not help the argument. In that point of view, the notes must be deemed to have been accepted by the defendants, as genuine notes, and payment to have been promised accordingly. Credit was given for them, as cash, by the defendants, for nineteen days, and, during all this period, no right could exist in the plaintiffs to recover the amount against any other person, from whom they were received. By such delay, according to the doctrine of Lord Chief Justice Gibbs, in Smith v. Mercer, 6 Taunt. Rep. 76, the prior holders would be discharged; and the case of The Gloucester Bank v. The Salem Bank, 17 Mass. Rep. 33, adopts the same principle; so that there would be a loss produced by the 353*] negligence of the defendants, *but, waiving this narrower view, we think the case may be justly placed upon the broad ground that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts. If there be any difference between them, the principle is stronger here than there; for there, the acceptor is presumed to know the drawer's signature. Here, a fortiori, the maker must be presumed, and is bound to know his own notes. He cannot be heard to aver his ignorance; and when he receives notes, purporting to be his own, without objection, it is an adoption of them as his own.

The general question, as to the effect of acceptances, has repeatedly come under the consideration of the courts of common law. In the early case of Wilkinson v. Luteridge, 1 Str. 648, the Lord Chief Justice considered that the acceptance of the bill was, in an action against the acceptor, a sufficient proof of the handwriting of the drawer; but it was not conclusive. In the subsequent case of Jenys v. Faucler, 2 Str. 946, the Lord Chief Justice would not suffer the acceptor to give the evidence of witnesses, that they did not believe in the drawer's handwriting, from the danger to negotiable notes; and he strongly inclined to think that actual forgery would be no defense, because the acceptance had given the bill a credit to the indorsee. Subsequent to this was the case of Price v. Neal, already commented on, in which it was thought that the acceptor ought to be 354*] conclusively bound *by his acceptance. The correctness of this doctrine was recognized by Mr. Justice Buller in Smith v. Chester, 1 D. & E. 655; by Lord Kenyon, in Barber v. Gingell, 3 Esp. Rep. 60, where he extended it to an implied acceptance; and by Mr. Justice Dampier, in Bass v. Cline, 4 M. & Selw. 15; and it was acted upon by necessary implication by the court, in Smith v. Mercer, 6 Taunt. Rep. 76. In Levy v. The Bank of the United States, 1 Binn. 27, already referred to, where a forged check, drawn upon the bank, had been accepted by the latter, and carried to the credit of the plaintiff, and on the refusal of the bank afterwards to pay the amount, the suit was brought, the court expressly held the plaintiff entitled to recover, upon the ground that the acceptance concluded the defendant. The case was very strong, for the fraud was discovered a few hours only after the receipt of the check, and immediate notice given. But this was not thought in the slightest degree to vary the legal result. "Some of the cases," said the court, "decide that the acceptor is bound, because the acceptance gives a credit to the bill, etc. But the modern cases certainly notice another reason for his liability, which we think has much good sense in it, namely, that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself." After some research, we have not been able to find a single case in which the general doctrine, thus asserted, has been shaken, *or even doubted; and the diligence [*355 of the counsel for the defendants, on the present occasion, has not been more successful than our own. Considering, then, as we do, that the doctrine is well established, that the acceptor is bound to know the handwriting of the drawer, and cannot defend himself from payment by a subsequent discovery of the forgery, we are of opinion that the present case falls directly within the same principle. We think the defendants were bound to know their own notes, and having once accepted the notes in question as their own, they are concluded by their acts of adoption, and cannot be permitted to set up the defense of forgery against the plaintiffs.

It is not thought necessary to go into a consideration of other cases cited at the bar, to establish that the acceptor may show that the accepted bill was void in its origin, as made in violation of the stamp act, etc.; for all these cases admit the genuineness of the notes, and turn upon questions of another nature, of public policy, and a violation of the laws of the land. Nor are the cases applicable, in which bills have been altered after they were drawn, or of forged indorsements, for these are not facts which an acceptor is presumed to know. Nor is it deemed material to consider in what cases receipts and stated accounts may be opened for surcharge and falsification. They depend upon other principles of general application. It is sufficient for us to declare that we place our judgment in the present case upon the ground that the defendants were bound to know their *own notes, and having received them [*356 without objection, they cannot now recall their assent. We think this doctrine founded on public policy and convenience; and that actual loss is not necessary to be proved, for potential loss may exist, and the law will always presume a possible loss in cases of this nature.

The remaining consideration is, whether there has been a legal waiver of the rights of the plaintiffs derived under the cash deposit, or, in other words, whether they have consented to treat it as a nullity. There is nothing on which to rest such a defense, unless it is to be inferred from the letter of Mr. Early, the cashier of the

Bank of the United States, under date of the 17th of March, 1819, addressed to the cashier of the Bank of Huntsville. That letter contains information of the forgery of the notes, and then proceeds, "by the person which we shall in a few days send to your place, as heretofore intimated, we will forward these altered bills for the purpose of getting you to exchange them for other money." Now, there is no evidence that this letter was ever shown to the Bank of Georgia, or its contents ever brought to the cognizance of its officers. It states no agreement to take back the notes, or to transmit them, on account of the Bank of the United States, to Huntsville. For aught that appears, the intention may have been to transmit them on account of the Bank of Georgia, under the expectation that the latter might desire it. But what is almost conclusive on this point is, that on the same day the Bank of Georgia had made 357*] *a tender of the notes to the plaintiffs, which had been refused. This is wholly inconsistent with the notion that they had agreed to take them back, or to treat the previous credit as a nullity. Assuming, therefore, that the cashier had a general or special authority for the purpose of extinguishing the rights of the plaintiffs, growing out of the prior transactions (which is not established in proof), it is sufficient to say that it is not shown that he exercised such an authority. And the case of Levy v. The Bank of the United States affords a very strong argument, that a waiver, without some new consideration, upon a sudden disclosure, and under a mistake of legal rights, ought not to be conclusive to the prejudice of the party, where, upon farther reflection, he refuses to acquiesce in it. The subsequent letter of the 25th of March, demonstrates that the intention of waiving the rights of the bank, if ever entertained, had been at that time entirely abandoned.

The letter from the Huntsville Bank, of the 4th of May, cannot vary the legal result. What might be the rights of the plaintiffs against that bank, in case of an unsuccessful issue of the present cause, it is unnecessary to determine. The contract, whatever it may be, is res inter alios acta, from which the defendants cannot, and ought not to derive any advantage.

It only remains to add, that if the plaintiffs are entitled to recover the principal, they are entitled to interest from the time of instituting the suit.

358*] *Upon the whole, it is the opinion of the court, that the Circuit Court erred in refusing the first and third instructions prayed for by the plaintiffs; and for these errors the judgment must be reversed, with directions to award a venire facias de novo. On the second instruction asked by the plaintiffs, it is unnecessary to express any opinion.

Judgment reversed accordingly.

[Patent.]

KEPLINGER v. DE YOUNG.

A, having obtained a patent for a new and useful improvement, to wit, a machine for making watch chains, brought an action, under the 3d section of the patent act of 1800, c. 179 (XXVI.), for a violation of his patent-right against B; and on the trial, an agreement was proved, made by the defendant with C, to purchase of him all the watch chains, not exceeding five gross a week, which he might be able to manufacture within six months, and an agreement on the part of C to devote his whole time and attention to the manufacture of the watch chains, and not to sell or dispose of any of them, so as to interfere with the exclusive privilege secured to the defendant of purchasing the whole quantity which it might be practicable for C to make. And it was proved that the machine used by C with the knowledge and consent of the defendant in the manufacture, was the same with that invented by the plaintiff, and that all the watch chains this made by C were delivered to the defendant according to the contract. Held, that if the contract was real and not colorable, and if the defendant had no other connection with C than that which grew out of the contract, it did not amount to a breach of the plaintiff's patent-right.

*Such a contract, connected with evidence [*359 from which the jury might legally infer, either that the machine which was to be employed in the manufacture of the patented article was owned wholly or in part by the defendant, or that it was hired to the defendant for six months, under color of a sale of the articles to be manufactured with it, and with intent to invade the plaintiff's patent-right, would amount to a breach of his right.

ERROR to the Circuit Court of Maryland.

This cause was argued by Mr. Webster and Mr. Sergeant for the plaintiff, and by the Attorney-General for the defendant.

Mr. Justice Washington delivered the opinion of the court:

This was a suit commenced by the plaintiff, Keplinger, in the fourth circuit for the district of Maryland, against the defendant, for the violation of the plaintiff's patent-right, secured to him according to law, in a certain new and useful improvement, to wit, a machine for making watch chains, etc. The third count in the declaration, upon which alone this cause has been argued, is in the usual form, charging the defendant with having unlawfully used the said improvement, without the consent of the plaintiff first had and obtained in writing. The defendant pleaded the general issue, and gave notice to the plaintiff that he should deny that the exclusive right of using the improvement mentioned in the declaration, was vested in the plaintiff, or that he was the original and first inventor of the said improvement, and that he should give evidence to establish those facts.

*At the trial, the plaintiff read in [*360 evidence the letters patent duly granted, bearing date the 4th of May, 1820, and proved that he was the true and original inventor of the machine specified in the patent, and that the defendant, together with John Hatch and John C. Kirkner, did use the said machine in the making of watch chains from steel, from the 4th of May till some time in the month of December, 1820.

The defendant, in order to prove that any concern or connection which he had with the said Hatch & Kirkner, in the making of watch chains, by means of the said machine, was merely as a purchaser of watch chains from them under the following contract, produced and gave the same in evidence. The agreement referred to, bearing date the 3d of May, 1820, is between M. De Young, and J. Hatch and J.

Kirkner, and witnesses, "that the said Hatch & Kirkner do hereby engage and obligate themselves to manufacture and deliver to M. De Young, or at his store in said city, not less than three gross, but as many as five gross, of wire watch chains, agreeably to a sample to be deposited by T. Barly (if practicable to manufacture so many), in each week, from the date hereof, for the term of six months, one-half of which number to be with turned slides, and the other half wire slides; the whole number to be four strands, if the said De Young so choose; but he is to have the privilege of directing the description to be furnished, that is to say, what number of four, five, six or eight strands; the prices of which 361*] *to be as follows: four strands, two dollars per dozen; six strands, two dollars sixty-six and two-third cents per dozen, and eight strands at the rate of three dollars thirty-three cents per dozen; said Hatch & Kirkner to devote their whole time and attention to said manufactory, and neither to sell, barter nor dispose of, in any manner, or way, or means whatever, of any goods of the description hereinbefore described, or which may, in any manner or way whatsoever, interfere with the exclusive privilege hereinbefore granted, but will faithfully manufacture for said De Young, and none other, as far as five gross of chains per week, if practicable, and not less than three gross per week, at the prices hereinbefore stipulated, and payable as follows: one-half in cash at the end of every week, for the total number delivered within the week, and the other half in said De Young's promissory note, payable at sixty days from the date thereof. And the said De Young, on his part, doth hereby promise to receive from the said Hatch & Kirkner, such quantity of watch chains answering the description of the sample, as it may be in their power to manufacture, not exceeding five gross per week, reserving to himself the privilege of directing what proportion thereof shall be four, six or eight strands, and pay for the same weekly in the following manner, viz., the one-half amount of week's delivery in cash, the other half in a note at sixty days, the same to be settled for weekly, in manner aforesaid, if required."

The defendant also gave evidence to prove 362*] *that all the connection he ever had with the said Hatch & Kirkner, relative to watch chains made by them with the said machine, or otherwise, was merely as a purchaser of such chains from them, under and in pursuance of the said contract.

The plaintiff then proved that, at the time of making the said contract, the defendant was fully apprized of the existence of the machine described and specified in the patent, and of its prior and original invention by the plaintiff, and of the intention of the plaintiff to obtain the said patent; and that the said contract was made with a view to the employment by the said Hatch & Kirkner, in the manufacture of watch chains, of a machine precisely similar to that invented by the plaintiff, after the plaintiff should have obtained his patent; and that a machine precisely similar to that invented by the plaintiff was employed by the said Hatch & Kirkner in the manufacture of watch chains by them under the said contract, and with the knowledge and consent of the defendant during the whole period aforesaid, he and they having received notice, on the 5th of May, 1820, of the plaintiff's patent; and that the watch chains so manufactured by Hatch & Kirkner, during the whole of the said period, were delivered by them to the defendant, and by him received, under and in conformity with the said contract.

Upon this evidence, the court, at the request of the defendant's counsel, instructed the jury that the plaintiff was not entitled to a verdict on the first and second counts in his declaration, *because the acts which they [*363 charge, if true, constitute no offense against the plaintiff's patent. And that, if the jury should be of opinion, on the evidence, that the plaintiff is the sole and original inventor of the whole machine; and that the defendant had no other connection with Hatch & Kirkner with regard to these chains, than that which arose from his said contract with them, under which he procured the chains to be made by Hatch & Kirkner, and sold them when so made; and that the said contract is a real contract; then these acts constituted no breach of the plaintiff's patent-right on the part of De Young, and that the verdict must be for the defendant; and that this legal aspect would not be changed, although the defendant may, on any occasion, have supplied, at the cost of Hatch & Kirkner, the wire from which the chains so manufactured were made.

To this instruction the plaintiff's counsel took a bill of exceptions, and a verdict and judgment having been rendered for the defendant, the cause is brought into this court by a writ of error.

The only question which is presented by the bill of exceptions to the consideration of this court is, whether the court below erred in the instruction given to the jury; and this must depend upon the correct construction of the 3d section of the act of Congress, of the 17th of April, 1800, c. 179, which enacts, "that where any patent shall be granted, pursuant to *the act of the 21st February, 1793, c. [*364 156, and any person without the consent of the patentee his executors, etc., first obtained in writing, shall make, devise, use or sell, the thing whereof the exclusive right is secured to the said patentee by such patent, such person so offending shall forfeit and pay to the said patentee, a sum equal to three times the actual damage sustained by such patentee," etc.

The contract, taken in connection with the whole of the evidence stated in the bill of exceptions, if the same were believed by the jury, formed most certainly a strong case against the defendant, sufficient to have warranted the jury in inferring, either that the machine which was to be employed in the manufacture of the watch chains was owned in whole or in part by the defendant, or that it was hired to the defendant for six months, under color of a sale of the articles which might be manufactured with it, and with intent to invade the plaintiff's patent-right. Whether the contract, taken in connection with the whole of the evidence, does or does not amount to a hiring by the defendant of the machine, or the use of it for six months, is a point which is not to be considered as being decided either way by the court. The

bill of exceptions does not call for an opinion upon it.

But the contract, taken by itself, amounted to no more than an agreement by the defendant to purchase, at a fixed price, all the watch chains, not exceeding five gross a week, which 365*] Hatch *& Kirkner might be able to manufacture in the course of six months, with any machine they might choose to employ; and an agreement on the part of Hatch & Kirkner, to devote their whole time and attention to the manufacture of the chains, and not to sell or dispose of any of them, so as to interfere with the exclusive privilege secured to the defendant of purchasing the whole quantity which it might be practicable for them to make.

If this contract was real, and not colorable, which is the obvious meaning of the instruction, and the defendant had no other connection with Hatch & Kirkner in regard to these chains that what grew out of it, it would, in the opinion of the court, be an extravagant construction of the patent law to pronounce that it amounted to a breach of the plaintiff's patent-right, by fixing upon the defendant the charge of having used the plaintiff's machine. Such a construction would be highly inconvenient and unjust to the rest of the community, since it might subject any man who might innocently contract with a manufacturer to purchase all the articles which he might be able to make within a limited period, to the heavy penalty inflicted by the act, although he might have been ignorant of the plaintiff's patent, or that a violation of it would be the necessary consequence of the contract. It might possibly extend further, and affect contracts express or implied, though of a more limited character, but equally innocent, as to which, however, it is not the intention of the court to express 366*] *any opinion, as this case does not call for it.

This cause was argued by the plaintiff's counsel as if the opinion of the court below had been given upon the whole of the evidence. But this was not the case. No instruction was asked for but by the defendant's counsel, and that was confined to a single part of the case, the connection between the defendant and Hatch & Kirkner, in regard to the watch chains which the latter bound themselves, by their contract, to manufacture and deliver to the former. If the jury had been of opinion, upon the whole of the evidence, that the contract was not a real one, or that that instrument did not constitute the sole connection between those parties, or that the transaction was merely colorable, with a view to evade the law, the jury were not precluded by the instruction from considering the plaintiff's patent-right as violated, and finding a verdict accordingly.

Had the plaintiff's counsel thought proper to call upon the court for an opinion and instruction to the jury, upon any points arising out of the whole, or any part of the evidence, it would have been their duty to give an opinion upon such points, leaving the conclusion of fact from the evidence to be drawn by the jury. But this course not having been pursued, this court can take no notice of the evidence, although spread upon the record, except so far as it is connected with the single point upon which the opinion which is excepted to was given. As to the residue of that opinion, that "the legal aspect of the *case would [*367 not be changed, although the defendant might, on any occasion, have supplied, at the cost of Hatch & Kirkner, the wire from which the chains so manufactured were made," it is quite as free from objection as the preceding part of it, since it stands upon precisely the same principle.

Judgment affirmed with costs.

[Usury. Lex Loci Contractus.]

DE WOLF

v.

J. JOHNSON, R. M. Johnson, W. T. Barry and J. Prentiss.

In a contract for the loan of money, the law of the place where the contract is made is to govern; and it is immaterial that the loan was to be secured by a mortgage on lands in another state.

In such a case, the statutes of usury of the state where the contract was made, and not those of the state where it is secured by mortgage, are to govern it, unless there be some other circumstance to show that the parties had in view the laws of the latter state.

Although a contract be usurious in its inception, a subsequent agreement to free it from the taint of usury will render it valid.

The purchaser of an equity of redemption cannot set up usury as a defense to a bill brought by the mortgagee for a foreclosure, especially if the mortgageor has himself waived the defense.

Under a usury law which does not avoid the securities, but only forbids the taking a greater interest than six per centum per annum, a court of equity will not refuse its aid to recover the principal.

A certificated bankrupt or insolvent, against whom no relief can be had, is not a necessary party to a suit in equity; but if he be made a defendant, he cannot be examined as a witness in the cause, until an order has been obtained upon motion for that purpose.

*APPEAL from the Circuit Court [*368 of Kentucky.

This was a bill filed by the appellant, De Wolf, in the court below, on the 4th of September, 1818, for a foreclosure of a mortgage given by Prentiss, one of the respondents, on the 7th of July, 1817, to secure the repayment of the sum of $62,000. The bill alleged that the mortgageor had conveyed his equity of redemption to W. T. Barry, by a deed of trust dated the 16th of March, 1818, describing the lands as "all those tracts or parcels of land described and contained in a deed of mortgage from the said J. Prentiss to the said J. De Wolf, dated the 7th of July, 1817," "it being the intention and meaning hereof, that after the satisfaction of the debts set forth in said deeds, the remainder of the property described in said deeds," "shall be hereby conveyed." According to the provisions of the deed, Barry

NOTE.—Usury.

As to general law of usury, see note to Levy v. Gadsby, 3 Cranch, 180; as to the law of place, in regard to usury, see note to Slacum v. Pomeroy, 6 Cranch, 221.

The above case of De Wolf v. Johnson is relied on as authority that the purchaser of an equity of redemption cannot show usury in the mortgage to

exposed the premises for sale at public auction, on the 27th of May, 1818, "subject to the encumbrances of any previous mortgage or deed of trust, particularly a mortgage deed to J. De Wolf, from J. Prentiss, dated the 7th of July, 1817," "recorded in the clerk's office of the Fayette County Court, and to which all persons wishing to purchase are referred for more particular information." At this sale, the property was purchased by J. Johnson and R. M. Johnson. Prentiss filed no answer to the bill, and it was taken pro confesso against him. J. Johnson answered, claiming as a bonæ fidei purchaser for a valuable consideration, and [*369] setting up the defense of *usury in the contract between Prentiss and the appellant, De Wolf, and also denying notice of the mortgage except by vague report, which report was accompanied with the suggestion that the mortgage was void, as being affected with usury. Barry also answered, admitting the conveyance to himself by Prentiss, in trust to sell, which sale he had effected publicly, and in good faith, before the bill filed; and in pursuance of the sale had conveyed to the defendants, J. & R. M. Johnson; and alleged that he was ignorant of the claim of the plaintiff, De Wolf, except so far as that claim was recognized in the deed of trust; and also set up the defense of usury between the mortgageor and mortgagee. The other defendant, R. M. Johnson, answered, recognizing and adopting the answer of J. Johnson, and denying for himself all knowledge of the mortgage at the date of the conveyance to Barry. He also averred that he was a creditor of Prentiss to the amount of nearly $500,000, for which he had no other security than the assignment to Barry, through which he derived title to the mortgaged premises. The cause went to hearing on the pleadings and proofs, and Prentiss was admitted as a witness on the part of the other defendants, subject to legal exceptions; but it did not appear by the transcript of the record, whether the decree of the court below was grounded upon his testimony. It appeared by the other evidence in the cause, that the transaction originated in a loan made by De Wolf to Prentiss, in the state Rhode Island, *in the year 1815, the [*370] repayment of which was secured by a mortgage upon the lands in Kentucky, which contract was afterwards waived by the parties, and a new contract entered into by them in the state of Kentucky, in the year 1817. The principal question of fact was, whether either, or both of those contracts, was void, under the usury laws of either of those states, and as this question is fully considered in the opinion of this court, it has not been thought necessary to extract from the voluminous mass of testimony in the court below, the general result of the evidence as bearing upon it.

On the part of the appellants, it was contended:

1. That the original contract of 1815, if usurious, was not void according to the laws by which it ought to be governed; the laws of Rhode Island not avoiding the contract, or the securities given for it, but only forfeiting one-third of the principal, and all the interest of the loan, as a penalty to be recovered by information or action of debt.

2. That the contract of 1817 was free from the taint of usury.

3. That if either, or both those contracts, were usurious, the defendants, J. & R. M. Johnson, could not take advantage of the usury, not only because they were not parties to the contract, but because, by the very terms of the deed of trust to Barry, under which they claim, they *took the estate in controversy sub- [*371] ject to the prior conveyance to the appellant.

On the part of the respondents, it was insisted:

1. That the loan of 1815 was usurious and void.

2. That the transaction of 1817 was a device to secure the repayment of money advanced on an usurious agreement.

3. That money advanced on an usurious agreement cannot be secured, and the payment enforced in a court of equity, at the instance of the lender, by force of any after agreement of the lender to relinquish the usury, and of the borrower to repay the money lent.[1]

1.—The act of Rhode Island of 1798, after prohibiting (s. 1) the contracting for more than six per centum per annum for the loan of money, wares, goods, etc., provides (s. 5) "that a sum equal to one-third part of the principal, and all the interest of every bond, mortgage, specialty, agreement, contract, promise or assurance whatsoever, which shall be made after the passing of this act, for the payment of money, goods, wares or other commodities to be lent on usury, wherein or whereby there shall be received, agreed for, or taken, for the forbearance or giving day of payment above the rate of interest expressed in the first section of this act, shall be forfeited by the creditor, one half of such forfeiture for the use of the state, and the other half for the use of him, her or them who will prosecute for the same. That the said forfeiture shall and may be recovered by information or action of debt, before any court proper to try the same; that in the trial of every such information or action, the borrower or hirer of the money, goods, wares or other commodities, on such usurious contract, shall be admitted a legal witness, if not interested in the event of such prosecution; provided, nevertheless, that all informations and actions for the recovery of such forfeiture shall be brought and commenced within one year after such forfeiture shall have accrued. Provided further, that nothing in this act shall extend to the letting of cattle, or other usages of the like nature in practice amongst farmers, or maritime contracts amongst merchants, as bottomry, insurance, or course of exchange, as hath been heretofore accustomed."

The act of Kentucky of 1798 prohibits the taking above the rate of six per centum per annum as the interest for the loan of money, wares or merchandise, and declares that "all bonds, contracts, covenants, conveyances or assurances, hereafter to be made for any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void."

defeat a foreclosure in Port v. The Bank of Utica, 7 Hill. 391, 406; and it was followed on this point in Sands v. Church, 6 N. Y. 2 Seld. 347, 352.

In Lloyd v. Scott, 4 Pet. 205, 229, 230, the judge who delivered the opinion says that in the above case of De Wolf v. Johnson, the question whether the purchaser of the equity of redemption can show usury in the mortgage to defeat a foreclosure was not involved. But in Sands v. Church, 6 N. Y., 352, the judge delivering the opinion says: "I have carefully examined that case and I cannot arrive at that conclusion."

In Lloyd v. Scott it is held, that a purchaser may set up the usury in a loan by way of annuity, charged on real property.

As to usury, see also the following cases: Nichols v. Fearson, 7 Pet. 103; Gather v. Farm. Bk. 1 Pet. 43, 44; Thornton v. Bk. of Wash. 3 Pet. 40; Bk. of U. S. v. Owens, 2 Pet. 327.

372*] *Mr. Jones and Mr. P. Hall, for the appellant, argued that contracts being to be governed by the laws of the country where they are made, as to their nature, construction and effect, the original contract of 1815 was not within the statute of Kentucky as to usury.[1] The rate of interest is governed by the law of the country where the debt was contracted, and not according to that where the action is brought.[2] That if there be no express reference to any other place, the law will intend that the contract was to be executed where it was made, and have a reference to the law of that state. Nor would taking a security upon lands in another country vary the application of the rule. Thus, contracts made in England, secured by mortgage on estates in the West Indies, are construed by the English law.[3] So, 373*] where the debt was contracted *in Ireland, and the security given in England, it was held that Irish interest should be allowed.[4] If the contract be not void by the laws of the country where it was made, it can never become so by being carried into another country to be enforced; if valid in the country where it was made, it will be valid everywhere, unless some reason of policy oppose its execution.[5] Usury is only malum prohibitum, and independent of statutory regulation, the parties may contract for whatever rate of interest they please.[6] Unless the statute of usury which applies to the case avoids the contract, the defendant cannot avail himself of this ground of defense. Penal laws are strictly local, and the statute of Rhode Island is merely a penal law.[7] The respondents, seeking to avail themselves of usury in a contract made in that state, must show that it would be a good defense there.[8] If the contract of 1815 were good under the law by which it ought to be governed, it would not be invalidated by the subsequent contract, even if that were void.[9] But the contract of 1817 was, in fact, free from usury, and would have the effect of purifying the previous contract 374*] *from all taint.[10] Where usurious securities have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is binding.[11] As to the sale of stock, if it was fair and bona fide, and not with a view to evade the statute, it would not invalidate the contract.[12] As to the amount advanced in treasury notes, they are to be put on a footing with bank notes, and if received in payment, are to be considered as cash.[13] A tender in bank notes, if not objected to, is good.[14] The sum paid as rent is not usurious, unless paid in consequence of a previous corrupt agreement.[15] A payment in the nature of a penalty is not usurious.[16] If there be any usury at all in the new contract of 1817, it has crept in by mistake and miscalculation, and that will not avoid it.[17] The testimony of Prentiss to prove the alleged usury is inadmissible, because he is a party upon the record, is liable for costs, is directly interested in the event of the *suit, and is concluded by [*375 the decree.[18] And finally, even if usury exist, and be ever so clearly proved, the defendants, J. & R. M. Johnson, cannot take advantage of it, since they purchased, subject to De Wolf's mortgage, which, if usurious, is not to be taken as absolutely void.[19]

Mr. Webster and Mr. Bibb, contra, admitted the general rule as to the lex loci contractus, but contended that the present contract was made with a view to the laws of Kentucky, where the borrower was domiciled, where the security was given, and where the money was to be repaid. It was an exception to the rule, that where the contract was made in one country with a view to the laws of another, the statutes of the latter were to govern it.[20] This was founded upon the same reason with the rule itself, i. e., the intention of the parties. Another exception is, where the parties go from one country into another, and there make a contract with a view to evade the laws of the former. So, if it be against the public policy of the country where performance of the contract is sought, to enforce it, the rule *does not apply.[21] But it was insisted [*376 that by the law of Rhode Island, where the original agreement was made, it was absolutely void; and, as such, could not be enforced in any other state or country. But the statute of Kentucky, which was the law properly applicable to the case, not only prohibited the usurious contract, but absolutely avoided the securi-

1.—Ord on Usury, 32, d; Blanchard v. Russell, 13 Mass. Rep. 4; Hicks v. Brown, 12 Johns. Rep. 142; 5 Day's Rep. 322; 2 Washington's Rep. 282; Van Reimsdyke v. Kane, 1 Gallis, Rep. 371; 4 Day's Rep. 96.

2.—2 Johns. Ch. Cas. 365.

3.—De War v. Span, 3 Term Rep. 425.

4.—Champant v. Lord Ranelagh, 1 Eq. Cas. Abr. 289.

5.—3 Dall. Rep. 370, note; Cowp. Rep. 341.

6.—8 Wheat. Rep. 355.

7.—Scoville v. Canfield, 14 Johns. Rep. 339; 4 Burr. Rep. 2251; 2 Mod. Rep. 307; Ord. on Usury, 194.

8.—Thompson v. Ketchum, 8 Johns. Rep. 189; 3 Esp. N. P. 163.

9.—Swartout v. Payne, 19 Johns. Rep. 294.

10.—Comyn. on Usury, 183–185.

11.—Ord. on Usury, 103; 3 Day's Rep. 350; 10 Mass. Rep. 121; Barnes v. Headly, 2 Taunt. Rep. 184; Chadburn v. Watts, 10 Mass. Rep. 123.

12.—3 Term Rep. 531; 8 East's Rep. 307; Ord. on Usury, 76; 2 Dall. Rep. 92; Comyn on Usury, 110; 1 Esp. N. P. 40, 176.

13.—3 Burr. Rep. 1516; 1 Burr. Rep. 452; 9 Johns. Rep. 120.

14.—3 Term Rep. 554; 7 Johns. Rep. 476; 19 Johns. Rep. 508; 10 Mass. Rep. 284.

15.—Comyn on Usury, 187; 7 Mod. Rep. 118; 3 Mass. Rep. 101, 258; 10 Mass. Rep. 121; 4 Burr. 2253.

16.—Comyn on Usury, 72.

17.—Ord. on Usury, 37; 1 Camp. N. P. 149; 3 Wils. 390; 4 Burr, 2253; 9 Mass. Rep. 49; 1 Bos. & Pull. 149.

18.—Phill. Evid. 57, 61, 62; 5 Johns. Ch. Cas. 95; 14 East's Rep. 565; 10 Johns. Rep. 95; 2 Wheat. Rep. 193, note; 20 Johns. Rep. 142; 5 Esp. N. P. 155; 6 Wheat. Rep. 109.

19.—Green v. Kemp, 13 Mass. Rep. 515; 16 Mass. Rep. 96; 5 Johns. Ch. Rep. 122, 555; 10 Johns. Rep. 202; 15 Johns. Rep. 555; 1 Taunt. 414; 9 Mass. Rep. 48; Bac. Abr. tit. Usury (F); Bull. N. P. 224; 1 Johns. Ch. Rep. 158.

20.—Huber v. Prælect. tom. 2, l. 1, tit. 3; Robinson v. Bland, 2 Burr. 1077.

21.—3 Dall. 374, note; Hargr. Co. Litt. 79, b. 44, note; 3 Atk. 727; 1 Vern. 428.

ties. It was well settled, that any device, however specious, by which illegal interest is reserved, would render the contract void.[1] Even a beneficial purchase by the lender, or disadvantageous purchase by the borrower, will be considered within the statutes of usury, if connected with a loan, or treaty, or communication for a loan.[2] So a sale of goods, or stock, as a contrivance to evade the usury laws, avoids the contract.[3] And if the lender, in part of his advance, give a bill or note, payable at a future day, and charges interest from the date of the contract, it is usurious.[4] A contract, void upon the ground of usury, cannot be made good by [*377] a subsequent new agreement, *and if void in part, it is void in toto.[5] If the lender of money, on an usurious contract, seeks to enforce his securities in a court of equity, the securities will be declared void, and ordered to be delivered up; and in this respect, the rule is different where the borrower himself applies to the court for relief, in which latter case he must pay, or offer to pay, the principal and interest lawfully due, before he is entitled to relief.[6] But it is sufficient if a contract be prohibited by positive law for a court of equity to refuse its aid in enforcing it, whether the securities given be expressly declared void or not. The other defendants, claming to stand in the place of Prentiss, as his assignees and creditors, have a clear legal and equitable right to take advantage of the illegality of the contract made with him, and which was attempted to be secured by a mortgage upon his property.

Mr. Justice Johnson delivered the opinion of the court:

This cause has been discussed very much at large, and with a degree of talent, candor, and research, very satisfactory to the court. In proceeding to consider it, however, we think it advisable to deviate from the order in which the points were examined at the bar, and to pursue them as they arise in the progress of the suit.

In the year 1818, the complainant filed his [*378] bill in *the Circuit Court of the United States for Kentucky, to obtain a foreclosure of a mortgage given to secure the sum of sixty-two thousand dollars, and bearing date July 7, 1817. The debt secured was payable by instalments, only one of which was due when the bill was filed, but in the progress of the cause all the instalments falling due, they were all, by consent, admitted into the pleadings, as if introduced by supplemental bill.

The bill first sets out the mortgage and the breach, and then proceeds to allege that Prentiss, the mortgageor, had conveyed his equity of redemption to W. J. Barry, who had sold to James Johnson and R. M. Johnson, the two latter of whom were then in possession.

Prentiss files no answer, and in due course the bill, as to him, is ordered to be taken pro confesso. James Johnson files an answer, claiming as bona fide purchased for a valuable consideration, and setting up the defense of usury in the contract between Prentiss and the complainant, and putting the complainant generally upon his proof. He also denies notice of De Wolf's mortgage, otherwise than by vague report, which report, he alleges, was accompanied with the suggestion that the mortgage to De Wolf was affected with usury, and void.

At a subsequent day, Barry also answers, admitting the conveyance to himself by Prentiss, in trust to sell, which sale, he alleges, he had effected publicly, and in good faith, before the bill was filed; and in pursuance of such sale, had conveyed *to the Johnsons. He [*379 further alleges that at the time of the execution of the deed of trust to him, "he was ignorant of the complainant's claim, except so far as that claim is recognized in the deed of trust," and also sets up the usury between the mortgageor and mortgagee, in avoidance of the mortgage.

R. M. Johnson also files an answer, in which he recognizes and adopts the answer of James Johnson, and further denies, altogether, knowledge of the mortgage to De Wolf at the date of the transfer to Barry. He then sets out that he is a creditor of Prentiss to the amount of near $500,000, for which he has no other security than the assignment to Barry, through which he derives title to the mortgaged premises.

Upon this state of the pleadings, with a few formal and immaterial additions, the parties went into their proofs. And as the complainant exhibited his mortgage in legal form, and with all the evidence of authenticity required by law, it followed that the defendants were put upon their proof to maintain the grounds on which they sought to avoid it.

It was not contended that in the immediate contract on which the bill was founded, there was any usurious taint belonging to that transaction itself. The ground taken was usury in a transaction anterior by two years, out of which the mortgage in question drew its origin, and from which the usurious taint was supposed to be transmitted either directly or incidentally. The case proposed to be established in proof *was, that in the year 1815 there [*380 was a negotiation for a loan between these parties, the scene of which was in Bristol, Rhode Island. That the sum to be loaned was $83,000, but which sum in fact was reduced below $80,000, by means which they contended were resorted to for the purpose of disguising the usurious interest, to be retained by way of premium, or bonus, or imposition. That the interest actually stipulated for was twelve per cent., of which six per cent. was reserved in a bond executed at the time for $111,000, comprising compound interest, there being no annual interest reserved. The other six per cent. was secured under the aspect of a rent payable out of lands in Kentucky, for which Prentiss executed absolute conveyances, and De Wolf stipulated to reconvey on the payment of the amount for which Prentiss gave his bond, and a sum annually, by way of rent, equal to six

1.—Cowp. 114; 3 Bos. & Pull. 154; Cro. Eliz. 27.

2.—1 Sch. & Lef. 115, 182, 119, note; Chitty on Bills, 94, 95; Bac. Abr. Usury, (C) 2; 1 Johns. Cas. 536; Cowp. 796, 770; Cro. Jac. 440.

3.—2 Dougl. 735; Cowp. 793; 1 Atk. 351; Bac. Abr. Usury (C), 8, 9, 13; 2 Vez. 155; 7 Johns Rep. 196; 3 Term. Rep. 531; 1 Bro. Ch. Rep. 149, 151; Esp. N. P. 11; Ambl. 371; 1 Johns. Ch. Rep. 537.

4.—13 Johns. Rep. 40; 2 Johns. Ch. Rep. 192; 4 Taunt. 810; 1 Bos. & Pull. 144.

5.—4 Camp. N. P. 157; 8 Johns. Rep. 253.

6.—5 Johns. Ch. Rep. 122.

per cent. upon the $83,000, that is, the sum of $4,980.

This rent, it seems, was paid the first year, together with an additional sum of $498, added as interest and damages.

And a bill for the sum of $4,980 was drawn the second year by De Wolf upon Prentiss, payable in Philadelphia, but this was returned under protest, and subsequently taken up by a bill for $5,154, indorsed by J. T. Meder, Jun.

The evasion of the statute against usury, supposed to have been practiced upon Prentiss in making up the sum of $83,000, had relation to three items. The first, a sum of about $32,-381*] 000, *admitted into the computation as the price set upon fifteen shares of the Lexington Manufacturing Establishment, transferred by De Wolf to Prentiss. The second, treasury notes to the amount of $20,211.94, received at par; and the third, $30,802.73, bills drawn upon Philadelphia also taken at par. Upon these three items there was an estimated loss sustained of about $3,400.

The contract of 1815 was unquestionably entered into in the state of Rhode Island, and was there reduced to writing; but had a view to Kentucky for its consummation. As it entered into the contract that Prentiss should secure De Wolf by a conveyance of Kentucky land to a large amount, two agents were employed and intrusted by De Wolf, with the securities to be passed to Prentiss, and a power to draw upon him for the money, to be paid in Philadelphia; which Prentiss was to have the benefit of, upon complying with the articles of his contract, purporting an absolute conveyance of the land. The place where the contract of repayment of the principal on the part of Prentiss was to be fulfilled, appears no farther than this, that the bond is given to pay generally, without regard to place, and the money to be paid by way of rent, appears by the subsequent acts of the parties respecting the bills drawn for the rent, to have been payable in Philadelphia.

The contract of 1817, in which this mortgage originated, was executed in Kentucky, and had its inception in an intimation from Prentiss of 382*] a *design to avail himself of the plea of usury. Upon this, De Wolf repaired to Kentucky, and there instituted a new negotiation with Prentiss personally, having for its object to clear the contract from all usurious incidents, and to take security for the sum loaned, at the legal interest of Kentucky, which, as well as that of Rhode Island, is six per cent. Accordingly, all the instruments of writing which appertained to the old contract were surrendered mutually, and a new mortgage given to secure the balance now sued for; the original sum having been reduced by large actual payments to the sum for which this mortgage was given, and which includes the same premises conveyed under the prior contract.

The defense set up rests upon the assumption that the new contract was not purged of the usury; or, rather, that the whole contract of 1815 was void, and could, therefore, form no basis or consideration for the contract of 1817. Or if not wholly void, it comprised several items of an usurious character, which ought to be included in the new contract. And here two preliminary questions arose, the first of which was, whether the lex loci of the contract of 1815 was Rhode Island or Kentucky. By the usury laws of the latter, the contract, and all the securities given for it, are void, both for principal and interest. By the laws of the former, although it is prohibited to take more than six per cent. interest, and a penalty imposed for the offense, the act does not render the contract void, certainly not for the principal sum. By the laws of Kentucky, *it [*383 is supposed that the principal debt being abolished, there could be no consideration to sustain the new contract; by the laws of Rhode Island, that the reverse would be the effect, unless, as was contended in argument, that the simple prohibition of such a contract, which is express in the Rhode Island act, would affect it with the character of an illegal contract, and, as such, one which a court of equity would not lend its aid to carry into effect.

With regard to the locality of the contract of 1815, we have no doubt that it must be governed by the law of Rhode Island. The proof is positive that it was entered into there, and there is nothing that can arise a question but the circumstance of its making a part of the contract, that it should be secured by conveyances of Kentucky land. But the point is established, that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan, on the part of the borrower, is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract. No tender would have been effectual to discharge the mortgagee, unless made in Rhode Island. On a bill to redeem, a court of equity would not have listened to the idea of *calling the mortgagee to [*384 Kentucky in order to receive a tender.

In the effort to sustain his defense under the laws of Rhode Island, the defendants have introduced into the cause the examination of their co-defendant, Prentiss, taken at the instance of themselves, and received in the court below subject to legal exceptions. We are not informed whether the court below actually recognized it as competent evidence, since the grounds on which that court dismissed the bill are not spread upon the record. It is enough that it does not appear to be rejected; we are now called upon to pass an opinion upon it.

The only grounds upon which an argument has been made in support of the admissibility of Prentiss' deposition, have been, that the complainant avers him to be insolvent, which fact the testimony in the cause goes also far to establish; and that his deposition was taken before he was in reality made a party by the service of a supœna. But on no principle can his evidence be adjudged competent. It is true, that cases occur in which certificated bankrupts are struck out of a record and made witnesses; but if this was a case in which a motion to strike out could have been sustained, the motion should have been made, and the party's name expunged from the record. On no

principle could he be made a witness while he was himself a party. He may have had little or no interest in the event of the suit, except as to the costs; but still, while a party to the record, he could not be examined. We 385*] *know of no exception to this rule, whatever be the court in which the question occurs, except it be in the administration of certain branches of the admiralty jurisdiction. From the views that we take of the case, however, we do not find it necessary to inquire whether there is sufficient evidence in the cause, after rejecting the evidence of Prentiss, to sustain the facts on which the defense rests. If, with the aid of that testimony, the defense cannot be sustained, a fortiori, it cannot be without it. And here it may be proper to premise, as was very correctly remarked in the argument, that there has not been, in fact, any contrariety of opinion expressed by the counsel on the law of usury. Usury is a mortal taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money-lender. But one difficulty presents itself here of no ordinary kind. It is not very easy to discover how the taint of Rhode Island usury can infuse itself into the veins of a Kentucky contract. The defense would not admit of a moment's reflection if it rested on the direct effects which laws against usury have upon contracts. Whatever sums may have been derived through the usurious contract of 1815, to the contract of 1817, they would not affect the latter with usury, unless introduced in violation or evasion of the laws of Kentucky, for the two contracts are governed by laws that have no connection. But it makes very little 386*] difference *in this case, since, if the contract of 1817 is, either in whole or in part, unconscionable, this court would not lend its aid to execute it as far as it was unconscionable, and the argument goes to show that it partakes of that character, because, admitting that the law of Rhode Island did not render the contract of 1815 null and void for the principal sum loaned, yet the sum exhibited in that contract, as principal, and so transmitted to the latter contract, contained sundry items which, it is contended, were passed upon Prentiss at a great loss, and under circumstances calculated to serve as a disguise to usury.

And first, as to the shares in the Lexington Manufacturing Company; these were fifteen in number, and appear to have been taken by Prentiss on account of the $83,000, about $2,000 a share. The whole of which, there is reason to think, was sunk in his hands, in the general wreck of the adventure.

It cannot be denied that this is a suspicious item; it does not, in general, comport with a negotiation for a loan of money, that anything should enter into the views of the parties but money, or those substitutes which, from their approximation to money, circulate with corresponding if not equal facility. Still, however, like every other case, it is open to explanation, and the question always is, whether it was or was not a subterfuge to evade the laws against usury. And here it is to be observed, that it is not every sale which, in a negotiation for a loan, will taint the transaction with usury; for it may *comport per- [*387 fectly with the general views of the borrower to make such a purchase, or to take the article even in preference to money. I would illustrate this by the case of a merchant who proposes to borrow a capital to adventure in trade, and who, instead of money, receives an assortment, at a fair price, adapted to that trade. There would be no ground for attributing to such a transaction a design to evade the statute. But in what does the present case vary from that? Prentiss had embarked in a manufactory, of the prospects of which he entertained the highest hopes. He either believed, or endeavored to persuade others, that it would yield fifty per cent. The De Wolfs had embarked, on his representations, $30,000 in the enterprise. No experiments had been yet made from which any doubts could be excited, nor is there any proof that the stock was falling. Under these circumstances, he proposes to take back the shares if he could procure money to complete the establishment. The connection between the actual loan, and taking the shares as part of the loan, was easy and natural, and the interest of twelve per cent., with other incidental advantages held out for the loan, may well be estimated as the actual inducement, without supposing that De Wolf was conscious of passing this item upon Prentiss at an inflated price. Prentiss had himself put a value upon these shares but a short time before, in the sale to De Wolf, at nearly the same price, and De Wolf was either his dupe, or the shares were resold at their value. Prentiss' continuing *confi- [*388 dence in their value is positively deduced from the efforts he made to complete, at every hazard and sacrifice, the establishment to which those shares appertained. He still thought it a profitable investment, and so had De Wolf thought it, or he would not have made so large an investment without an atom of security but what was to be found in his anticipations from the establishment itself. It is conclusive that this was no heterogeneous disconnected article forced into the negotiation, but intimately connected with, if not the primary object of, the loan; that the price, however inflated, was that which both parties had, by previous unequivocal acts, set upon it; and if it could be said to have a market value, there is no evidence that it was above its market value; and, finally, that it was an actual transfer of interest with a view to acquire the article, and not merely to throw it upon the market in order to raise money. It was a real transaction, and not a subterfuge.

On the subject of the treasury notes and bills drawn on Philadelphia, we can perceive nothing usurious, or even unconscionable, in this part of the transaction. As to treasury notes, they were thrown into circulation as money, and it is an historical fact that they were worth all they purported to be worth, notwithstanding the casual depreciation which the embarrassments of the country, and the scarcity of gold and silver, may have produced; and as to the bills on Philadelphia, we are induced to believe that payment in that form was a benefit conferred on the borrower. *From the [*389 well known course of trade between Kentucky

and Philadelphia, it would scarcely have been possible, at that time, or perhaps at any time, to have suited them better in making a payment of money intended to be transported to, and used in, Kentucky. With regard to the bills, it is in evidence that there was no loss incurred; and on the treasury notes, not as much as the transportation of gold and silver would have cost, calculating all the incidents to actual transportation. But what if these payments had been made in Rhode Island bank bills? Would there have been a pretext of lurking usury in such a payment? Yet who can doubt that the payment would have been less convenient than that actually made? In all probability, with reference to gold and silver, and the exchange or depreciation in Kentucky, the paper of Rhode Island would have been equally, if not more disadvantageous. It is not on such vague and equivocal grounds that courts infer the presence of usury. But there is one consideration with reference to this part of the cause which is conclusive. There is no evidence in the record that these payments were in any way forced upon Prentiss. On the contrary, for anything that appears in the evidence, it may have been, in both instances, the payment of his own choice. In a letter not long before the loan, he actually quotes bills on Philadelphia from four to six per cent. advance. Nothing of that chaffering appears in the cause which distinguishes all the cases in which attempts are made to evade 390*] usury laws, *at the moment of extorting extravagant profits on the advance of money.

With regard to the two payments made by way of rent, we have to remark that there never was any payment of interest for two years on the $83,000, besides what was made in that form; and had the payments been direct and absolute, and confined to the sum of $4,890 each, there could no question have been raised respecting those payments. They would have amounted only to the legal compensation for the use of the money. With regard to the second year, it is obvious that as yet nothing has been actually paid; but as it may be said to be secured or acknowledged by another bill, we will consider both sums as paid. And then the only exceptionable parts of the payment will be the sum of $498, added to that actually paid for the first year, and $174.30 added to the bill drawn for the rent of the second year. As to the cash, it is a simple allowance of interest upon a bill drawn for the $4,980, upon its being returned and taken up by another, and cannot be excepted to. And, as to the first, we perceive in the transaction about the second payment, a sufficient explanation of the origin of the addition made in that instance. As Prentiss acquiesced in having a bill drawn for the second year, payable in Philadelphia, we may reasonably conclude that the agreement was to pay the rent or interest, whichever it may be called, by drawing such a bill. If, then, such a bill was drawn, and re-391*] turned for non-payment, it may *afford an easy solution of the question upon what principle that addition was made.

But why, for so inconsiderable a sum, should we perplex ourselves with difficulties in so large a transaction? It could, at most, in common with all the items we have been examining, have furnished only a ground for a deduction, certainly not for dismissing the bill. Nor should we have proceeded to examine these items in detail, were it not that the court below will have to make a decree upon which it will be necessary to allow or disallow these items. Nor, when it is considered under what circumstances this second contract was entered into, would this court, upon slight grounds, be induced to open it.

The parties had previously entered into a contract avowedly usurious with relation to the interest reserved. The defendant intimates his intention to avail himself of the defense of usury, and the parties sit down together for the sole and express purpose of purging it of all usurious taint, and to arrange a new contract respecting the same loan which should be legally obligatory.

Is it, then, probable, that any deduction would have been withheld, which, by being retained, could affect the new contract with usury, or with any of the incidents of usury? Would De Wolf have trusted himself again in the hands of Prentiss, by mixing up anything with this contract on which a legal exception could be sustained? We think not.

But one of the counsel for the appellees has placed the objection to the complainant's right to *relief on a more general ground [*392 than the receipt of usury, or the avoidance of the contract under statute. He insists that it is enough for this court to refuse its aid, that the contract of 1815 was prohibited by law, although not avoided by law.

That a court of equity will not lend its aid to an illegal or unconscionable bargain is true. But the argument carries this principle rather too far as applied to this case. The law of Rhode Island certainly forbids the contract of loan for a greater interest than six per cent., and so far no court would lend its aid to recover such interest. But the law goes no farther; it does not forbid the contract of loan, nor preclude the recovery of the principal under any circumstances. The sanctions of that law are the loss of the interest, and a penalty to the amount of the whole interest, and one-third of the principal if sued for within a year. On what principle could this court add another to the penalties declared by the law itself?

But the case does not rest here. The subsequent legal contract of 1817 rescued the case from the frowns of the law. Courts of justice will not shut the door in the face of the penitent; and hence it has been decided, in a case very analogous to the present, that although a contract be in its inception usurious, a subsequent agreement to free it from the illegal incident shall make it good. 1 Campb. Rep. 165, note; 2 Taunt. Rep. 184.

According to the views, then, which we have *exhibited of the case, the principal sum [*393 of the loan of 1815 was a subsisting debt at the date of the contract of 1817, and unaffected by any of the deductions contended for in the several items which we have considered. There was, then, a good consideration for the contract of 1817, and it is legally valid to the amount which it purports on the face of it.

But if it were otherwise, there are two views

of this subject upon which the court below ought to have sustained the bill.

It is very clear that the Kentucky contract must be considered as a new and substantive contract. It is governed by a distinct code of laws from the Rhode Island contract, and cannot be affected by the taint of usury which might have been transmitted to it under some circumstances, had it taken place in Rhode Island. It was, then, equivalent to a payment and reloan; and no one can doubt that money paid on an usurious contract is not recoverable back beyond the amount of the usury paid.

Again, it is perfectly established that the plea of usury, at least as far as to landed security, is personal and peculiar; and however a third person, having an interest in the land, may be affected incidentally by a usurious contract, he cannot take advantage of the usury. Some exceptions may exist to this rule under bankrupt systems, but they are statutory and peculiar.

Here, then, the case presents a third person, the assignee of an equity of redemption, setting up a defense, which, in one aspect, Prentiss 394*] himself *cannot set up; and which, in another aspect, he has not set up; but, on the contrary, under the state of the pleadings, must be supposed to have refused to set up, or have abandoned. These views are independent of the effect of notice, or of the peculiar circumstances of the notice in this case.

It is true, the Johnsons deny the notice prior to the deed of trust. But previous notice is immaterial, since the notice with which the law affects them, is that which the deed to Barry, under which they claim, communicates to him as assignee. In the actual case, the notice is peculiarly strong and pointed, since the only description of the lands in question, in the deed to Barry, is contained in a reference for description to the mortgage to De Wolf, and the purpose is explicitly declared to give priority to that mortgage. Technically and morally, therefore, they required no more than what should remain after satisfying De Wolf. But had they purchased from Prentiss, in the most absolute and general manner, and altogether without notice actual or constructive, they still could have acquired no more than the equity of redemption, and that would not have transferred to them the right of availing themselves of the plea of usury. We have examined the cases quoted to this point, and are satisfied with their application and correctness. It would, indeed, be astonishing were it otherwise, for the contrary rule would hold out no relief to the borrower; it would be only transferring his money from the pocket of the 395*] *lender to the pocket of the holder of the equity of redemption.

Upon the whole, we are of opinion that the decree must be reversed, and the cause sent back to have a decree of foreclosure entered, and carried into effect, according to the exigencies of the case.

[Lottery.]

BRENT et al. v. DAVIS.

The scheme of a lottery contained a stationary prize for the first drawn number on each of twelve days, during which the drawing was to continue, and the first drawn number on the tenth day was to be entitled to $30,000, payable in part by 300 tickets, from Nos. 501 to 800 inclusive. No. 623, one of the 300 tickets to be given in part payment of the said prize, was drawn first on that day, and decided to be entitled to the prize of $30,000. After the drawing for the day was concluded, the managers reversed this decision, and awarded the prize to No. 4760, which was drawn next to No. 623, and had drawn a prize of twenty-five dollars, which they decreed to No. 623.

In drawing the same lottery, it was discovered on the last day that the wheel of blanks and prizes contained one blank less than ought to have been put into it; and to remedy this mistake an additional blank was thrown in.

In an action brought by the managers against a person who had purchased the whole lottery, for the purchase money, it was held that these irregularities did not vitiate the drawing of the lottery, the conduct of the managers having been bona fide, and the affirmance of their acts not furnishing any inducement to the repetition of the same mistake, nor any motive for misconduct of any description.

Quære, Whether the ticket No. 623, or No. 4760, was entitled to the prize of $30,000.

*ERROR to the Circuit Court for the [*396 District of Columbia.

This cause was argued by Mr. Key for the plaintiffs, and by Mr. Swann and Mr. Jones for the defendant.

Mr. Chief Justice Marshall delivered the opinion of the court:

The defendant was the purchaser of the first class of a lottery to be drawn in the city of Washington, conformably to a scheme agreed on between the plaintiffs, who had been appointed managers, and himself; and the declaration is on the penalty of the bond given for the sum of $10,000, conditioned for the performance of articles entered into between them, one of which was that he should pay the said sum of $10,000 to the plaintiffs within sixty days after the lottery should be completed.

The defendant prayed oyer of the bond, and of the condition; after which the following entry is made: "Non damnificatus pleaded, and issue, with leave to give the special matter in evidence on both sides."

A jury was impaneled, who found a special verdict, which states at large the by-law of the corporation authorizing the lottery, the appointment of the managers, their sale of the first class to Davis, the scheme of the lottery, and the agreement entered into by him with them.

The verdict then states that the managers, and the said Davis, proceeded to draw the said *lottery, in the course of which, certain [*397 irregularities took place, which are detailed at large; and the whole progress of the lottery to its conclusion is stated.

The scheme contains a stationary prize for the first drawn number on each of twelve days, during which the drawing was to continue; which were not put into the numerical wheel. The first drawn number on the 10th day was to be entitled to $30,000, payable in part by three hundred tickets, from numbers 501 to 800 inclusive. No. 623, one of the three hundred tickets to be given in part payment of the said prize, was drawn first on that day, which was immediately proclaimed by the managers, and the prize awarded to it, by making the usual entry in a book kept for that purpose.

After the drawing for that day was concluded, the managers reconsidered their judgment,

awarding the prize of $30,000 to No. 623, and reversed it. They then awarded the prize to No. 4760, which was drawn next to 623, and had drawn a prize of twenty-five dollars, which prize they decreed to No. 623; and the original entries made in the book for the registration of prizes, were transposed so as to conform to this last determination.

On the last day, it was discovered that the wheel of blanks and prizes contained one blank less than ought to have been put into it; and to remedy this mistake the managers, and the said Davis, agreed to throw in an additional 398*] blank. *The verdict appears to have been intended not only for this cause, but for another suit also, which was brought for the benefit of the proprietors of a ticket which had drawn a prize of $10,000, by the corporation of Washington against one of the managers, on a bond given for the performance of his duty. It concludes with the following findings: "If, upon the whole matter, the law be for the plaintiffs, so as to entitle the plaintiffs to demand and have of the defendant in this action, the sum of $10,000, in and by the agreement recited in the condition of the bond given by the said Gideon Davis to the said managers aforesaid, sixty days after the drawing of the said lottery is completed, then we find for the plaintiffs the debt in the declaration mentioned, and one cent damages, to be discharged by the payment of $10,000.

"And if the proprietors of said prize tickets, or the said proprietors of the said ticket No. 1037, be entitled to demand and have the amount of the several prizes drawn against their respective tickets in the course of the drawings as aforesaid, after making the deduction of fifteen per cent. according to the said scheme, and if the proprietors of the said ticket No. 1037, be entitled to demand and receive payment of the said prize of $10,000, with such deduction as aforesaid against the defendent in this action, then we find for the plaintiffs the farther sum of $8,500, to the use of the said purchasers and proprietors of the said ticket No. 1,037, in equal shares and pro- 399*] portions aforesaid. And if, *upon the whole matter, the law be for the defendant, we find for the defendant."

The judgment of the court was in favor of the defendant; and that judgment is now before this court on a writ of error.

If, through the confusion which is introduced into this record by the extreme irregularity of the proceedings, the court can perceive that the plaintiffs have a real cause of action which may be barred by this judgment, the justice of the case requires that it should be reversed, although the great fault in pleading has been committed by the plaintiffs in failing to assign any breach of the condition of the bond on which the suit was instituted.

The suit is supposed to be brought for the recovery of the $10,000 which the defendant engaged to pay sixty days after the lottery should be drawn. This claim is resisted on the plea that the lottery, in point of law, is not yet drawn; that the irregularities stated in the verdict have vitiated the whole transaction; that the lottery must be redrawn; and that no right of action can accrue to the plaintiffs until sixty days after such redrawing shall be concluded.

The right of the plaintiffs, then, to maintain this action, depends on the legality of the drawing as found in the special verdict.

The defendant insists that two errors have been committed in drawing the lottery, which vitiate the whole transaction. The first is the proceeding respecting the first drawn ticket on the 10th day; and the last the circumstances in *relation to the deficient ticket in the [*400 wheel of blanks and prizes.

If the ticket which was first drawn in fact, ought to be considered as entitled to the prize, as was first decided by the managers, then no irregularity whatever took place in their proceedings with regard to this ticket, and this objection is clearly at an end. If the last decision of the managers was right, still there was no irregularity in the drawing, unless the ticket No. 623 ought to have been restored to the wheel, and have taken its chance for a blank or a prize. We are not satisfied that the managers ought to have taken this course. The ticket was properly put in the wheel, and was consequently liable to be drawn out of it at any time. The scheme did not say that if any of those tickets which were to be paid in part discharge of the stationary prizes should itself draw the prize, it should be returned to the wheel and redrawn; and great objections would, without doubt, have been made to such a proceeding. It would have diminished the chance of every remaining ticket for the undrawn prizes, and would have constituted a much more valid objection than can be made to what was actually done. Had No. 623 been replaced in the wheel, and been fortunate enough again to draw a large prize, it would have been very difficult to sustain its title to that prize. This first objection to the conduct of the managers is not, we think, supported.

More difficulty is presented by the last. The mistake in the number of the tickets placed in the *wheel is undoubtedly an [*401 irregularity; but the effect it ought to have on the lottery is not so obvious. The ticket not put in the wheel was a blank; and, consequently, the omission did not diminish the chances of the adventurers. The last drawn number would find no corresponding ticket in the other wheel; but the chance of each to be the last drawn was precisely the same as the chance of each would have been to draw the blank, which ought to have been in the wheel. Had the lottery been completed without attempting to correct the error by throwing in another blank, the owner of the last drawn ticket would have been in the same situation as if the blank had remained in the wheel; and if he could be considered as having any just cause of complaint, it would seem more reasonable that the proprietors of the lottery should restore him the price of his ticket, than that the whole proceeding should be declared a nullity. The general quiet is more consulted by considering his particular contract as void for want of consideration, than by annulling all the rights acquired in the course of the drawing.

We do not think the case materially varied by placing the blank in the wheel in the course of the last day. The tickets previously drawn could not be affected by this act. The rights to prizes which had been previously vested could not be devested by this act. It could af-

fect nothing which had been done, and was of importance to those tickets only which remained in the wheel. It did not in the slight-
402*] est degree vary their *chance. There were the same number of prizes and the same number of blanks, with this only difference—had the blank not been put in the wheel, the last ticket would have drawn nothing; whereas by putting it in the wheel, it did not necessarily fall to the lot of the last ticket. But the aggregate of chances remained precisely the same. It appears to have been one of those unimportant incidents, which, having been found to be accidental, ought not to have so essential and so disquieting an effect as unsettling all that had been done would have.

The establishment of the lottery thus drawn can be attended with no pernicious consequence. The transaction was, throughout, perfectly fair; and if the managers have committed an error; it was unintentional, and unimportant. The affirmance of their acts can furnish no inducement to the repetition of the same mistakes, nor any motive for misconduct of any description. But let it be settled, that the absence of a blank at the conclusion of a lottery shall vitiate the whole transaction, and it is not difficult to perceive how frequently motives may exist for producing that state of things. However questionable may be the policy of tolerating lotteries, there can be no question respecting the policy of removing, as far as possible, from those who are concerned in them, all temptation to fraud.

The case of Madison et al. v. Vaughan, decided in the Court of Appeals of Virginia, is supposed by the defendants to be an authority for declaring that this lottery ought
403*] to be redrawn. *In that case, a number corresponding to the number of one of the tickets was not put into the wheel, and two blanks more than the proper number were put into it. Chancellor Wythe considered the lottery as well drawn; but his decree was reversed in the Court of Appeals. Supposing the decree of reversal to be correct, there is some difference between the cases. One ticket not being in the wheel, the proprietor of it did not partake of the chance to which every adventurer had an equal right; and there being two more blanks in the wheel than were allowed by the scheme, the chances of every ticket were diminished. If when all the numbers for the tickets which had been put in the wheel were drawn, two blanks had remained undrawn, it would be difficult to show that any injury had been done to a ticket-holder by the two additional blanks; but if one or two prizes had remained undrawn, it would be obvious that some ticket had drawn a blank which ought to have drawn a prize, and this circumstance would have afforded stronger reason for the decree that the whole proceeding must be considered as a nullity.

The case of Neilson v. Mott (2 Binn. 301) was a suit brought by the proprietor of a lottery against a purchaser of 500 lottery tickets, on a note given by him for the purchase money, which was payable one day after the conclusion of the drawing of the lottery. In the wheel containing the numbers of the tickets, the numbers of thirty-nine tickets were omitted, and in the same wheel there were
404*] duplicates of thirty-nine numbers. *The proprietors had satisfied all the holders of the duplicate numbers except four or five, and had offered to indemnify all by public advertisement. A day or two before the last day's drawing, the managers opened the wheel, and discovered that there was one number omitted and another put in twice, which they altered.

The defendant resisted the payment of his note, because the lottery was not legally drawn, the whole being vitiated by this mistake.

Judgment was given for the plaintiff, on the ground that the drawing was not vitiated by these irregularities. Two of the judges were of opinion, that as the defendant had sustained no injury by them, he could not avail himself of them; and the third (the court consisting of three) thought he had waived his right by not returning his tickets, and by receiving the prizes he had drawn.

The case of Schinotti v. Bumstead et al. 6 D. & E. 646, was an action brought by the holder of a ticket claiming a prize allotted in the scheme to that which should be last drawn in the lottery.

The number of one ticket had not been put into the wheel; and the demand made by the owner of the ticket which was last actually drawn, was resisted, on the ground that the ticket not yet drawn, for which a correspondent blank remained in the wheel, must be the last. Lord Kenyon said, that as the plaintiff's ticket was the last drawn, he is entitled to the prize; the *only competitor with him [*405 was the owner of a ticket which never was drawn, and that person has no claim to it whatever.

So far as respects the omission to put the number of one ticket into the wheel, this case bears an exact resemblance to Madison et al. v. Vaughan, and is, perhaps, stronger than the case under consideration. The omission of a ticket is, at least, as irregular and as important as the omission of a blank, and yet, in Shinotti v. Bumstead et al., no suggestion was made against the validity of the drawing.

Upon these authorities, and upon the reason and substantial justice of the case, this court is of opinion that the lottery in the special verdict mentioned has been legally drawn, and that the defendant became liable to the plaintiffs, sixty days after it was concluded, for the sum of $10,000. The judgment, therefore, in favor of the defendant, must be reversed. But the pleadings are too defective to sustain a judgment on this verdict for the plaintiffs. The verdict, therefore, and the pleadings, up to the declaration, must be set aside, and the cause remanded to the Circuit Court, that farther proceedings may be had therein according to law.

Judgment reversed, and a venire facias de novo awarded.

[*Practice.] [*406

*THE CORPORATION OF WASHINGTON, for the use of M'Cue et al.,
v.
MOSES YOUNG.

Where the manager of a lottery, drawn in pursuance of an ordinance of the corporation of the

city of Washington, gave a bond to the corporation, conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance;" held, that the person entitled to a prize ticket had no right to bring a suit for the prize against the manager, upon his bond, in the name of the corporation, without their consent.

THIS cause was argued by the same counsel with the preceding.

Mr. Chief Justice **Marshall** delivered the opinion of the court:

The defendant was the manager of a lottery, drawn in pursuance of an ordinance of the corporation of Washington, and gave his bond to the corporation in the penalty of $10,000, conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance."

The declaration was on the penalty of the bond; after oyer of which, and of the condition, the defendant pleaded non damnificatus, upon which there was issue, with leave to give the special matter in evidence on both sides.

A jury was impaneled, who found the special verdict stated in the preceding case of Brent et 407*] *al. v. Davis, with this additional circumstance, which, having no connection with that case, was not stated in it. The ticket No. 1037 drew a prize of $10,000. It had been sold in quarter shares to several persons, but had remained in possession of the said Gideon Davis, who gave to each purchaser a certificate specifying the interest he held in the ticket. After the drawing was completed, but before the institution of this suit, Gideon Davis delivered the said ticket, No. 1037, to the managers, towards securing and paying of the moneys stipulated to be paid by him under his contract for the purchase of the lottery.

This suit is instituted for the benefit of the purchasers of the ticket No. 1037, without the consent of the corporation.

The judgment of the court was in favor of the defendant, and the plaintiffs have sued out a writ of error to bring the cause into this court.

The first inquiry is, into the right of the proprietors of the ticket No. 1037, to sue in the name of the corporation without its consent. Their counsel insists that the bond was taken for the benefit of the fortunate adventurers in the lottery, and that each has a right to use it. In support of this proposition, he has cited the case of M'Mechen v. The Mayor and City Council of Baltimore, decided in the Court of Appeals of Maryland in the year 1806. That was a writ of error to a judgment confessed in the general court, in an action brought by the corporation on a bond given by Thomas Yates 408*] and Archibald *Campbell, with their sureties, conditioned for the performance of their duty as auctioneers. The court determined that the suit was to be considered as brought by authority of the corporation, although no warrant of attorney was shown; and that the confession was an admission of the right to recover the penalty of the bond; whether in their own right, or for the use of another, was immaterial.

The opinion was also expressed, as stated by the reporters in a note, that every person whose money was withheld by the auctioneers, had a right to apply to the city council to direct a suit to be instituted on the bond; and the corporation could not, consistently with their duty under the ordinance, refuse such application, and might be enjoined by suit in chancery to allow the person to use their name to prosecute his claim.

Had this been the direct judgment of the court, it could not have sustained the pretensions of the proprietors of this ticket to maintain this suit under the circumstances which attend it. They had undoubtedly "a right to apply to the corporation to direct the suit, and the corporation could not, consistently with their duty, have refused such application," if the purpose of the bond was to secure the fortunate adventures in the lottery, not to protect the corporation itself. But the propriety of bringing such suit was a subject on which the obligees had themselves a right to judge. If the proprietors of one prize ticket had an interest in this bond, the proprietors of every other prize ticket had the same interest; *and it would not be in the power of [*409 the first bold adventurer who should seize and sue upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs against their own will. No person who is not the proprietor of an obligation, can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment. The declaration of the judge in the case cited from Harris & Johnson, that a court of chancery might enjoin the obligees to allow the injured person to use their names in that particular case, is evidence of the opinion that he could not sue at his own will. We think, then, that this case is no authority for the power claimed by the proprietors of the ticket No. 1037; and we think, upon general principles, they had no right to institute this suit without the consent of the corporation.

But we think, also, that the corporation itself must be considered as the real plaintiff, and that its right to prosecute the suit cannot be affected by the allegation that it is brought for the benefit of others.

It has been determined in this court, that the warrant of attorney need not be spread on the record, to enable counsel to appear for a corporation; and if the dismission of the suit be not ordered, the consent of the corporation will be presumed after verdict.[1] If, in its progress, the *court shall perceive that it is [*410 brought without authority, the proper course would seem to be to dismiss it; not to render judgment for the defendant, which might, where no special breach is assigned, bar any other action.

The proprietors of the ticket No. 1037 have shown no right to sue on this bond. Their remedy is certainly directly against Gideon Davis; and, in the event of his insolvency, it may be against the managers. But if they have, without authority, put this bond in suit, the proper course is to turn them out of court, not to render a judgment, which may bar any future suit brought by the plaintiffs, whose names have been improperly used.

The judgment of the Circuit Court, there-

1.—See Osborn v. United States Bank, ante Vol. IX., p. 738, 829.

fore, must be reversed; but as the pleadings are so incomplete as not to show what judgment ought to be entered, the proceedings are set aside up to the declaration, and the cause remanded to the Circuit Court, to be farther proceeded in according to law.

Judgment reversed accordingly.

411*] [*Insurance.]

JANNEY

v.

THE COLUMBIAN INSURANCE COMPANY.

Under a policy containing the following clause: "It is declared and understood, that if the abovementioned brig, after a regular survey, should be condemned for being unsound and rotten, the insurers shall not be bound to pay the sum hereby insured, nor any part thereof." A survey by the master and wardens of the port of New Orleans, which was obtained at the instance of the master, who was also a part owner, and was transmitted by him to the other part owner, and by the latter laid before the underwriters as proof of the loss, stated, that the wardens "ordered one streak of plank fore and aft to be taken out, about three feet below the bends on the starboard side; and found the timber and bottom plank so much decayed that we were unanimously of opinion her repairs would cost more than she would be worth afterwards, and that it would be for the interest of all concerned she should be condemned as unworthy of repair on that ground. We did, therefore, condemn her as not seaworthy, and as unworthy of repair; and, therefore, according to the powers vested by law in the master and wardens of this port, we do hereby order and direct the aforesaid damaged brig to be sold at public auction for the account of the insurers thereof, or whomsoever the same may concern." It was held, that the survey was conclusive evidence, under the clause, to discharge the insurers from their liability for the loss.

Quære, How far the state legislatures may authorize the condemnation of vessels as unseaworthy, by tribunals or boards constituted under state authority, in the absence of any general regulation made by Congress, under its power of regulating commerce, as a branch of the admiralty jurisdiction.

However this may be, the above condemnation not being specially authorized by any law of the state of Louisiana, it would not have been considered as conclusive evidence within the clause, had not the condemnation been obtained by the master, as the agent of the owners, and afterwards adopted by them as proof of the facts stated therein.

412*] *ERROR to the Circuit Court for the District of Columbia.

This was an action brought in the court below by the plaintiff in error, Janney, against the defendants in error, the Columbian Insurance Company, on a policy of insurance on the brig Hunter, Grinnolds, lost or not lost, from Alexandria to Norfolk and New Orleans; in which policy there was the following clause: "It is declared and understood, that if the abovementioned brig, after a regular survey, should be condemned for being unsound or rotten, the insurers shall not be bound to pay the sum hereby insured, nor any part thereof."

On the first trial of the cause, the jury, not agreeing on a verdict, was discharged; and, on the second trial, a verdict was found for the defendants, under an instruction from the court to the following effect, as stated in the bill of exceptions:

And the plaintiff offered to prove, by parol evidence, that at the time that the said brig Hunter sailed from the port of Alexandria upon her voyage aforesaid, and at the time she was surveyed and condemned at New Orleans as hereinafter mentioned, she was sound, and that the repairs of vessels, and materials of shipbuilding, at that place, were very high: and that the prices there would have amounted to two or three times as much as the prices would have amounted to in the port of Alexandria; and that the repairs of the said vessel, arising from the injuries which she *had [*413 sustained in her voyage to New Orleans, would not have amounted to less, in that place, than $2,000, independent of the detention of the vessel, and the other necessary expenses of the voyage. But the defendants produced, and read in evidence to the jury, a regular survey, called upon the state and condition of the vessel on her arrival at New Orleans, by the said Capt. Grinnolds, master and part owner; and by him transmitted to the plaintiff to be laid before the insurance office as evidence of loss; and actually laid before such office by the plaintiff accordingly; and, at the former trial, read on the part of the plaintiff in evidence to the jury, in the words following:

"Port Wardens' Office,
"New Orleans, 13th January, 1819.

"We, the subscribers, the wardens of this port, having been thereto required by Capt. Grinnolds, did repair on board the brig Hunter, commanded by him, and lately arrived from Norfolk, and, assisted by A. Seguin, carpenter, surveyed her condition. Found twenty-five feet of quarter rail, and seventy-five feet of waist boards, and the boat's davit, carried away; the oakum of the break of the quarter-deck started, and also the strings and drifts; the cambouse stove, and its house carried away; the vessel was reported to have leaked much at sea. All which, therefore, according

NOTE.—Insurance—"rotten clause" in a policy.

If the ship is unseaworthy on a regular survey, by reason of being rotten or unsound, the underwriters are discharged, at whatever time the decay may have commenced, and whether the ship was or was not unseaworthy by reason of rottenness when the risk commenced. Dorr v. Pacific Ins. Co. 7 Wheat. 581; Rogers v. Niag. Ins. Co., 2 Hall. 86.

In respect to what constitutes a regular survey, one made under the order of a court having jurisdiction of the proceeding is such, as far as the authority to order it is concerned. 1 Phillips on Insurance. 464.

So also one made by surveyors appointed by the American counsul in a foreign port. Innes v. Alliance Ins. Co. 1 Sandf. N. Y. 310.

So, also, one by surveyors appointed by the master, as agent of the owners, where, under the circumstances, such an appointment is a sound exercise of discretion on his part. Polleys v. Ocean Ins. Co., 2 Shep. Me., 141.

So, the assent of the master to a survey is ground of presumption of its being regular. Dorr v. Pacific Ins. Co., 7 Wheat. 581.

There may, however, be irregularities in a survey by surveyors duly appointed. 1 Phillips on Insurance, 465. See also Watson v. Ins. Co. of N. A., 2 Wash. C. C. 152; Marine Ins. Co. v. Wilson, 3 Cranch, 187.

to the powers vested by law in the master and 414*] *wardens of this port, we do hereby certify.

James Rinker,
"(Signed) E. Marchand,
J. M. Cartande.

"A true copy of the records in this office,
"George Pollock, Warden and Secretary."

"Port Wardens' Office,
"New Orleans, 24th February, 1819.

"We, the subscribers, wardens of this port, having been thereunto required by Captain Grinnolds to inspect the condition of the brig Hunter, commanded by said Captain Grinnolds, from Norfolk, did repair to the ship-yards, and assisted by Andrew Seguin and Robert Fell, ship-carpenters, and for the greater satisfaction of said master, by Captain Wayne, of the ship Ariadne, and Captain Williams, of the brig Maryland, surveyed her condition. We ordered one streak of plank fore and aft to be taken out, about three feet below the bends on the starboard side, and found the timbers and bottom planks so much decayed that we were unanimously of opinion her repairs would cost more than she would be worth afterwards; and that it would be for the interest of all concerned she should be condemned as unworthy of repair on that ground. We did, therefore, condemn her as not seaworthy, and as unworthy of repair; and, therefore, according to the powers vested by law in the master and wardens of this port, we do hereby order and direct the aforesaid damaged brig to be sold at public 415*] *auction, for account of the insurers thereof, or whomsoever the same may concern.

James Rinker,
"(Signed) E. Marchand,
J. M. Cartande.

"Port Wardens' Office,
"New Orleans, 22d March, 1819.

"We the subscribers, wardens of this port, do hereby certify, to whom it may concern, that the goods mentioned in the annexed account of sales were sold at public auction, by our order in our presence, by Dutillet & Sagony, commissioned auctioneers, after having been advertised in due form of law; and that the said account of sales is, in all respects, just and true.

"In testimony whereof, we have countersigned the said account, and now grant the certificate as the law directs.

"(Signed) Em. Marchand,
J. M. Cartande.

"A true copy of the records in this office,
"George Pollock, Warden and Secretary."

Whereupon the defendant prayed the opinion of the court, and their instruction to the jury, that the said survey is conclusive evidence that the said vessel was condemned for being unsound and rotten; and that it is not competent for the plaintiff to produce evidence inconsistent with said survey, to prove that the said vessel was, in fact, sound at the time of such survey; and that, upon such evidence, 416*] the plaintiff is not entitled *to recover under the policy given in evidence in this case; and the court so accordingly instructed the jury, and refused to suffer the said evidence to be given to the jury.

A verdict and judgment thereon having been rendered for the defendants, the cause was brought by writ of error to this court; and was argued by Mr. Swann for the plaintiff, and by Mr. Jones for the defendants.

Mr. Justice Johnson delivered the opinion of the court:

This case varies somewhat in form, but nothing in principle, from the case of Dorr v. The Pacific Insurance Company, 7 Wheat. Rep. 582. The material point of distinction is this: In that case the discharge of the underwriters was made to depend on a regular survey alone; the stipulation was, "that if the vessel, upon a regular survey, should be thereby declared unseaworthy by reason of her being unsound or rotten," the policy should be discharged. And hence, although a condemnation in the Vice-Admiralty Court of the Bahamas was produced in evidence in that cause, the court makes no other use of it, than as a means of authenticating the survey upon which the decree was made.

The terms of the present stipulation are these: "If the above-mentioned brig, after a regular survey, should be condemned for being unsound or rotten," the insurers are to be discharged. From which it is obvious, that both a regular survey and a condemnation are in contemplation *of the parties. And the [*417 question is, whether the bill of exceptions makes out the casus fœderis.

This gives rise to three questions: Was the survey regular? was the condemnation conformable to the contract? and does the one or the other bring the case within the terms of the stipulation? With regard to the survey, the case is a very clear one. The laws of Louisiana contain ample and judicious provisions on this subject. The master and wardens of the port of Orleans are vested with various powers, and required to keep an office and a book of record open to all the world; they possess, in fact, some of the attributes of a municipal court. With regard to damaged vessels, the vessels deemed unfit to proceed to sea, they, or any two of them, with one or more skilful carpenters, are constituted surveyors; and the laws enjoin, "that they shall, upon every such survey, certify under their hands, how the vessels so surveyed appeared to them, and shall cause entries to be made in a book to be kept for that purpose in their office." A survey, therefore, made by them, pursuant to this law, and at the call of the captain of this vessel, was emphatically a regular survey.

The difficulty in the cause arises upon the next member of the clause under consideration, to wit, that which requires a condemnation. The certificate of the survey purports that there was, in fact, a condemnation of the vessel; but there is nothing in the laws of Louisiana which vests the power expressly in the master and wardens of the port to condemn a vessel as unfit for sea or *unworthy of repair. [*418 As to damaged merchandise, the power is expressly given; but as to ships, it appears to be exercised as incidental to the surveying power. In other parts of the world, it is very generally exercised as an incident to the admiralty power; and the admiralty jurisdiction under our

system, can only be exercised under the laws of the United States.

These considerations are only thrown out to preclude the supposition that the court has not had them in mind whilst considering this subject. We do not mean to intimate that the power is one which cannot be exercised under municipal regulations. On the contrary, there are many reasons for maintaining that it may be so exercised until Congress may think proper to establish some general rule upon the subject, either as one appertaining to trade and commerce, or within the admiralty jurisdiction. If, therefore, there had been express provision on the subject in the laws of Louisiana, or it had been shown to be recognized as a power known and habitually exercised in that port, as an incident to the surveying power, we should have felt no difficulty on this point. As it is, we must place our opinion on another ground, one, however, which is also noticed in Dorr's case. It is this, that the condemnation, such as it is, was obtained through the instrumentality of the master, who, as such, represented his employers, and who was, in fact, in this instance, also a part owner. In this condemnation he acquiesced, broke up the voyage, and sold the vessel; and the certificates now before this 419*] *court were transmitted to the underwriters, and actually, in a former trial between the same parties, made evidence to prove the fact which they ascertain. It is, then, too late for the plaintiffs to dispute the validity or verity of the act of condemnation. They have recognized the jurisdiction of the tribunal they appealed to, to obtain the survey, as sufficient also to make the condemnation, and must be held to abide by it as such. All further and other investigation in a more competent tribunal, if there was such, was rendered impossible by their act.

It only remains, then, to determine whether the facts ascertained by the survey are such as bring the case within the terms of the stipulation.

We are of opinion they are. It would be difficult to find a shade of difference in this respect, between the present case and that of Dorr. The terms of this certificate are, "we found the timbers and bottom plank so much decayed that we are unanimously of opinion her repairs would cost more than she would be worth afterwards; and that it would be for the interest of all concerned she should be condemned as unworthy of repairs on that ground. We did, therefore, condemn her as not seaworthy, and as unworthy of repairs Now, it cannot be questioned that the ground of condemnation here stated does not stand single and unconnected with the estimated cost of repairs. But does this vary the case? We are of opinion it does not, since the condemnation of a vessel, 420*] on account of decay, can *never, in its nature, stand single and unconnected with the expense of repairs. It is the commonplace to which the question of condemnation must always have reference. It is hardly possible to conceive a case where a survey would be called in which a vessel might not be repaired or renovated, and still leave enough of the hull to maintain her identity. A state of hopeless and absolute decay, therefore, is never in the contemplation of the contract. And whether expressed or not, the consideration whether the value when repaired would exceed the expense, invariably enters into the decision of surveyors upon a question of seaworthiness.

As, then, her being decayed, so as to be unworthy of repairs, is equivalent to, and in fact the technical meaning of, unseaworthiness, we are of opinion that the certificate brings the case within the words of the stipulation.

It follows, that the court were correct in refusing the evidence offered by the plaintiff.

Judgment affirmed.

[*Instance Court.] [*421

SIXTY PIPES OF BRANDY.

Kennedy & Maitland, Claimants.

Under the duty act of 1799, c. 126 (CXXVI.), s. 43, it is no cause of forfeiture that the casks, which are marked and accompanied with the certificates required by the act, contain distilled spirits which have not been imported into the United States, or a mixture of domestic with foreign spirits the object of the act being the security of the revenue, without interfering with those mercantile devices which look only to individual profit without defrauding the government.

APPEAL from the Circuit Court of Massachusetts.

This cause was argued by Mr. **Emmet** for the appellants and claimants, and by Mr. **Webster** for the respondents.

Mr. Justice **Johnson** delivered the opinion of the court:

The libel in this case contains two allegations, and the amended or supplemental libel contains a third.

The first is, that these sixty pipes of brandy were imported from abroad, and landed in the port of Boston without a permit. The second, that they were not accompanied with the marks and certificates required by law. And the third, *that they were imported from [*422 abroad, and landed in the port of New York without a permit.

To the first and third of these allegations, the record furnishes no evidence, nor, in fact, is it contended that the article seized is to be visited by the penalties inflicted for those offenses, otherwise than as an incident to the cause of forfeiture contained in the second allegation.

The passage of the law on which the libelants claim the forfeiture, is in these words: "And if any casks, etc., containing distilled spirits, etc., which, by the foregoing provisions, ought to be marked and accompanied with certificates, shall be found in possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same are liable to forfeiture, and it shall be lawful for any officer of the customs, or of inspection, to seize them as forfeited; and if, upon the trial, in consequence of such seizure, the owner or claimant of the spirits, etc., seized, shall not prove that they were imported into the United States according to law, and the

duties thereupon paid or secured, they shall be adjudged to be forfeited."

The fact that these casks were accompanied with certificates is not questioned, nor that the certificates accompanying them were those which issued from the custom-house upon those identical casks. But it is contended that the identity of the spirits is destroyed by a large admixture of other spirits; and that, by the true construction of the law, such a change falsifies the certificate, and the casks are no 423*] longer, in the sense of *the law, "accompanied by certificates." And, further, that such a change justified the seizure, and wherever the seizure is just, the onus probandi is thrown upon the claimant, and he is held to comply strictly with the words of the law, and prove the spirits which they contain to have been "imported according to law, and the duties thereon paid, or secured to be paid."

That such a construction of the law is carrying its penal effects beyond the literal meaning of its terms, we understand no one to deny. The words are, "if any casks containing distilled spirits, which ought to be marked and accompanied with certificates," etc. That these words must necessarily be confined to the casks, and cannot extend to its contents, results, we think, from requiring the article to be marked, as well as accompanied with the certificate; a requisition, absurd in terms, if applied to the distilled spirits contained in the casks. And although the term, "the same," used in the member of the sentence which imposes the forfeiture, might, with grammatical correctness, be applied exclusively to the cask, and thereby produce a greater absurdity, yet it may, with as much propriety, be applied to both the cask and spirits as its antecedent; and this application is sustained by the subsequent words of the same period; which speak expressly and exclusively of the "claimant of the spirits," and leave the cask to be claimed only as an incident to the property in the spirits.

The constituents of the offense here intended to be visited on the claimant, obviously are, 424*] *(1) That the cask should contain distilled spirits. (2) That it should be one which the law requires should be marked and accompanied with a certificate, that is, one that has been used for foreign spirits. (3) That it should be found in the possession of some person unaccompanied with the legal mark and certificates. When these three facts concur, the property is presumed subject to forfeiture; and it follows, that unless all the constituents unite in the given case, it must be a case of innocence. But the whole argument of the libelant goes to impose a fourth circumstance as essential to the imputation of innocence, and the absence of which, of consequence, must exist in order to repel the imputation of crime; which is, that the distilled spirits in the cask should be the identical spirits imported in the cask; and this, not from any necessary construction of the language of the act, but as a deduction from the supposed policy of the act.

We are induced to adopt the opinion, that even if it were consistent with the rules of construction to give a latitude to the meaning of language used in a statute so highly penal, the language of this act is so far from sanctioning the construction here contended for, that it actually repels it; for, it is observable that when the act goes on to declare what it shall be incumbent on the defendant to establish, in order to escape the penalty of the law, the identity of the spirits found in the cask, with that originally imported, is not required to be proved. It is only required that he should prove the spirits seized to have *been legally im- [*425 ported, and the duties paid, and whether in those casks, or any other casks, is altogether immaterial to his defense. Gin and brandy may interchange receptacles, and travel together in perfect security, provided they have been respectively legally imported, and the original certificates attend the casks to which they were originally attached.

From this, we think it conclusively results that the government had nothing in view but the security of its own revenue, without interfering with those devices of the mercantile world which look only to individual profit without defrauding the government; and hence, that the spirit and policy of the 43d section would carry us no further than its express letter.

But there are other views of this subject which raise other questions in adjudicating on this cause. And, first, it is very obvious that if the change of the contents of the cask could invalidate the immunities of the certificate in other cases, it could not in the case where domestic spirits have been substituted for that imported. If the evidence establishes any adulteration in this case, it proves it to have been made by the addition of American spirits to the imported brandy. But when the act imposes upon the claimant the necessity of proving "that the spirits found in the casks were imported into the United States according to law, and the duties thereon paid or secured," it could not have intended to impose an actual impossibility, by requiring such proof as to spirits which, ex vi termini, *were not [*426 imported. Much less could it have intended to leave open a chance of defense, where the substitution was of foreign liquors, upon which it might, by possibility, have been defrauded, and preclude all defense as to domestic spirits, a trade in which, coastwise or in any wise, was perfectly harmless, and could not have produced a fraud upon the revenue.

But, although the libelant may have failed on his second count, he is entitled to all the benefit which the law allows him under his first and third. And here the case rests upon the general provisions of the 50th, 70th, 71st, and some other sections of the revenue law, under which the collector was certainly justifiable in making any seizure, where he had reasonable ground to suspect that a fraud upon the revenue, or a violation of the revenue laws, was meditated. And upon showing probable cause for such seizure, the onus probandi is thrown upon the claimant. Whatever was the fact, the certificates of the numerous individuals who examined this brandy, and testified to its equivocal nature, were sufficient to attract the collector's attention, and justify his instituting an inquiry to determine whether this brandy, notwithstanding the certificates, had actually paid the duty. The brandy which had paid the duty, might, by possibility, have been drawn off, and other brandy substituted that had evaded the duty. It would be too much, also, to hold him to a

correct construction of laws which have excited doubts and elicited contrary opinions in courts 427*] of justice. The claimant, therefore, *upon the general provisions of the collection law, was properly called upon to furnish an explanation of circumstances calculated to excite reasonable suspicion. After comparing the mass of testimony which the case affords, we are led to the conclusion that the claimant has successfully repelled the charge of illicit importation. If, as before observed, the brandy was not the identical brandy imported in these casks in which it was seized, still all the evidence goes to prove that it was in part the same, and in part consisted of neutral spirits, which spirits two of the witnesses call American. Illegal importation, therefore, is out of the case. And the views which we have taken of the subject render it unnecessary to examine the question, whether the evidence establishes the fact of adulteration or not.

Decree of condemnation reversed, with a certificate of probable cause.

428*] [*Constitutional Law. Jurisdiction.]

THE STEAMBOAT THOMAS JEFFERSON. Johnson et al., Claimants.

The District Court has not jurisdiction of a suit for wages earned on a voyage, in a steam vessel, from Shippingport, in the state of Kentucky, up the river Missouri and back again to the port of departure, as a cause of admiralty and maritime jurisdiction.

The admiralty has no jurisdiction over contracts for the hire of seamen, except in cases where the service is substantially performed upon the sea, or upon waters within the ebb and flow of the tide.

But the jurisdiction exists, although the commencement or termination of the voyage is at some place beyond the reach of the tide. It is sufficient if the service is essentially a maritime service.

Quære, Whether, under the power to regulate commerce among the several states, Congress may not extend the remedy, by the summary process of the admiralty, to the case of voyages on the western waters.

However this may be, the act of 1790, c. 29, for the government and regulation of seamen in the merchant service, confines the remedy in the district courts to such cases as ordinarily belong to the admiralty jurisdiction.

APPEAL from the Circuit Court of Kentucky.

Mr. Justice Story delivered the opinion of the court:

This is a suit brought in the District Court of Kentucky for subtraction of wages. The libel claims wages earned on a voyage from Shippingport, in that state, up the river Missouri, and back again to the port of departure; and the question is, whether this case, as stated in the *libel, is of admiralty and maritime [*429 jurisdiction, or otherwise, within the jurisdiction of the District Court. The court below dismissed the libel for want of jurisdiction, and the libelants have appealed from that decree to this court.

In the great struggles between the courts of common law and the admiralty, the latter never attempted to assert any jurisdiction except over maritime contracts. In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide. This is the prescribed limit which it was not at liberty to transcend. We say the service was to be substantially performed on the sea, or on tide water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially a maritime service. In the present case, the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundreds of miles above the ebb and flow of the tide; and in no just sense can the wages be considered as earned in a maritime employment.

Some reliance has been placed in argument upon that clause of the judiciary act of 1789, ch. 20, s. 9, which includes all seizures made on waters navigable from the sea by vessels of ten *or more tons burthen (of which [*430 description the waters in this case are), within the admiralty jurisdiction. But this is a statutable provision, and limited to the cases there stated. To make the argument available, it should be shown that some act of Congress had extended the right to sue in courts having admiralty jurisdiction, to cases of voyages of this nature. We have for this purpose examined the act of Congress for the government and regulation of seamen in the merchants' service (act of 1790, ch. 29), and though its language is somewhat general, we think that its strict interpretation confines the remedy in the admiralty to such cases as ordinarily belong to its cognizance, as maritime contracts for wages. It merely recognizes the existing, and does not intend to confer any new jurisdiction. Whether, under the power to regulate commerce between the states, Congress may not extend the remedy, by the summary process of the admiralty, to the case of voyages on the western waters, it is unnecessary for us to consider. If the public inconvenience, from the want of a process of an analogous nature, shall be extensively felt, the attention of the legislature will doubtless be drawn to the subject. But we have now only to declare that the present suit is not maintainable as a cause of admiralty and maritime jurisdiction, upon acknowledged principles of law.

The decree of the Circuit Court, dismissing the libel for want of jurisdiction, is therefore affirmed.

Decree accordingly.

NOTE.—As to jurisdiction of the District Court in Admiralty. See note to Glass v. The Betsey, 3 Dall. 16.

The decision in this case (The Thomas Jefferson) that the jurisdiction of the courts of admiralty of the United States is limited to the ebb and flow of the tide, is overruled in The Genesee Chief v. Fitzhugh, 12 How. 443, 458, 459; Jackson v. The Magnolia, 20 How. 296.

As to lien for materials and work. See note to The General Smith, 4 Wheat. 438.

431*] [*Prize.]

THE SANTA MARIA.

The Spanish Consul, Libelant.

Upon an appeal from a mandate to carry into effect a former decree of the court, nothing is before the court but the proceedings subsequent to the mandate.

But the original proceedings are always before the court, so far as is necessary to determine any new points in controversy between the parties, which are not terminated by the original decree.

After a general decree of restitution in this court, the captors, or purchasers under them, cannot set up in the court below new claims for equitable deductions, meliorations and charges, even if such claims might have been allowed, had they been asserted before the original decree.

Nor can the claimants, or original owners, in such a case, set up a claim for interest upon the stipulation taken in the usual form, for the appraised value of the goods, interest not being mentioned in the stipulation itself.

Nor can interest be decreed against the captors personally, by way of damages for the detention and delay, no such claim having been set up, upon the original hearing in the court below, or upon the original appeal to this court.

The case of Rose v. Himely, 5 Cranch, 313, reviewed, explained, and confirmed.

Upon a mandate to the Circuit Court, to carry into effect a general decree or restitution by this court, where the property has been delivered upon a stipulation for the appraised value, and the duties paid upon it by the party to whom it is delivered, the amount of the duties is to be deducted from the appraised value.

APPEAL from the Circuit Court of Maryland.

This cause was formerly before the court, and the decision then pronounced will be 432*] found reported, *ante, Vol. VII. p. 490. The claim of Mr. Burke, as a bonæ fidei purchaser, was then rejected, upon the ground of the illegality of the original capture, it having been made in violation of the neutrality of the United States; and a general decree of restitution was awarded in favor of the libelant, suing in his official character as the consul of Spain, for the benefit of the original owners. A mandate issued from this court to the court below, to carry that decree into effect. Pending the original proceedings in the court below, and before the appeal, the property, upon the application of Mr. Burke, was delivered to him, upon a stipulation given with sureties in the usual manner, for the payment of the appraised value, according to the future decree of the court. The appraisers estimated the property at $7,473.43, being, as they declare, "the long price, including custom-house duties," and for this sum, the stipulation was given. Upon the application to the court below, to enforce the mandate of this court, Mr. Burke filed a petition, asserting that he had incurred cost and expenses, and paid certain liens upon the property. The specifications now insisted on, were the following: (1) Insurance on the property from Galveztown to Baltimore, viz., $751.25. (2) Duties paid on the same at Baltimore, viz., $1,945.14. A petition was also filed on behalf of Mr. Burke and a Mr. Forbes (who now, for the first time, appeared in the cause), as joint owners of the schooner Harriet, in which the property in question *was [*433 brought from Galveztown to Baltimore, praying for the allowance of freight for the voyage, amounting to $1,500. The libelant also made an application for interest upon the amount of the stipulation to be decreed in his favor, either from the time of capture, from the date of the stipulation, or from the decree of this court.

The respective claims of all the parties for these allowances were rejected by the Circuit Court, and from the decree dismissing them an appeal was taken to this court.

The **Attorney-General**, for the appellant, Burke, stated that the allegation demanding restitution in the original case, was filed by the Spanish consul against the goods, and the appellant claimed the cargo as having been remitted to him in return for an outward cargo shipped to his agent at Matagorda. It is now alleged that he was part owner of the capturing vessel, and, therefore, as a wrongdoer, not entitled to the equitable deductions he claims. He insists that he is a bonæ fidei purchaser, without notice of the illegal capture, and, therefore, entitled to be allowed for duties and other charges. In the admiralty, the libelant and claimant are both actors.[1] If, therefore, it had been the wish of the libelant to put in issue the fact of Burke's knowledge of, or connection with, the illegal capture, he should have answered the averment which is contained *in the claim, that he (Burke) [*434 was entirely ignorant of, and unconnected with, that transaction; or he should have filed an amended libel, and charged the guilt of Burke. The libelant did neither; and thus the fact of Burke's guilt or innocence was not in issue in that case. It was not involved in the decision of the court, which turned on the facts of the illegal armament of the Patriota in the ports of the United States, the capture of the Santa Maria by that vessel, and the identity of the goods as part of the cargo of the Santa Maria. These facts being established, it was immaterial who the owners of the capturing vessel were, or how the goods came into the possession of Burke. Restitution was decreed to the original owners, and it was in the execution of this decree under the mandate from this court, that the proceedings now in question took place. Upon the present appeal, nothing is before the court but what is subsequent to the mandate.[2] The respondents cannot, therefore, enter into the question of the guilt or innocence of Burke, upon the evidence in the original cause. He is now to be considered as an innocent purchaser, and entitled as such to all equitable deductions, meliorations, and charges.

Besides the other claims which are now insisted on, there was a minor claim in the court below for the difference between the valuation and the actual sales, which was withdrawn up-

1.—Jennings v. Carson, 4 Cranch's Rep. 23.

2.—Rose v. Himely, 5 Cranch's Rep. 313.

435*] on the authority *of the case of The Betsey, and other cases cited in a note to that case.[1]

To the claims for duties, insurance, and freight, it was objected in the Circuit Court that the court had no authority to consider them, because the original decree of this court had closed the door against all inquiry into the subject, upon the principle settled in Rose v. Himely. But this was a misapplication of the principle determined in that case. The question on the first appeal was merely as to the proprietary interest of the cargo. But after the principal question in the cause has been finally decided, and the cause quoad hoc perpetually disposed of, any question of charge upon the original fund may still be taken up as a new question, so long as the fund remains within the power of the court. Such is undertsood to be the practice, both in England and in this country.[2] Considering Burke as an innocent purchaser of the goods, who had brought them to the United States, where they were claimed by the original owners, and restored to them, because of the defect of title in those from whom Burke had purchased, this case cannot be distinguished in principle from that of Rose v. Himely, in which freight, insurance, duties and other expenses, were allowed, under the same circumstances.[3] The charges and expenses in 436*] the present *case, having been actually borne by the innocent purchaser, in bringing the goods safely into the country, seem to enter into the value of the article themselves; and in withdrawing them from the possession of the purchaser, a re-imbursement of his actual expenses is required by natural equity, and may be considered as a species of mitigated salvage. The claim for the amount of the duties rests upon higher grounds. Wherever goods are sold by order of court, or consent of parties, the duties attach as upon an ordinary importation; and upon restitution of the proceeds, the amount of the duties is to be deducted.[4] The party gets more than the value of the goods if he gets the amount of the duties; and the purchaser pays the duties twice over to the government as duties, and again to the original owner, as part of the long price value of his goods.

As to the claim by the other party for interest upon the appraised value, so far as it is claimed from the time of capture, the question is not before this court, because it was not, made in the court below. Nor can it be allowed from the date of the stipulation, because the stipulation is a mere substitute for the specific goods, which would not have carried interest. The principle of Rose v. Himely applies to this demand, since it is the nature of a claim for damages for the illegal detention and delay, which were prayed in the original libel, but 437*] which were not allowed by *the court below, nor by this court, upon the first appeal. Interest might, doubtless, have been expressly reserved in the stipulation, if the court below had deemed the party entitled to it. But these questions are definitively closed by the original decree, and cannot arise upon the mandate to carry that decree into effect.

Mr. D. Hoffman, contra, insisted that the original proceedings in the cause showed that Burke was a participater in the illegal seizure of this property, and, consequently, could not claim any equitable deductions from the full value on account of charges incurred by him in its preservation. He was a malæ fidei possessor, who was not entitled to be allowed for his expenses actually laid out upon the property, still less for the fictitious charges of freight, insurance, and duties. As to the duties, they have been incurred solely by his electing to import the goods for consumption. Had they been delivered to the original owners, and carried away by them, or had they never been brought in, they would not have been subject to duties. There was a manifest inconsistency in the opposite argument, which would not admit the stipulation to carry interest, whilst it sought to diminish the principal sum specified in the stipulation, by claims which might have been made upon the original hearing. But there is no principle, authority, or established practice, which requires, that where the goods have been delivered on bail, the court should, cotemporaneously, decree restitution of the specific *thing, and the performance of the stip- [*438 ulation. The court may decree restitution generally, and in executing the decree it is to be applied to the stipulation, so as to include not only what is substantially comprehended in the decree, but every equitable demand consistent with it, although not expressly included in its terms. The allowance of interest by the court below, after the original decree in this court, does not so much depend upon the circumstance of its being expressly reserved upon the face of the stipulation, as upon the notorious fact that the court would be subsequently called on to act definitively upon the stipulation, when it came to execute the final decree of this court. In thus executing it, by allowing interest, the court below would not modify or add to the original decree of this court, since this allowance opens nothing which had been adjudicated by this court, and is to be regarded as nothing more than an incident to the execution of the decree of restitution. That restitution would have been incomplete without it, as, if the property had not been delivered to the capturing claimant upon bail, it might have been delivered in the same manner to the original owner, or sold by order of court, and the proceeds invested in stocks bearing an interest.

As to the case of Rose v. Himely, it will be found that the court there assumes that the question of interest was before it on the original appeal, and asserts that if the claim had then been made, it would have been rejected, because *the court did not consider the [*439 appellants as infected by the marine trespass committed by the captors. "The circumstances of the case were such as to restrain the court from inserting in its decree anything which might increase its severity. The loss was heavy, and it fell unavoidably on one of two innocent parties. The court was not inclined to add to its weight by giving interest in the

1.—5 Rob. 295.

2.—The Fortuna, 4 Rob. 228; The Vrow Anna Catharina, 6 Rob. 269; The Nereide, 1 Wheat. Rep. 171; The St. Lawrence, 2 Gallis. 20.

3.—4 Cranch, 281; 5 Cranch, 316.

4.—The Concord, 9 Cranch, 387.

nature of damages. The allowance of interest, therefore, in the court below, is overruled."[1] Besides, in that case, the court had all the questions of equitable deductions and allowances before them on the original appeal, and gave a very special decree and mandate, which, ex industria, omitted interest. But here the question is not between two equally innocent parties. Here none of the questions of freight, insurance, duties, and interest, were raised in the original cause. They were all reserved as incidental to the stipulation, which was not then brought before this court.

The doctrine laid down in Rose v. Himely, that after a decree in this court, and the cause sent by mandate to the court below, and the further proceedings upon the mandate are appealed from, nothing is before this court on the appeal but what is subsequent to the mandate, is unquestionably a sound and salutary rule. But is it anything more than what the general principles of law could establish? Is it anything more than an application of the familiar 440*] maxim as to res *adjudicata? "Nothing is before this court," says the Chief Justice, "but what is subsequent to the mandate." This is unquestionably true, but with this indispensable qualification, that the matter in question prior to the mandate was, or ought necessarily to have been, before the court originally. The rule was applied to the claims of freight and insurance which the original decree of this court had expressly allowed, but which the commissioner appointed by the Circuit Court under the mandate had disallowed. But no case can be found which requires the court below to pass any decree, in the first instance, upon the stipulation, or to allow interest before the appeal, or which requires the question of interest, or any similar incidental claim, to be brought before this court upon the original appeal. The rule in regard to matters prior or subsequent to the mandate, appears to be understood precisely in this manner by the learned judge who delivered the opinion of the court in Martin v. Hunter. "A final judgment of this court is conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments."[2]

The claim for interest is an incident to the execution of the mandate for restitution. Interest is impliedly due, wherever a liquidated sum of money is wrongfully withheld. "If a man has my money by way of loan, he ought to answer interest; but if he detains my money 441*] wrongfully, *he ought, a fortiori, to answer interest; and it is still stronger, when one by wrong takes from me my money or goods, which I am trading with, in order to turn them into money."[3] Were not this the case, a strong temptation would be presented to debtors to violate their duty. In the language of Lord Mansfield, "they would be encouraged to make use of all the unjust dilatoriness of chicane, and the more the plaintiff is injured, the less he will be relieved." This is emphatically applicable to the present case, where the capturing claimant has superadded to the original wrong done to the owners of these goods, all the unjust dilatoriness of chicane.[4]

Mr. Justice Story delivered the opinion of the court, and after stating the case, proceeded as follows:

Several preliminary questions have been argued, which must be disposed of before the court can entertain any question upon the merits of these claims; and if disposed of one way, they put an end to the controversy.

In the first place, it is asserted that Mr. Burke is a malæ fidei claimant, entitled to no favor whatever; and by reference to the original proceedings, *will be found a party [*442 to the wrongful capture and detention of the property. And the first question, therefore, that arises, is, whether upon this appeal the court can look into those proceedings for the purpose of ascertaining the guilt or innocence of the claimant. The principle laid down in the case of Rose v. Himely, 5 Cranch, 313, that upon an appeal from a mandate, nothing is before the court but the proceedings subsequent to the mandate, is undoubtedly correct in the sense in which that expression was used, with reference to the doctrine of that case. Whatever had been formerly before the court, and was disposed of by its decree, was considered as finally disposed of; and the question of interest raised upon the execution of the mandate in that case, was in that predicament. But upon all proceedings to carry into effect the decree of the court, the original proceedings are always before the court, so far as they are necessary to determine any new points or rights in controversy between the parties, which were not terminated by the original decree. The court may, therefore, inspect the original proceedings, to ascertain the merits or demerits of the parties, so far as they bear on the new claims, and must decide upon the whole examination what its duty requires. In the present case, it is impossible to separate the stipulation from the other proceedings. It is unintelligible without reference to them. The court must inspect them, to guide it in its future acts, and to enable it to carry into effect the decree of the Supreme Court. That *decree re- [*443 stores the property generally as claimed by the libelant; but what that property is, in what predicament it is, and what are the means by which it is to be restored, must be ascertained, before the court can institute any farther proceedings.

Another preliminary question is, whether the subject-matter of these claims is, in this stage of the cause, open for discussion. All the claims of Mr. Burke might certainly have been brought forward and insisted upon in the original proceedings. If his right to the property was not established, still he might be entitled to equitable deductions for meliorations or charges; and if these claims were favored by the court, the decree of restitution would have

1.—5 Cranch's Rep. 317.

2.—1 Wheat. Rep. 304, 354.

3.—1 P. Wms. 396; see also 1 Blun. Rep. 494; 9 Johns. Rep. 71; 11 Mass. Rep. 504; 1 N. H. Rep. 180.

4.—The Diana, 3 Wheat. Rep. 58; 3 Dall. Rep. 333, 336; 2 Burr. Rep. 1088; see also 1 H. Bl. 305; 3 Wils. Rep. 205; 7 Term. Rep. 124; 2 Bos. & Pull. 219; 1 Johns. Cas. 27; 1 Johns. Rep. 343; 4 Mass. Rep. 171.

been subject to these deductions. They would then have constituted a lien upon the property, and the Circuit Court must have enforced it. But no such claims were insisted upon in the written allegations, or even viva voce at the hearing; the omission was voluntary, and the decree of restitution passed in the most absolute and unconditional form. The consequences of now admitting them to be brought before this court by appeal, would be most inconvenient and mischievous in practice. It would encourage the grossest laches and delays. The party might lie by through the whole progress of the original cause until a final decree, holding the real owner out of his property, and securely enjoying, as in this case, the profits, and then start new claims for future investigation which would protract the final decision to an 444*] indefinite period. Such a *course would have a tendency justly to bring into disrepute the administration of justice, and inflict upon the innocent all the evils of expensive litigation. We think, therefore, that upon principle, every existing claim which the party has omitted to make at the hearing upon the merits and before the final decree, is to be considered as waived by him, and is not to be entertained in any future proceedings; and when a decree has been made, which is in its own terms absolute, it is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims which might have been attached to it by the court, if they had been previously brought to its notice. These remarks apply as well to the claim for freight as the other items. Mr. Burke, as the importer of the goods, would, if the carrier ship had belonged to a mere stranger, have been directly responsible for the freight, and would have been entitled to bring it forward in the original suit as an equitable charge. It can make no difference in his favor, that he was, as he now asserts himself in his petition to be, a joint owner of the vessel with Mr. Forbes. Whether, as between himself and his co-proprietor, he would be liable to pay any freight, does not appear, for the petition is naked of any proofs, and he may have occupied only his own portion of the vessel. Nor is there any evidence adduced that Mr. Forbes was really a joint owner; and in his original claim, Mr. Burke expressly asserts the vessel to be his own, in terms which imply a sole pro- 445*] prietary interest. *But without relying on these circumstances, it is sufficient to say that it is too late for Mr. Burke in any way to assert the claim for freight, and if payable at all, he must now bear the burthen occasioned by his own laches.

This view of the subject makes it wholly unnecessary to enter upon the inquiry how far Mr. Burke is an innocent possessor of the property in controversy, and, as such, entitled to equitable deductions and charges. The claim, whether a lien, or a mere equity, has been totally displaced by the unconditional decree of restitution.

The same doctrine applies to the claim of interest made by the libelant. The question was involved in the original proceedings, and the libel itself contains an express prayer for damages, as well as for restitution of the property. Damages are often given by way of interest for the illegal seizure and detention of property; and, indeed, in cases of tort, if given at all, interest partakes of the very nature of damages. The ground now assumed is, that interest ought to be given since the date of the stipulation, or, at all events, since the decree of restitution, because the claimant has had the use of the property during this period, and it is but a just compensation to the libelant for the delay and loss he has sustained by the dispossession. It might have been just and proper for the court below to have refused the delivery of the property upon stipulation, unless upon the express condition that the same should carry interest, if so decreed by the court. And, in cases of this nature, it appears *to us [*446 highly proper that such a clause should be inserted in the stipulation. But the present stipulation contains no such clause, and, therefore, so far as respects the principal and sureties, to decree it upon that, would be to include a liability not justified by its terms. It is true, that interest might be decreed against Mr. Burke personally, not as the stipulator, but as the claimant in the cause; but then it would be by way of damages for the detention or delay. In this view, it was a matter open for discussion upon the original appeal; and no interest having been then asked for or granted, the claim is finally at rest. What was matter formerly before the court cannot again be drawn into controversy.

We have considered these questions thus far upon principle. But they have been already decided by this court. The case of Rose v. Himely, 5 Cranch's Rep. 313, is directly in point. The authority of that case has not been in the slightest degree impugned, and, without overthrowing it, this court could not now entertain the present claims. We are not disposed to doubt the entire correctness of that adjudication.

The question in regard to the duties, admits of a very different consideration. The decree of restitution awards to the libelant the whole property in controversy, and nothing more. Upon the face of the proceedings it appears that the stipulation was taken for the appraised value of the property, including the duties paid to the United States by the claimant. The amount of *those duties never consti- [*447 tuted any part of the property of the libelant, or those for whom he acts. Neither he nor they have ever incurred the charge, or made the advance. And if it is now given to the libelant, it is a sum beyond the value of the property, which has been paid upon the importation without his aid, and without any injury to him or his principal. It is true, that in the hands of the claimant the property may be assumed to be worth the whole appraised value; but that value includes not only the value of the property, per se, but the amount of the duties already paid by the claimant. In receiving it, the claimant has received no more of the libelant's property than the sum, deducting the duties already paid. It has been said that the property was wrongfully brought to the United States by the claimant, and, therefore, he is not entitled to favor. This might be a satisfactory answer to any attempt of the claimant to charge the libelant with the duties as an equitable charge. But no such claim has been as-

serted; and if the court were now to decree to the libelant the whole sum in the stipulation, the decree in effect would require the claimant to pay the duties to the libelant, as well as to the government. The original decree purports no such thing It is confined to simple restitution of the property; and the proceeds substituted for that, are the net sum, deducting the duties; the market price, or appraised value, being compounded of the original value and the duties. These observations are confined to 448*] a case, where the error in the *stipulation is apparent upon the face of the proceedings; and it would be dangerous, as well as improper, to entertain the question, where the evidence must be sought from extrinsic sources. Upon the whole, the decree of the Circuit Court is affirmed as to all things, except the disallowance of the claim for the deduction of duties, and as to that, it is reversed; and it is ordered that the libelant have restitution of the net appraised value, deducting the duties; and that as to so much thereof as has not been already paid to him, interest be allowed to him at the rate of six per cent. per annum, from the time of the allowance of the present appeal, unto the final execution of this decree, and that the stipulation stand security therefor.

Decree.—this cause came on, etc. On consideration whereof, it is ordered, adjudged and decreed, that the decree of the Circuit Court in the premises be, and hereby is, affirmed, except in disallowing the item stated in the petition of the claimants, paid for duties, and except so far as is otherwise directed by this decree; and this court, proceeding to pass such decree as the Circuit Court ought to have given, do hereby further order, adjudge and decree, that the said items of duties, amounting to the sum of nineteen hundred and forty-five dollars and fourteen cents, be deducted from the appraised value of the property, as ascertained in the stipulation; and that the libelant have restitution of the residue of the appraised value; and that upon so much of the 449*] *said residue as has not already been paid to the libelant, interest at the rate of six per centum per annum be allowed to the libelant, from the time of the present appeal until this present decree shall be executed upon mandate by the Circuit Court, together with all the costs of suit on the present as on the original appeal; and that the said stipulation do stand as security therefor; and that the Circuit Court do award execution upon the said stipulation, for the amount of principal and interest so ordered, adjudged and decreed.

[Covenant. Pleading.]

DAY et al. v. CHISM.

In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount; but no formal terms are prescribed in which the averment is to be made.

Where it was averred in such a declaration, "that the said O. had not a good and sufficient title to the said tract of land, and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises by due course of law," it was held sufficient as a substantial averment of an eviction by title paramount.

Where the plaintiffs declared in covenant both as heirs and devisees, without showing in particular how they were heirs, and without setting out the will, it was held not to be fatal on a general demurrer.

Such a defect may be amended under the 32d section of the judiciary act of 1789, c. 20.

ERROR to the Circuit Court of Tennessee.

*This cause was argued by Mr. Bibb [*450 for the plaintiff in error, and by Mr. Eaton for the defendant in error.

Mr. Chief Justice Marshall delivered the opinion of the court:

This is an action of covenant brought by the heirs and devisees of Nathaniel Day, in the court for the seventh circuit, for the district of Tennessee, on a covenant contained in a deed from the defendant to the said Nathaniel Day, purporting to convey a tract of land therein mentioned. The declaration, which contains six counts, states the covenant in the fourth in the following words: That the said Obadiah Chism, the defendant, "then and there, by the said indenture, covenanted and agreed with the said Nathaniel Day, his heirs and assigns, to warrant and defend the title to the said premises against the claim of all and every other person whatsoever, as his own proper right in fee-simple." In the fifth count, the covenant alleged is, "to warrant and defend the land against all and every person whatever."

In some of the counts, the only breach assigned is want of title in the defendant. The fourth and fifth counts charge that "the said Obadiah, the defendant, hath not kept and performed his covenant so made with the said Nathaniel aforesaid, with the said Nathaniel in his life-time, nor with the plaintiffs since his death, but hath broken it, in this, that he hath not warranted and defended the title to said premises, described in said covenant, *against all and every person whatso- [*451 ever, to said Nathaniel Day, his heirs and assigns; and also in this, that the said Obadiah had no title to said tract of land, but it was vested in the state of Tennessee; and the said plaintiffs aver that by reason of the said want of title in said Obadiah, the said Nathaniel, in his life-time, and the plaintiffs, since his death, were unable to obtain possession thereof, or to derive any benefit therefrom; and also in this, that the said Obadiah had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law; and also in this, that the said Obadiah had no title to the said premises, but the same was in the state of North Carolina, by reason whereof the said Nathaniel, in his life-time, and the plaintiffs, since his death, were and are unable to obtain possession of the said premises.

The defendant demurred to the declaration, and assigned for cause of demurrer, that (1st) "it does not appear in and by the said declaration, any averment or allegation therein, that the said plaintiffs have been evicted by a title

paramount to the title of the defendant; and (2d) the said declaration is, in other respects, defective, uncertain and informal."

The covenant stated in the declaration is, we think, a covenant of warranty, and not a covenant of seisin, or that the vendor has title. In an action on such a covenant, it is undoubtedly necessary to allege, substantially, an eviction by title paramount, but we do not think 452*] that any *formal words are prescribed, in which this allegation is to be made. It is not necessary to say, in terms, that the plaintiff had been evicted by a title paramount to that of the defendants. In this case, we think such an eviction is averred substantially. The plaintiffs aver "that the said Obadiah had not a good and sufficient title to the said tract of land; and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises by due course of law." This averment, we think, contains all the facts which constitute an eviction by title paramount. The person who, from want of title, is dispossessed and ousted by due course of law, must, we think, be evicted by title paramount.

We think, then, that the special cause assigned for the demurrer will not sustain it.

There are other defects in the declaration which are supposed by the counsel for the defendants in error to be sufficient to support the judgment. The plaintiffs claim both as heirs and devisees, and do not show in particular how they are heirs, nor do they set out the will.

It is undoubtedly true, that their title cannot be in both characters, and that the will, if it passes the estate differently from what it would pass at law, defeats their title as heirs. But a man may devise lands to his heirs, and the statement that they are his heirs, as well as his devisees, though not a strictly artificial mode of declaring, is an error of form and not of substance. Of the same character is, we think, the omission to show how the plaintiffs are heirs, or 453*] to set out the will. Although *in the case of Denham v. Stephenson, 1 Salk. 355; 6 Mod. 241, the court says "that where H sues as heir, he must show his pedigree, and coment heres, for it lies in his proper knowledge," the court does not say that the omission to do this would be fatal on a general demurrer, or that it is an error in substance. The plaintiff must show how he is heir on the trial; and the 32d sec. of the judiciary act of 1789, c. 20, applies, we think, to omissions of this description. The judgment may be given, "according to the right of the cause, and matter in law," although the declaration may not show whether the plaintiff is the son or brother of his ancestor, or may not set out the will at large. An averment that he is the heir or the devisee, avers substantially a valid title, which it is incumbent on him to prove at the trial.

The declaration presents another objection, respecting which the court has felt considerable difficulty. In the same count, breaches are assigned, which are directly repugnant to each other. The plaintiffs allege that from the defect of title in the vendor, they have not been able to obtain possession of the premises; and also that they have been dispossessed of those premises by due course of law. These averments are in opposition to each other. But the allegation that possession has never been obtained is immaterial, because not a breach of the covenant, and, the majority of the court is disposed to think, may be disregarded on a general demurrer.

*It is the opinion of the court that [*454 the fourth and fifth counts, however informal, have substance enough in them to be maintained against a general demurrer, and that the judgment must be reversed, and the cause remanded for further proceedings. It will be in the power of the Circuit Court to allow the parties to amend their pleadings.

Judgment reversed accordingly.

[Local Law.]

M'DOWELL v. PEYTON et al.

The following entry, "J. T. enters 10,000 acres of land, on part of a treasury warrant, No. 9739, to be laid off in one or more surveys, lying between Stoner's Fork and Hingston's Fork, about six or seven miles nearly north-east of Harrod's Lick, at two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hingston's Fork, on the east side of the branch then running a line from said ash saplings, south 45 degrees east, 1,600 poles; thence extending from each end of this line north 45 degrees east, down the branch, until a line nearly parallel to the beginning line shall include the quantity of vacant land, exclusive of prior claims," is not a valid entry, there being no proof that the "two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hingston's Fork," had acquired sufficient notoriety to constitute a valid call for the beginning of an entry, without further aid than is afforded by the information that the land lies between those forks.

APPEAL from the Circuit Court of Kentucky.

This cause was argued by Mr. Wickiffe for *the appellant, and by Mr. Talbot for [*455 the respondents.

Mr. Chief Justice Marshall delivered the opinion of the court:

This is an appeal from a decree pronounced in the court of the United States for the seventh circuit and district of Kentucky, dismissing a bill brought by the plaintiff, to obtain a conveyance for a tract of land in possession of the defendant under an elder grant, to which the plaintiff claims to have the superior equitable title. The defendant rests on his patent; and as the entry under which the plaintiff claims was made before that patent issued, the cause depends essentially on the validity of the entry. It is in these words:

Dec. 24th, 1782.—"John Tabb enters 10,000 acres of land, on part of a treasury warrant, No. 9739, to be laid off in one or more surveys, lying between Stoner's Fork and Hingston's Fork, beginning about six or seven miles nearly north-east of Harrod's Lick, at two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hingston's Fork, on the east side of the branch; then running a line from said ash saplings, south 45 degrees east, 1,600 poles; thence extending from each end of this line north 45 degrees east, down the branch, until a line nearly parallel to the beginning line shall include the quantity of vacant land, exclusive of prior claims."

The counsel for the defendant insists that 456*] this *entry is invalid, because it does not describe the land with that certainty which is required by the land law of Kentucky. They contend that the description given to find the beginning is false, and calculated to mislead a subsequent locator.

Harrod's Lick, Stoner's Fork and Hingston's Fork are proved to have been objects well known by those names at the date of the entry, and serve as a general description of the country in which the land lies; but it is not shown that the two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hingston's Fork, had acquired sufficient notoriety to constitute a valid call for the beginning of an entry, without further aid than is afforded by the information that the land lies between these forks. Its identity is proved, but the decisions on the act of 1779 require notoriety as well as identity. The plaintiffs' counsel maintain that there are descriptive words in the entry sufficient to bring a person, using reasonable diligence, and searching for this beginning, near enough to it to find the two white-ash saplings. Those descriptive words are: "Beginning about six or seven miles nearly north-east of Harrod's Lick, at two white-ash saplings, etc., standing at the forks of a west branch of Hingston's Fork, on the east side of the branch." The information which is to guide a subsequent locator to the white-ash saplings, is the course and distance from Harrod's Lick, and the forks of a west branch of Hingston's Fork.

A survey was made by the order of the 457*] court, *and the plat shows that the saplings mentioned in the entry are three miles and one hundred and forty-five poles from Harrod's Lick, and that the course which leads to them is north 53 degrees east. The real distance, then, is about one-half the distance called for in the entry, and the course varies eight degrees.

To obviate the objection founded on this variance, the plaintiff alleges the distinction between the descriptive and locative calls of an entry. The purpose of the first is to bring the subsequent locator into the neighborhood of the land he means to avoid, and that of the second is to find the land already appropriated, so as to enable him to appropriate the adjacent residuum. The precision, therefore, which is necessary in a locative call, has never been required in that which is descriptive.

The correctness of this principle is not controverted. Still, it is necessary that the descriptive calls should designate the place so nearly, as to give information which would enable a subsequent locator of ordinary intelligence to find the land previously entered, by making a reasonable search. It will not be pretended that in such a case as this, exactness in distance or in course would be indispensable to the validity of the entry; but distance and course are both intended to lead to the ash saplings, and, if unaided by other description, could alone be regarded by the person who should search for them. He would pursue a north-east course at least six miles from Harrod's Lick; and not finding a western branch 458*] *of Hingston, would search for such a stream in every direction, from the place to which he was conducted by his course and distance. In an unexplored country, covered with cane and other wood, it would be extremely difficult to find an object far from being conspicuous, at a distance of two or three miles, and would require more time and labor than ought to be imposed on a person desirous of appropriating the adjacent residuum. The counsel for the plaintiffs would not attempt to support such an entry; but they contend that the error in both course and distance is corrected by other parts of the entry, and by the situation of objects to which the attention is directed.

The land is required to lie between Stoner and Hingston; and the person who should pursue a north-east direction from Harrod's Lick, in search of it, would strike Hingston at the distance of five and one-eighth miles. He would, consequently, know that he had passed the ash saplings, and would return in search of them. His search would be directed to a western branch of Hingston, at the forks of which the two white-ash saplings would be found. It is contended that this description would lead the inquirer to the mouth of Clear Creek, proceeding up which, he would find at one of its forks the white-ash saplings, at which Tabb's entry begins.

If this statement was strictly accurate, there would certainly be great force in the argument founded on it. With certain information that Clear Creek was called for in the entry, and that *its beginning was at a place [*459 so well described as to be known when seen, it might not, perhaps, be too much to require the person desirous of acquiring adjacent land to trace that creek to the forks at which the saplings stand. But the inquirer is not directed to Clear Creek. He is directed to a western branch of Hingston, and two branches empty into that stream, the one above and the other below the point, at which a north-east course from Harrod's Lick would strike it, and about equi distant from that point. There is no expression in the entry which would, in the first instance, direct the inquirer to Clear Creek, on which the saplings stand, in preference to Brush Creek, on which they do not stand. His attention would be rather directed to Brush Creek, by a circumstance which is undoubtedly entitled to consideration, and has always received it in Kentucky. It is this: Clear Creek had, at the time this entry was made, an appropriate name, which distinguished it from the other western branches of Hingston; and a locater, intending to place his beginning on that creek, might be reasonably expected to call it by its appropriate name, and not to refer to it by a general description which it possessed in common with many other streams. The inquirer, therefore, would proceed, in the first instance, to Brush Creek, because that creek would be designated, when Tabb's entry was made, only as a western branch of Hingston. The plaintiff contends that this error would soon be corrected, because the entry calls for a north-east course to run down the branch, and Brush *Creek bends so [*460 much at a small distance from its mouth, so as to satisfy the inquirer that this could not be the stream intended by the entry. With the

plat before us, we can readily make this discovery. But a person unacquainted with the course of Brush Creek, would not make it until he had proceeded up it a considerable distance. He could not know, till he had done so, that the creek would not again change its course, and pursue a south-western direction. If, after making this discovery, he should go to Clear Creek, he would find its first course from Hingston a very discouraging one; nor would its course be adapted to the call of the entry until he came within a very short distance of the fork at which the saplings stand. Add to this, Clear Creek appears to fork several times before reaching the saplings; and at each of these forks, an accurate search must be made before the inquirer would proceed farther up the creek.

The course and distance from Harrod's Lick, mentioned in the entry, are calculated to mislead a person desirous of knowing the land it designates; and although these errors might unquestionably be corrected by other parts of the description, which would conduct us with reasonable certainty to the beginning, it may well be doubted whether the whole of this entry, taking all its parts together, and combining them, contains such reasonable certainty. Had it been now, for the first time, brought before a court for adjudication, it is liable to such great and serious objections that 461*] it would most probably be *pronounced invalid. But the highest court of Kentucky has already given this decision; and this court has always conformed to that construction of the legislative acts of a state, which has been given by its own courts. This general principle is entitled to peculiar consideration, when it applies to an act which regulates titles to land.

The case of Cochran v. Thomas, reported in Hardin, 261, depended on the validity of this entry, and in that case, the court decided against its validity. The authority of this decision has been questioned on several grounds.

1st. It was made by only two judges, when the court consisted of four, the others being interested.

Had a contrary opinion been avowed by both or either of the other judges, or by any judge since this decision was made, its authority would undoubtedly be much impaired, if not entirely annulled. But no such contrary opinion has been expressed, although the decree in Couchman v. Thomas was pronounced in the spring term of 1808. Since then it was made by a tribunal, which was at the time legally constituted, and has remained unquestioned for sixteen years. This court must admit its authority in like manner as if it had received the formal approbation of a majority of the judges.

2d. A second objection is, that it is a single decision; and the courts of Kentucky do not consider themselves as bound by a single decision, if its principles are believed, on more ma- 462*] ture *deliberation, to be unsound. Those courts, we are informed, have often given different decisions on the same entry, when brought before them in a different case, prepared with more care.

That different decisions will be often made on the same entry, can excite no surprise when it is recollected that the validity of an entry does not depend entirely on its own terms, but on the application of those terms to external objects, and the general notoriety of those objects, as proved by the testimony in each case. If in one case, the party claiming under an entry had neglected to prove the notoriety of some material call, by the notoriety of which its certainty was to be established, in consequence of which defect the entry was declared to be invalid, this could constitute no reason for pronouncing the same decision in another case, between different parties, who had been careful to bring before the court ample testimony of the fact on which the cause must depend. This difference of decision would constitute no difference of principle.

But the court can perceive no new testimony in the case under consideration, which can vary it to the advantage of the plaintiff, from the case of Couchman v. Thomas.

It may be very true that a single decision cannot be permitted to shake settled principles, and that this court ought not to consider one judgment as overturning well established doctrines, and introducing a new course of opinion. But, certainly, a decision on the very point which has remained for many years unquestioned, has the *first impression in [*463 its favor, and must be proved to overturn established principles before this court can disregard it.

The land law of Kentucky requires that the holder of a land warrant shall locate it "so specially and precisely that others may be enabled with certainty to locate other warrants on the adjacent residuum."

In construing this provision of the law, courts have always inclined to support entries, where this inclination could be indulged consistently with the provision itself; but they have always supposed a reasonable degree of precision and certainty to be indispensable to the validity of every entry.

They have laid down great general principles, in the application of which to particular cases, the shades of difference are as numerous and as nice as in the application of the principle that the intention of the testator shall govern, to the words of a will.

The description of the land to be acquired, which every entry must contain, may be divided into general and special. The general description must be such as to bring the holder of a warrant to be located into the neighborhood of the land already appropriated, and such as to enable him to find that land with reasonable diligence; the special description, or, in the technical language of the country, the locative calls of the entry, must be such as to ascertain and identify the land. All the cases recognize these principles, and claim to come within them.

*The counsel for the plaintiff has [*464 cited many cases in which entries have been sustained, although the whole description they contain has not been precisely accurate.

The court has examined these cases, and is of opinion that in all of them, although the description may be in part defective and uncertain, such defect and uncertainty have been cured by other calls, which afford all the information, that could be reasonably required. An example of this is furnished by the case of Taylor v. Kincaid (Hardin, 82). The entry

was made "on the head of Willis Lee's branch, four miles from Leesburg," and was sustained, although the head of the branch was, in truth, eleven miles from Leesburg. In this case, however, the mistake in the distance was corrected by the notoriety of the object itself. Willis Lee's branch, at the time, and before the location was made, was so notorious that the inquirer could not be misled by the mistake in the distance. That a part of the description which is erroneous, may be discarded, if the object called for is itself so notorious that it requires no aid from description, and cannot be mistaken; and that such part will not vitiate the entry, may be admitted, without impugning the judgment in the case of Couchman v. Thomas. Tabb's entry contains no descriptive call which would conduct the inquirer to the white-ash saplings he is in search of, and the saplings themselves were not objects of sufficient notoriety to cure the defects in the general description.

Decree affirmed.

465*] [*Local Law.]

DARBY'S LESSEE v. MAYER et al.

Quære. How far a will of lands, duly proved and recorded in one state, so as to be evidence in the courts of that state, is thereby rendered evidence in the courts of another state (provided the record on its face shows that it possesses all the solemnities required by the laws of the state where the land lies), under the 4th art., sec. 1, of the constitution of the United States.

The local law of Maryland, as to the effect of evidence of the probate of a will of lands, in an action of ejectment, is the same with the common law.

A duly certified copy of a will of lands, and the probate thereof, in the Orphan's Court of Maryland is not evidence in an action of ejectment, of a devise of lands in Tennessee.

ERROR to the Circuit Court of West Tennessee.

This cause was argued by Mr. Bibb and Mr. Isaacs for the plaintiff in error, and by Mr. White and Mr. D. Hoffman for the defendants in error. But as the judgment turned only on a single point, and does not finally dispose of the cause, it has not been thought necessary to report the argument.

Mr. Justice Johnson delivered the opinion of the court:

This was an action of ejectment, in which the present plaintiff was plaintiff in the court below. His title is derived through a patent to one John Rice, and successive conveyances down to himself, *which it is immateri- [*466 al to recapitulate, since no question arises upon this part of the evidence. The defense set up was the statute of limitations, and in order to bring himself within its provisions, the defendant received the patent under which the plaintiff claims, as the patent for his own land, and undertakes to connect himself with it. This gave rise to a variety of exceptions taken by the plaintiff to the evidence offered by the defendant for this purpose, to which the defendant replies, that should he have failed in establishing a connection by a chain of title, he has complied with the statute notwithstanding, by proving his possession within the patent issued to Rice, which, he contends, is all the connection with a patent which the law requires.

One of the grounds of exception made by the plaintiff is, that the evidence of the defendant proves his possession to be upon a tract of land essentially different from that which the patent covers. And not a little difficulty has existed on this part of the case, to understand the counsel when discussing the question of identity. All this has arisen from omitting to have the locus in quo established by a survey; an omission to which the court takes this opportunity to express its disapprobation. It is true that the case upon this bill of exceptions can be disposed of without such a survey, but great facility would have been afforded by a survey, in understanding the discussion, which, without it, was scarcely intelligible. It is very obvious, when we refer to the patent to Rice under which the plaintiff claims, *and the entry to Ramsey through which [*467 the defendant deduces title, both of which are made parts of the bill of exceptions, that they do not describe the same land. On the contrary, that to Rice, calling for the entry to

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NOTE.—The title to land by devise can be acquired only under a will duly proved according to the state or country where the land lies. The probate of one state or country is of no validity as affecting the title to lands in another. McCormick v. Sullivant, ante, 192.

The judgments of tribunals cannot, as a general rule, operate beyond the territorial limits of the government or nation to which such tribunals belong. Platt v. Oliver, 2 McLean, 267.

The title to real property, and all modes of disposing of it, must be exclusively governed by the laws of the country where it is situated. U. S. v. Crosby, 7 Cranch, 115; Clark v. Graham, 6 Wheat. 577; Johnson v. McIntosh, 8 Wheat. 543; Kerr v. Morn, 9 Wheat. 565; Oakley v. Bennett, 11 How. 33; Soc'y, etc., v. Wheeler, 2 Gall. 105; See further the notes to Elmendorf v. Taylor, ante 152, and to Clark v. Graham, 6 Wheat. 577.

A will regularly proved in another state, in strict conformity with the laws of that state, acquires, if it possess the other legal requisites, a binding efficacy in Virginia, so that it may be admitted to record. Carter v. Cutting, 8 Cranch, 251.

It is not necessary that an executor of a will, made in Virginia, devising to him land in Kentucky, should take out letters testamentary in Kentucky to enable him to maintain ejectment for it. Doe v. McFarland, 9 Cranch, 151.

The copy of a will of lands lying in Pennsylvania, made in New York, proved before the surrogate of New York by one of the subscribing witnesses who also proved that the other two witnesses attested the same in the presence of the testator, authenticated under the seal of the surrogate's office, and entered in the office of the register general of Pennsylvania, is not admissible in evidence in Pennsylvania. In all cases, no matter where the will is proved, if it concern land in Pennsylvania, it must be proved by two witnesses. Hylton v. Brown, 1 Wash. C. C. 204.

Where a suit in one state brings incidentally in question the title to land held under devise in another state, it is not necessary that there should be probate of the will in the state where the suit is brought, before it can be used as evidence of title. Slack v. Walcott, 3 Mas. 508.

A testamentary paper executed in a foreign country, although executed so as to give it the effect of a last will by the foreign law, cannot be made the foundation of a suit for a legacy in the courts of this country, until it has received probate here in the courts having the peculiar jurisdiction over wills. Armstrong v. Lear, 12 Wheat. 169.

Ramsay as its eastern boundary, must necessarily lie without it.

However, we are of opinion that we are not now at liberty to notice this inconsistency. The bill of exceptions states that the plaintiff proved the defendant in possession of the land granted to Rice, and the defendant proved himself in possession of the land entered to Ramsay, both concurring in the fact that the land in the defendant's possession was the land in controversy; from which it certainly results that Rice held a patent for Ramsay's entry. But the defendant having no patent, the other has, of course, the legal estate in him, which may be barred by the defendant's possession, if he brings himself within the provisions of the statute.

In order to connect himself with the patent, the defendant proved a sale of the inchoate interest of John Rice to one Solomon Kitts, and the next link in his title depended upon the will of Solomon Kitts. To prove that Kitts devised the land to the trustees through whom defendant made title, a copy and probate of the will of Kitts was produced in evidence, duly certified from the Orphan's Court of Baltimore county, Maryland, in which, it seems, the will had been recently proved and recorded. This evidence was excepted to, but the court overruled the exception, and it went to the jury.

468*] *The question is, whether the evidence thus offered was legal evidence of a devise of land.

The common law doctrine on this subject no one contests; the ordinary's probate was no evidence of the execution of the will in ejectment. Where the will itself was in existence, and could be produced, it was necessary to produce it; when the will was lost, or could not be procured to be produced in evidence, secondary evidence was necessarily resorted to, according to the nature of the case. But whatever proof was made, was required to be made before the court that tried the cause; the proof before the ordinary being ex-parte, and the heir-at-law having had no opportunity to cross-examine the witnesses; neither were the same solemnities required to admit the will to probate as were indispensable to give it validity as a devise of real estate. At first it was a question of controversy between the common law and ecclesiastical courts, whether a will, containing a devise of lands, should not be precluded from probate, although containing a bequest of personalty also. And the question was one of serious import, since the common law courts required the production of the original, whereas the consequence of probate was, that the original should be consigned to the archives of the court that proved it. This was at length compromised, and the practice introduced of delivering out the will, when necessary, upon security to return it.

Upon general principles, there is no question that lands in Tennessee must, in all re-469*] spects, be *subject to the land laws of Tennessee. Their laws affecting devises, and the rules of their courts respecting evidence in ejectment, must be the law of this case, as far as the constitution of the United States does not control the one or the other.

With regard to the modification under which the right of devising may be exercised, there is no question that the power of the state is unlimited; and wills of realty, wherever executed, must conform to the laws of Tennessee. The right of determining whether its laws have been complied with in this respect, is a necessary result from the power of passing those laws. But in this respect, it has been supposed that the right of the states is in some measure controlled by that article of the constitution which declares "that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." And hence that a will of lands duly recorded in one state, so as to be evidence in the courts of that state, is rendered evidence thereby in the court of every other state; provided the record, on the face of it, shows that it possessed the solemnities required by the laws of the state where the land lies.

As this is a question of some delicacy, as it relates to devises of lands, the court passes it over at present, being induced to adopt the opinion that the rule could not be applied to this case, since the laws of Maryland do not make the probate here offered evidence in a land-cause in the courts of that state.

*That the law of Maryland, with re- [*470
gard to the evidence of a devise in ejectment, is the common law of England, is clearly recognized in the case of Smith's Lessee v. Steele (1 Harris and M'Henry, 419). In that case, as in this, a copy of the will and probate were offered in evidence, and was supported by proof of the loss of the original will from the office of probates. Yet the whole argument turns, not on the admission of the copy and probate per se, but whether admissible at all to prove the existence and contents of the original will. And the court declare, in permitting it to be read in evidence to the jury, that they are at liberty to find for or against the original will, not holding them bound from the production of the probate to find for the plaintiffs. It is observable also in that case, that it is yielded in argument throughout, that the admission of the probate could only be sustained on the idea that the acts of 1704 and 1715, now no more in force, permitted the ordinary to take probate of wills of land. But it has been supposed that the Maryland law of probates of 1798 has, by express enactment, made such probates evidence in their own courts. And had it been shown that such had been the established construction of that law, and the practice of the state courts under it, this court would not have hesitated to relinquish their own views on the correct construction to be given to that clause.

As it is, we must pursue the suggestions of our own minds with regard to the legal construction of the act.

*The clause alluded to is the 4th [*471
sec., ch. 2, art. 3, of the act in question, and is in these words: "An attested copy, under the seal of office, of any will, testament or codicil recorded in any office authorized to record the same, shall be admitted in evidence in any court of law or equity, provided that the execution of the original will or codicil be subject to be contested until a probate hath been had according to this act."

It is true that the generality of the terms in the first lines of this clause is such as would, if unrestricted by the context, embrace wills of lands. It is also true that the previous chapter in the same article prescribes the formalities necessary to give validity to devises of real estate; it is further true that the previous sections of the second chapter indicate the means, and impose the duty of delivering up wills of all descriptions to the register of the Court of Probates, for safe keeping, after the death of the testator, and until they shall be demanded by some person authorized to demand them for the purpose of proving them.

But it is equally true that the act does not authorize the registering of any will without probate. Nor does it, in any one of its provisions, relate to the probate of any wills, except wills of goods and chattels.

The clause recited makes evidence of such wills only as are recorded in the offices of courts authorized to record them. But when the power of taking probate is expressly limited to the probate of wills of goods and chat-472*] tels, we see not *with what propriety the meaning of the clause in question can be extended to wills of any other description. The Orphan's Court may take probates of wills though they affect lands, provided they also affect goods and chattels; but the will, nevertheless, is conclusively established only as to the personalty. Unless the words be explicit and imperative to the contrary, the construction must necessarily conform to the existing laws of the state on the subject of wills of real estate. And when the power of taking probates is confined to wills of personalty, we think the construction of the clause recited must be limited by the context.

We are therefore of opinion that there was nothing in the law of Maryland which could, under the constitution, make the document offered to prove this will per se evidence in a land cause. Nor does there appear to exist any rule of law in Tennessee which could make such a document good evidence under the laws of that state.

Since, therefore, the charge of the court was general in favor of the defendants, and the effect of each particular piece of evidence upon the minds of the jury cannot be discriminated, this opinion disposes of the whole cause.

The case presents several other, and very important questions, but the court will at present decline remarking on them.

Judgment reversed, and a venire facias de novo awarded.

473*] [*Instance Court. Practice.]

J. MANRO et al.

v.

JOSEPH ALMEIDA, and the goods, chattels and credits of the said Almeida.

The courts of the United States, proceeding as courts of admiralty and maritime jurisdiction, have jurisdiction in cases of maritime torts, in personam as well as in rem.

The courts of the United States, proceeding as courts of admiralty and maritime jurisdiction, may issue the process of attachment to compel appearance, both in cases of maritime torts and contracts.

Under the process act of 1792, c. 137 (XXXVI.), s. 2, the proceedings in cases of admiralty and maritime jurisdiction in the courts of the United States are to be according to the modified admiralty practice in our own country engrafted upon the British practice; and it is not a sufficient reason for rejecting a particular process, which has been constantly used in the admiralty courts of this country, that it has fallen into desuetude in England.

The process by attachment may issue, wherever the defendant has concealed himself or absconded from the country, and the goods to be attached are within the jurisdiction of the admiralty.

It may issue against his goods and chattels, and against his credits and effects in the hands of third persons.

The remedy by attachment in the admiralty, in maritime cases, applies even where the same goods are liable to the process of foreign attachment, issuing from the courts of common law.

It applies to the case of a piratical capture, and the civil remedy is not merged in the criminal offense.

In case of default, the property attached may be condemned to answer the demand of the libelant.

It is not necessary that the property to be attached should be specified in the libel.

It seems, that an attachment cannot issue without an express order of the judge, but it may be issued simultaneously with the monition; and where the attachment issued in this manner, and in pursuance of the prayer of the libel, this court will presume that it was regularly issued.

*APPEAL from the Circuit Court of [*474 Maryland.

This was a libel filed in the District Court by the appellants, resident merchants of Baltimore, against the respondent, Almeida, charging him with having forcibly and piratically taken from on board a certain vessel, off the capes of the Chesapeake, and within the territorial limits of the United States, the sum of $5,000, in specie, belonging to the appellants, and converted the same to his own use, without bringing it into any port or place for adjudication. The libel further stated that the said Almeida had absconded from the United States, and fled beyond the jurisdiction of the court, and that no means of redress remained for the libelants, unless by process of attachment against the goods, chattels and credits of the said Almeida, which were also about to be removed, by his orders, to foreign parts. The libel also prayed a personal monition, and likewise viis et modis, and that the respondent might answer the premises on oath, and be compelled to pay the appellants the said sum of $5,000 and damages; and in default thereof, that his goods, chattels and credits, when attached, be condemned to answer the premises, etc. The marshal returned, that he had attached certain goods and chattels of the said Almeida; that the said Almeida was not to be found within the district, and that he had left a copy of the monition at the late dwelling house of Almeida, and had affixed it at the public exchange, *and on the [*475 mast of the vessel containing the goods and chattels attached by him. But although the transcript of the record contained a petition for the sale of the attached goods, and an order of the court denying the prayer of the petition, yet it did not appear by the record by what authority the attachment issued. But it appeared, by the admission of counsel at the hearing, that the attachment had been issued by the clerk of the District Court, as a process of course, without any particular order of the judge. The respondent appeared by a proctor of the court, and demurred to the libel. On the argument of the demurrer, the District Court dismissed the libel, and ordered that the goods,

chattels, and credits attached, should be restored with costs. This decree being affirmed, pro forma, by the Circuit Court, the cause was brought by appeal to this court.

Mr. Hoffman and Mr. Mayer, for the appellants, argued, (1) that on principle the process of attachment must be considered as peculiarly applicable in admiralty proceedings. As the court acts habitually in rem, the proceeding by attachment very naturally became a part of its practice. Hence it was often resorted to in early times in England; but the courts of common law, influenced by an illiberal and jealous spirit, have graudally encroached upon the admiralty judicature; and, we may readily believe, as we are told, that it has fallen into 476*] desuetude *in that county.[1] But this does not prove that its legal existence is extinguished. It is still in use on the European continent, whence the local customs of London and Exeter were also derived; the principle being, that persons are to be reached by justice through the medium of their property, as well as by direct proceedings in personam; and though there are some exceptions to the application of this principle, yet it is universally applied to the case of absconding debtors.[2] Contrary to the opinion of Huberus, the proceeding by attachment was known to the civil law, and is expressly provided for by the Digest, in the case of an absconding defendant.

2. It has been said, that if the proceeding by attachment, in the admiralty, be applicable to cases of contract, it cannot properly be applied to a tort such as the present. But there is no authority to sustain such a distinction. In Clerke's Praxis no distinction is laid down between tort and debt; but the course of proceeding is intimated in that book as applicable to both; and the language in 2 Bro. 434, includes all grievances and claims whether of contract or tort.[3] In this country, however, it has been expressly adjudged to extend to tort as well as debt.[4] It may be admitted that where the tort 477*] *is of so indefinite a character that it can be reduced to no certain estimate, attachment will not lie. But here there is an obvious standard for determining the amount of the wrong, and liquidating the damages. The property taken consisted of specie dollars. Where a tort can be thus defined, attachments have been allowed even from the courts of common law.[5] Res non per se invicem sed per pecuniam estimatur, et non pecunia per res. Even before the statute of Marlbridge, for remedy in excessive distresses where money was taken in such cases, trespass would lie; because money is the measure of its own value, and of every wrong concerning it.[6] There is, then, here, as much certainty in the demand, from the nature of the wrong, as is required in debt. The appellants do not sue as for a "tort," by that name; but they state their complaint, and leave it to the court to give it the benefit of such technical forms as are appropriate to the case. Even at common law, they might have devested their claim of all the formal characteristics of tort, and given it the qualities of contract and the certainty of debt. The wrong concerning money exclusively, they might have brought indebitatus assumpsit for money had and received, instead of trespass for money taken and carried away. A court of admiralty, with its characteristic liberality, will regard their claim as *having assumed [*478 this technical form, if it be necessary for the purposes of justice.

3. Even if the process issued irregularly in this case, for want of a previous special application to the judge, it is now too late to object to the irregularity, since the appearance of the defendant cures all formal defects in the process.[7] But the equitable maxim, that what ought to be done will be considered as done, is applicable in a court of admiralty; and if the claim be so verified as that the process of attachment ought to have issued, the court will consider it as having duly issued. Quod fieri non debit factum valet, is a maxim applicable to the omission of acts merely directory and formal in their nature. It may be that the course of the English High Court of Admiralty requires a previous application to the judge to authorize the issuing an attachment, but such is not the practice in the United States. The irregularity might have been taken advantage of by an exception, in the nature of a plea in abatement, or by a motion to set aside the process, but not upon demurrer, as here attempted.

4. This is a complaint cognizable on the instance side of the court, and not of prize jurisdiction. The libel alleges a capture within the territorial jurisdiction of this country, and, therefore, a violation of its neutrality. It is then not a case of ordinary belligerent capture, involving the rights of war, and requiring the cognizance *of the prize court. A mere [*479 maritime tort is out of the sphere of the prize jurisdiction, which is confined to captures jure belli. The libel here charges a piratical taking, and not a capture jure belli. The act of 1794, c. 50, s. 6, authorizes the district courts to take cognizance of all cases of capture within our waters. It brings them within the civil or instance jurisdiction of the admiralty, and does not consider such cases as subjects of prize jurisdiction, which had already been vested in the district courts.

5. The civil remedy in this case is not merged in the piracy charged as the wrong of which the appellants complain.[8] That doctrine only applies to cases of felony and treason; and takes its rise from the policy of the ancient common law, to compel the despoiled party to prosecute his appeal for robbery, and to prevent the compounding of felonies. Piracy is not felony at common law, nor has it all the common law incidents of felony, although in some cases it is expressly declared by statute to be felony, although the stat. 28 Hen. VIII. ch. 15, makes

1.—2 Bro. Civ. and Adm. Law, 338.
2.—Van Leeuwen's Rom. Dutch Law, 542, 543, 546, 548.
3.—Hall's Adm. Pract. 60, 61, 63, 70, 78, 82, 89.
4.—Bee's Adm. Rep. 60, 64, 141, 186; 2 Gallis. Rep. 41; Del Col v. Arnold, 3 Dall. 333; The Cassius, 3 Dall. 123; 2 Sir L. Jenkins' Works, 714, 754.
5.—Sergeant's Law of Attach. 44; 2 Bro. Pennsylv. Rep. 28, Appendix; 5 Serg. & Rawle, 450; 3 Term Rep. 338.
6.—2 Bac. Abr. tit. Distress; 1 Burr. 590; 2 Str. 281.
7.—3 Cranch, 496; 4 Cranch, 421.
8.—Co. Litt. 111, 112; 5 Term. Rep. 175; 4 Bl. Com. 70, 268, 362; 14 Johns. Rep. 268; 2 Bro. Civ. & Adm. Law, 110.

piracy triable according to the course of the common law, yet it has not been interpreted to place it on the footing, and give it the technical qualities, of felony. A pardon of felonies, since this statute, does not, ex vi termini, include piracy.[1] The act of Congress goes no farther, 480*] in identifying *piracy with felony, than the statute of Henry does. An attachment against a pirate's goods, for a robbery committed by him, was known to the earlier periods of the law, and there was a writ from chancery to authorize it.[2] But it is clear that the doctrine of merger cannot be applied to the case of a pirate absconding from justice, and where the individual sufferer cannot prosecute him criminally. Such is understood to be the recently adjudged law in England, even in respect to a felony at common law.

6. It was unnecessary that the attachment should specify the goods to be attached. No rule of practice prescribes it, and no principle of convenience requires it. In the analogous case of distringas on mesne process at common law, no such specification is made. The party whose goods are attached may release them by appearing and giving security; and if he suffers them to be condemned and sold by default, no more of the proceeds will be decree to the libelant than is sufficient to satisfy his demand.

7. Nor is the locality of the territory or jurisdiction within which the property is attached material to the validity of the attachment, it being seized in the exercise of the admiralty judicature upon a subject within its established jurisdiction, and the property taken, or the right to it, not being the immediate object of the suit, but only incidental to its prosecution. Clerke's Praxis (pt. 2, tit. 28) 481*] does, indeed, speak of *goods within the ebb and flow of the tide, or on the sea, being subject to the attachment; but it evidently alludes to these instances only by way of exemplification, not of restriction. This is also evident from tit. 32, which authorizes the attachment of the defendant's goods and credits in the hands of a third person, without restriction as to locality.

Mr. Taney, contra, argued, (1) that a civil suit could not be maintained for the injury complained of in the libel. The remedy is here sought in personam by a suit in the Instance Court. The attachment is a mere ancillary process to compel appearance. The property is out of the jurisdiction of the court, and this is a proceeding against other property to compel an appearance. The wrong charged in the libel is a piracy. Can this be treated as a private wrong? There is no case in the records of the English admiralty to authorize such a proceeding, and both principle and analogy are against it. The absence of all authority in adjudged cases is a strong argument that it is not law. It is said that piracy is not treason nor felony. In England it was treason, and is felony. It has been such since the stat. 25 Edw. III., c. 2.[3] The goods of pirates, not belonging to others, are forfeited to the crown, as in felony.[4] How, then, can these goods be *made liable to satisfy the damages [*482 sustained by a private party?

But it is said that the injured party may waive the tort, and treat it as a contract. The only case where this may be done, is where, on a conversion of the plaintiff's goods, and a subsequent sale and receipt of the goods, the plaintiff may ratify what is done, and consider the goods as having been received by his authority. But that is in the case of a private tort, which may be waived; a wrong to the public cannot be waived. The authority of Dr. Browne is express, that in such a case the remedy is either criminally, as for a public crime, or in the prize court, as for a wrongful taking as prize.[5]

2. If the appellants can maintain a civil suit in such a case, can they do it in this form of proceeding? Will an attachment from the admiralty lie against the goods of an absent or absconding debtor? The power of proceeding in this manner once existed, and was analogous to the proceeding by foreign attachment according to the custom of London; but has long since been disused in England,[6] and, like many other usages in the admiralty, has become obsolete.[7] But the foreign attachment, according to the custom of London, only applied to cases of contract; and Sir L. Jenkins claims the admiralty jurisdiction to be exercised in this manner only *in cases of contract.[8] The prac- [*483 tice, as it is laid down by Clerke, is plainly confined to contracts. The caption of tit 28, part 1, is "of the warrant to be impetrated in rem, where the debtor absconds," etc. And tit. 32 states that "sometimes the person, who, by loan, or other maritime contract, is indebted to another," etc., and then authorizes an attachment of the credits or goods of the debtor in the hands of a third person, upon the principle laid down in the code, that debitor creditoris est debitor creditori creditoris; all which evidently implies that the whole proceeding is confined to matters of debt and contract.[9]

Although the proceeding by attachment has been occasionally resorted to in this country, yet it cannot be said to have gained a legal footing; and it would be an extremely inconvenient practice in our divided jurisdiction, where there may be as many different attachments issued at the same time as there are districts in the Union. But, to prevent the abuses to which it is liable, it is indispensably necessary that this process should only issue by an express order of the court. There is no precedent for its issuing of course, and as it cannot issue without an affidavit, the sufficiency of the matter contained in the affidavit, and the libel, are fit subjects for the determination of the judge, and ought not to be confided to the discretion of a mere ministerial *officer, such as the clerk. So, [*484 also, the property to be attached should be specifically stated in the warrant. This is required by Clerke, in the passages already cited. Tit. 28 authorizes "a warrant to be impetrated to this effect, viz., to attach such goods or such ship of D, the defendant, in whose hands soever they may be; and to cite the said D, specially

1.—Bac. Abr. tit. Piracy, Pardon.
2.—Fitz. Nat. Brev. 114; 2 Gallis. Rep. 408, 409.
3.—4 Bl. Comm. 71.
4.—2 Bro. Civ. & Adm. Law, 462.
5.—2 Bro. Civ. & Adm. Law, 113.
6.—2 Bro. Civ. & Adm. Law, 434.
7.—Hall's Adm. Pract. 62.
8.—3 Hall's Law Journ. 571; 2 Bro. Civ. & Adm. Law, 435.
9.—Hall's Adm. Pract. 60, 70.

as the owner, and all others who claim any right or title to them," etc. These errors were not cured by the defendant's appearance, because, if we resort to the analogy of common law proceeding, his appearance dissolved the attachment; and, in the present case, he appeared under protest, for the purpose of contesting the regularity of the proceedings.

Mr. Justice Johnson delivered the opinion of the court:

The record in this cause sets out the libel, the demurrer, and the decision of the court upon the demurrer. So far the case is consistent and intelligible; but the record contains, also, a petition for the sale of certain attached goods, a survey of the goods, and a decision against the petition, but no exhibition of the process or mode by which these goods came into the custody of the marshal. As the decision of the court sustains the demurrer, we are left at a loss, upon the record, to discover how process of attachment came to be issued. To obtain such process is the very prayer of the libel, and the decision of the court is against that prayer.

All the solution that the case presents, is to 485*] be *found in the argument of counsel, and their mutual admissions.

The clerk, it seems, issued the attachment as process of course, and the respondent, instead of moving to quash it for irregularity, appeared to the libel, filed his demurrer, and was content to let the regularity of the attachment abide the decision of the court upon the general questions raised upon the libel. The court appears to have treated the subject under the same views, since the decree of the District Court, after dismissing the libel, contains an order "that the goods, chattels and credits attached, be restored, with costs;" which decree was affirmed, pro forma, in the Circuit Court.

Upon this state of the case the cause has been argued, as one bringing up to this court a question on the regularity of the process issued by the clerk; and if the process so issued, and the return of the marshal upon it, and a motion to quash the writ, had been set out on the record, there is no question that the appeal would have brought up the whole subject. But as the record is deficient in these particulars, we do not perceive how we can take notice of that part of the judge's decision which orders the restoration of the goods attached.

We must therefore confine ourselves to the questions raised on the libel and demurrer.

The immediate question presented is, whether the court below erred in refusing to the libellant the process of attachment on the case made out in his libel.

486*] *And this resolves itself into two questions; the first arising on the right, the second on the remedy of the case. It must be here noticed that the legality of the seizure made by Almeida is not now in question; that question may be undergoing adjudication, for aught we know, in a court of competent jurisdiction, and we are not to be understood as prejudging the influence which the decision of a foreign tribunal may have upon the final adjudication between these parties. The defendant has demurred under protest, and the only question now is, whether the libelant has made out, prima facie, a good cause for relief in the admiralty.

The ground of complaint is a maritime tort, the violent seizure on the ocean of a sum of money, the property of the libelants. That the libelant would have been entitled to admiralty process against the property, had it been brought within the reach of our process, no one has questioned. The only doubt on this part of the subject is, whether the remedy in personam, for which this is a substitute (or, more properly, the form of instituting it), can be pursued in the admiralty.

On this point we consider it now too late to express a doubt. This court has entertained such suits too often, without hesitation, to permit the right now to be questioned. Such was the case of Maley v. Shattack, 3 Cranch, 458. Such is the principle recognized in Murray v. The Charming Betsey, 2 Cranch, 483, where the court decrees damages against the libelant. *Such, also, was the principle in the [*487 case of The Apollon, 9 Wheat. Rep. 362, in which the libel was directly in personam, and damages decreed. We consider that question, therefore as not to be stirred.

The remedy by attachment, also, to compel appearance, has very respectable support in precedent. In the District Court of South Carolina, during the administration of a very able admiralty judge, it was resorted to habitually, both in cases of tort and contract. Bee's Adm. Rep. 141. The case of Del Col v. Arnold, 3 Dall. Rep. 333, is the only one we know of, in which any view of this question appears to have been presented to this court. And there, undoubtedly, the exception taken was not to the issuing of the attachment in the abstract, but to the issuing of it against a prize made from a friendly power, before the property had been devested by condemnation. The response of the court on this point would seem to imply something more, since their decision is reported to have been, "that whatever might originally have been the irregularity in attaching the Industry and cargo, it is completely obviated, since the captors had a power to sell the prize, and by their own agreement they have consented that the proceeds of the sale should abide the present suit."

Still, there is nothing to be deduced from this case which can affect the question now under consideration. The point, as stated to have been presented to the court in argument, was certainly one of which a captor could not avail himself, *and the original owner [*488 of the prize was not in court. And although the court would appear to have had the present question in view when disposing of that point, yet it is only noticed arguendo, as they pass on to take a ground which precluded the necessity of considering the point made in argument.

We therefore consider this altogether a new question before this court.

The jurisdiction of the admiralty rests upon the grant in the constitution, and the terms in which that grant is extended to the respective courts of the United States. The forms and modes of proceeding in causes of admiralty and maritime jurisdiction are prescribed to the courts by the second section of the process act of 1792. In the process act of 1789, the lan-

guage made use of in prescribing those forms implied a general reference to the practice of the civil law; but in the act of 1792, the terms employed are, "according to the principles, rules and usages, which belong to courts of admiralty, as contradistinguished from courts of common law."

By the laws of Maryland, the right of attachment may be asserted in the courts of common law, and the court below appears to have considered the libel in this instance as an attempt by the libelant to avail himself in the admiralty of the common law remedy by attachment. The forms of the libel must determine this question, and there we find the prayer expressed in these words: "To the end, there- [*489 fore, that your libelants *may obtain speedy relief in the premises, they pray process of attachment against the said goods, and chattels, and credits, of the said J. A., which may be found within the jurisdiction of this honorable court, and the process thereof, according to the just course of the admiralty, and that monition viis et modis, be made accordingly," etc., "to compel an answer," etc.; and "finally, that the said goods, and chattels, and credits, when duly attached, may, by a decree of this honorable court, be condemned to answer the premises."

There can be little doubt, as well from the objects embraced in this prayer as from the argument, that the identity of the remedy in the common law and admiralty courts, appears to have been in the mind of the party libelant. Yet this was no ground for the total refusal of the relief prayed for; the writ should have been granted, and the question as to ulterior proceedings under it retained, to be disposed of afterwards. The prayer of the libel contemplates two purposes: first, to compel appearance; second, to condemn for satisfaction. Now, although the latter may be only incidental, and not the primary object of the attachment, yet, if it be legal for the purpose of compelling appearance, the demand for the one purpose was no ground for refusing it for the other.

In giving a construction to the act of 1792, it is unavoidable that we should consider the admiralty practice there alluded to as the admiralty practice of our own country, as grafted [*490 upon the *British practice; it is known to have had some peculiarities which have been incorporated into the jurisprudence of the United States. We had then been sixteen years an independent people, and had administered the admiralty jurisdiction, as well in admiralty courts of the states as in those of the general government; and if, in fact, a change had taken place in the practice of the two countries, that of our own certainly must claim precedence.

On the subject particularly under consideration, it appears from an English writer that the practice of issuing attachments had been discontinued in the English courts of admiralty, while in some of our own courts it was still in use, perhaps not so generally as to sanction our sustaining it altogether on authority, were we not of opinion that it has the highest sanction also, as well in principle as convenience.

It is a mistake to consider the use of this process in the admiralty as borrowed from, or in imitation of, the foreign attachment under the custom of London. Its origin is to be found in the remotest history, as well of the civil as the common law.

In the simplicity of the remote ages of the civil law, the plaintiff himself arrested the defendant, and brought him before the pretor. But as the sanctuary of his own habitation was not to be violated, if he came not abroad, a summons was attached to his door-posts citing him to appear and answer. Hence our monition viis et modis. If he still proved recusant after three *times repeating this solemn [*491 notice, a decree issued to attach his goods; and thus this process of the admiralty had a common origin with the common law mode of instituting a suit by summons and distress infinite. If the defendant obeyed, he could only appear upon giving bail; and thus, again, the analogy was kept up with the appearance at common law, which was synonymous with filing special bail.

Thus, this process has the clearest sanction in the practice of the civil law, and during the three years that the admiralty courts of these states were referred to the practice of the civil law for their "forms and modes of proceeding," there could have been no question that this process was legalized. Nor is there any thing in the different phraseology adopted in the act of 1892 that could preclude its use. That it is agreeable to the "principles, rules and usages, which belong to courts of admiralty," is established, not only by its being resorted to in one at least of the courts of the United States, but by the explicit declaration of a book of respectable authority, and remote origin, in which it is laid down thus: "If the defendant has concealed himself, or has absconded from the kingdom, so that he cannot be arrested, if he have any goods, merchandise, ship or vessel, on the sea, or within the ebb or flow of the sea, and within the jurisdiction of the Lord High Admiral, a warrant is to be impetrated to this effect, viz., to attach such goods or ship of D, the defendant, in whose hands soever they may be, and to cite the said *D specially as the owner, and all oth- [*492 ers who claim any right or title to them, to be and appear on a certain day to answer unto P in a civil and maritime cause." Clerke's Praxis by Hall, part 2, tit. 28.

I have cited the passage at length, in order to facilitate a reference which must be made to it on several other points in this opinion. And, (1) it appears from this authority that where a defendant has concealed himself, or absconded from the kingdom, this process may issue. In this particular, the averments in the libel conform literally to the authority.

2. It is required that the goods and effects to be attached should be within the jurisdiction of the admiralty. To this the libel conforms also, for the prayer is for process against "the said goods, and chattels, and credits of the said J. A., which may be found within the jurisdiction of the court, and the process thereof, according to the just course of the admiralty."

3. It is required that the attachment issue against any goods, merchandise, ship or vessel on the sea, etc. The only deviation in this particular is, that the process prayed for is

against the credits, as well as the goods and chattels, etc., within the jurisdiction of the court.

On this part of the prayer, the question is raised as to what goods and chattels the attachment may issue, where situated, and whether against credits and effects in the hands of third persons, but not tangible or accessible to the marshal.

493*] *This question arises from a comparison of the tit. 32, p. 70, Clerke's Praxis by Hall, with the 28th before cited. The language of the 28th would seem to confine the operation of the attachment to goods and chattels "on the sea, or within the ebb and flow of the sea." But, by reference to the 32d, it appears that it is consistent with the practice of the admiralty also, in cases where there is no property which the officer can attach by manucaption, to proceed to attach goods or credits in the hands of third persons, by means of the simple service of a notice.

To all the questions which may be supposed to arise on this part of the case, we give one general answer, viz., that as goods and credits in the hands of a third person, wherever situated, may be attached by notice, there cannot be a reason assigned why the goods themselves, if accessible, should not be actually attached; and although it is very clear that the process of attaching by notice seems given as the alternative, where the officer cannot have access to the goods themselves, yet all this may be confided to the discretion of the judge who orders the process; and if the party libelant was entitled to the process at all, the court was not justified in refusing it altogether.

4. The libel prays that the articles attached may be condemned to answer the demand of the libelant.

On this subject it is very clear that the primary object of the attachment is to obtain an 494*] appearance. *But it is equally clear that upon the third default in personal actions, the goods arrested were estreated, and, after a year, finally abandoned to the plaintiff. But as this proceeding was too dilatory for the movements of the admiralty, the condemnation and sale, after proof of the cause of action, was substituted for it. There was, therefore, nothing incorrect in uniting the prayer for condemnation with the acknowledged end of forcing an appearance; and if there had been, it was no ground for refusing relief as far as the claim was sustainable in the admiralty.

It may be remarked here, that the case is somewhat embarrassed by the state of the pleadings, inasmuch as, after appearance, it is hardly conceivable on what ground the attachment could be granted. It would seem that the defendant, for some cause, had been permitted by the court to appear and plead without giving bail to the action. There are such causes known to the practice of the civil law, and we are compelled to take the case as we find it.

It has been further argued, that as the libel alleges the trespass complained of to have been piratically done, the civil remedy merges in the crime. But this, we think, clearly, cannot be maintained. Whatever may have been the barbarous doctrines of antiquity about converting goods piratically taken into droits of the admiralty, the day has long gone by since it gave way to a more rational rule, and the party dispossessed was sustained in his remedy to reclaim the *property as not devested [*495 by piratical capture. It is hardly necessary to quote authority for this doctrine, but it will be found to have been the rule of justice as early as the reports of Croke and Ventris.

If the party may recover his property, why not recover the value of it from any goods of the offender within reach of the admiralty? We think the doctrine of merger altogether inapplicable to the case. Even at common law, it was confined to felonies, and piracy was no felony at common law.

On the question, whether the property to be attached should have been specified in the libel or process, we have before remarked, that as neither the process nor return is before us, we can express no opinion respecting its form. The libel contains no specification of the articles to be attached, and if this were fatal, the demurrer might have been sustained. But, pursuing the analogy with the civil law process to compel appearance, we can see no reason for requiring such a specification. There is no reason to conclude that the decree for attachment issued against the recusant at the civil law, was otherwise than general. And although the other course may be pursued, and might be most convenient and satisfactory, yet we know of no imperative rule upon the subject. The authority on which the libel was filed sanctions the general language in which it is couched.

The last point made in argument was, whether the process of attachment could issue without an *order of the judge. But here, [*496 again, we have to remark that we can take no notice of the circumstances under which the writ actually did issue. And, looking to the libel, it appears to have been its express object to obtain such an order from the court. That the process of attachment at the civil law did not issue of course, is very well known. It was obtained for contumacy after monition; and analogy, as well as public convenience, would seem to render the judge's order necessary. Yet, we see no objection to pursuing the prayer of the libel, and issuing it simultaneously with the monition; the purposes of justice would seem to require that course.

Upon the whole, we are of opinion that for a maritime trespass, even though it savors of piracy, the person injured may have his action in personam, and compel appearance by the process of attachment on the goods of the trespasser, according to the forms of the civil law, as ingrafted upon the admiralty practice. And we think it indispensable to the purposes of justice, and the due exercise of the admiralty jurisdiction, that the remedy should be applied, even in cases where the same goods may have been attachable under the process of foreign attachment issuing from the common law courts. For it will necessarily follow, in all such cases, that a question peculiarly of admiralty cognizance, will be brought to be examined before a tribunal not competent to exercise original admiralty jurisdiction; and that as a primary, not an incidental question; since the whole proceeding will have *for its [*497 object to determine whether a maritime tres-

pass has been committed, and then to apply the remedy.

Judgment reversed, and the cause remanded for further proceedings.

[Practice.]

THE GRAN PARA.

The Consul-General of Portugal, Libelant.

Where the Court of Admiralty has parted with the possession of the property, upon bail or stipulation, and it is necessary, for the purposes of justice, to retake the property into the custody of the court, the proper process against any person not a party to the stipulation, but who is alleged to have the actual or constructive possession, is a monition, and not an execution, in the first instance.

THIS is the same case which was reported ante, Vol. VII., p. 471, and was an appeal from proceedings had in the court below, under the mandate of this court in the original cause.

The cause was argued by Mr. D. Hoffman for the appellant, and by the Attorney-General and Mr. Taney for the respondent. But as the present determination of the court was confined to the single point of practice, without affecting the other questions involved in the cause, it 498*] has *not been thought necessary to report the arguments of counsel.

Mr. Justice Story delivered the opinion of the court:

This is an appeal from the Circuit Court for the district of Maryland, from proceedings had in that court under the mandate of this court in the original cause, which is reported in 7 Wheat. Rep. 471.

The material facts are these: The original libel was against sundry quantities of gold and silver coin, and bullion, deposited by Daniels in the Marine Bank of Baltimore. A claim was interposed by one Nicholas Stansbury, asserting himself to be "agent, and attorney in fact," of Daniels, on behalf of the latter, and claiming restitution of the property as lawfully captured in war by Daniels. Pending the proceedings in the court below, Stansbury made application for the delivery of the property upon stipulation, and thereupon the court ordered that J. D. Daniels be permitted to draw for, and the president and directors of the Marine Bank be suffered to pay to Daniels, the money in controversy, provided that Daniels should enter into a stipulation in $23,000, with such surety or sureties as might be approved of by the libelant's proctors, to abide such further order or decree, either interlocutory or final, as might be made by the court in the premises. The libelant's proctors approved of Stansbury, and one Thomas Sheppard, and one Henry 499*] Didier, Jun., as sureties, *and they, accordingly, gave a stipulation for the amount "for J. D. Daniels, claimant." But Daniels himself was not a party to the stipulation. By a subsequent order of the court, the money was delivered by the Marine Bank to Stansbury, who signed a receipt for the same as attorney for Daniels, upon a certificate of the deposit originally given by the cashier of the bank to Daniels, and by him delivered over to Stansbury.

A decree of restitution having passed in the Supreme Court, after the mandate was brought into the Circuit Court, the libelant prayed that execution might issue against Daniels to enforce the performance of the decree, and that a monition, or other proper process, might issue against the sureties to the stipulation. To this course the proctor for the claimant objected, and the court finally ordered admiralty process to issue against the stipulators, but refused to make any further order under the motion of the libelant. The case is now before us by appeal from that decision.

Several points have been urged in the argument, upon which, in the present stage of the cause, it is not thought necessary to express any opinion. Assuming Daniels to be a party to the cause, in virtue of the claim made in his behalf by Stansbury, it still remains to show that the process of execution is, in the first instance, to be issued against him. He is not a party to the stipulation, and so far as any remedy is to be sought upon that, it lies exclusively against the *sureties, since he, [*500 as principal, has not, personally, or through the instrumentality, of any agent, become bound by it. The remedy against him for the property, or its proceeds, must be sought solely upon the ground that he has the actual or constructive possession of them in virtue of the delivery to his agent under the order of the court below. If the property had remained in the custody of the court, there is no pretense to say that he would be liable for the restitution. It is the delivery to him, or to his authorized agent, which can alone give rise to any liability on his part, whether he be a party to the suit, or only a custodee of the property or its proceeds. In such cases, the usual proceeding in the admiralty is, not to award execution against the party, for that would preclude him from showing, in his defense, that he never had any actual or constructive possession, or that he was discharged from all liability. The proper course is, to issue a monition to Daniels in the usual manner, upon the return of which he may appear and justify himself, and interpose such allegations on the merits as may bring all the matters fully before the court for judgment. This is the constant practice of the admiralty; and the subsequent proceedings are to be according to the common usage; upon which it is unnecessary to comment.

It is therefore the opinion of this court that the Circuit Court was right in refusing to grant an execution against Daniels, under the circumstances, and that its decretal order ought to be *affirmed; but inasmuch as it appears [*501 that the principal question between the parties has been, whether any process whatsoever could be awarded against Daniels, it is directed that the affirmation of the order be without prejudice to the award of a monition against Daniels in the common form of the admiralty.

Decree.—This cause came on, etc. On consideration whereof, it is ordered, adjudged and decreed, that the decree of the Circuit Court, refusing to issue an execution against John D. Daniels, as prayed for by the libelant in his

petition, be, and the same hereby is, affirmed with costs, without prejudice to the libelant, to apply to the said Circuit Court for a monition against the said John D. Daniels, in the premises, according to the usage of the admiralty, that being a process to which the libelant is entitled by law.

502*] [*Practice.]

THE PALMYRA. Depau, Claimant.

No appeal lies from a decree of restitution, with costs and damages, in the Circuit Court; the report of the commissioners appointed to ascertain the damages not having been acted on by the court when the appeal was taken. Such a decree is not a final decree.

APPEAL from the Circuit Court of South Carolina.

This was the case of an armed vessel called the Palmyra, taken under Spanish colors by the United States schooner Grampus (commanded by Lieutenant Gregory, and cruising, with instructions from the President, against pirates), and brought into the port of Charleston, S. C., for adjudication. A libel was filed by the captors, and a claim interposed by Mr. Depau, as agent of the alleged owners of the Palmyra, Spanish merchants domiciled at Porto Rico, and of the captain, officers and crew. In the District Court the libel was dismissed, without costs and damages against the captors. The decree of restitution was affirmed in the Circuit Court, with costs and damages, and the cause was brought by appeal to this court.

It was suggested by the **Attorney-General** (with whom was Mr. **Hayne**) for the appellants, that after the decree of restitution, and for damages, in the Circuit Court, there had been 503*] a *reference to commissioners to ascertain the amount of damages, and before the report of the commissioners had been acted upon by that court, the appeal was taken. The question was, whether the appeal was not taken too early, the judiciary act of March 3, 1803, c. 353 (XCIII.), having confined the right of appeal to "final decrees."[1]

Mr. **Tazewell**, contra, stated that in the District Court there was a decree of restitution and a denial of damages. Both parties appealed from that decree, the libelants being dissatisfied with the decree of restitution, and the claimants with the denial of damages. These were, then, cross-appeals, and consequently there might be an appeal from the decision of the Circuit Court decreeing restitution, and affirming, in this respect, the decree of the District Court, although the decree of the Circuit Court, reversing that of the District Court as to damages, and awarding the latter to the claimants, was as yet undetermined.

Mr. Chief Justice **Marshall** delivered the opinion of the court:

The court has had the question submitted in this cause under consideration, and is of opinion that the appeal is not well taken. The decree of the Circuit Court was not final in the sense of the act of Congress. The damages remain undisposed of, and an appeal may still lie *upon that part of the decree award- [*504
ing damages. The whole cause is not, therefore, finally determined in the Circuit Court; and we are of opinion that the cause cannot be divided so as to bring up successively distinct parts of it.

The case in 3 Cranch, 179, is essentially different. In that case, which was an appeal in an equity cause, there was a decree of foreclosure and sale of the mortgaged property. The sale could only be ordered after an account taken, or the sum due on the mortgage ascertained in some other way; and the usual decree is, that unless the defendant shall pay that sum in a given time, the estate shall be sold. The decree of sale therefore is, in such a case, final upon the rights of the parties in controversy, and leaves ministerial duties only to be performed.

Appeal dismissed.[2]

See S. C. 12 Wheat. 1.
Cited—11 Wheat. 430; 8 Pet. 818; 15 How. 467; 19 How. 284, 286; 23 Wall. 409.

1.—Ray v. Law, 3 Cranch, 179.

2.—See Young v. Grundy, 6 Cranch, 51; Gibbons v. Ogden, 6 Wheat. Rep. 448.

APPENDIX.

[*NOTE I.]

Documents Relating to the Slave Trade, Referred to in the Case of the Antelope.

(A.)

Report of the Committee to whom was referred so much of the President's Message, of the 7th of December last, as relates to the Suppression of the Slave Trade.

FEBRUARY 16, 1825.—Read, and committed to the committee of the whole House on the state of the Union.

The committee on the suppression of the slave trade, to whom was referred so much of the President's message, of the 7th December last, as relates to that subject, have, according to order, had the same under consideration, and respectfully report:

That, pursuant to the almost unanimous request of the House of Representatives, expressed by their resolution of the 28th of February, 1823, the President of the United States concluded a convention with Great Britain, on the 13th of March, in the following year, by which the African slave trade was denounced to be piracy under the laws of both countries; the United States having so declared it, by their antecedent act of the 15th of May, 1820, 4*] and it being understood between *the contracting parties, as a preliminary to the ratification of the convention of the United States, that Great Britain should, by an act of her parliament, concur in a similar declaration.

With great promptitude, and in accordance with this agreement, such an act was passed, declaring the African slave trade to be piracy, and annexing to it the penalty denounced against this crime by the common law of nations. A copy of this act was transmitted, by the British government, to the executive of the United States, and the convention submitted, by the President, to the Senate, for their advice and consent.

The convention was approved by the Senate, with certain qualifications, to all of which, except one, Great Britain, sub modo, acceded; her government having instructed its minister in Washington to tender to the acceptance of the United States, a treaty, agreeing in every particular except one with the terms approved by the Senate. This exception the message of the President to the House of Representatives presumes "not to be of sufficient magnitude to defeat an object so near to the heart of both nations," as the abolition of the African slave trade, "and so desirable to the friends of humanity throughout the world." But the President further adds, "that, as objections to the principle recommended by the House of Representatives, or, at least, to the consequences inseparable from it, and which are understood to apply to the law, have been raised, which may deserve a reconsideration of the whole subject, he has thought proper to suspend the conclusion of a new convention, until the definite sentiments of Congress can be ascertained."

Your committee are therefore required to review the grounds of the law of 1820, and the resolution of 1823, to which the rejected, or, as they rather hope, the suspended convention, referred. The former was the joint act of both branches of Congress, approved by the President; the latter, although adopted with extraordinary unanimity, was the single act of the House of Representatives.

Upon the principle or intention of the act of Congress of 1820, making the slave trade punishable as piracy, the history of the act may reflect some light.

A bill from the Senate, entitled "An act to continue in force the act to protect the commerce of the United States, and punish the crime of piracy, and also to make further provision to punish the crime of piracy," came to the House of Representatives on the 27th of April, 1820, and was, on the same day, referred to a committee of the whole, to which had been referred a bill of similar purport and title, that had originated in the House of Representatives.

*Upon the 8th of May following, the [*5 committee on the suppression of the slave trade reported an amendment of two additional sections to the Senate's bill; also, a bill to incorporate the American society for colonizing the free people of color of the United States, and three joint resolutions, two of which related to the objects of that society; but the first of which, in behalf of both houses of Congress, requested the President "to consult and negotiate with all the governments where ministers of the United States are, or shall be, accredited, on the means of effecting an entire and immediate abolition of the African slave trade." The amendatory sections denounced the guilt and penalty of piracy against any citizen of the United States, of the crew or company of any foreign vessel, and any person whatever of the crew or company of any American vessel, who should be engaged in this traffic.

The amendments, bill and resolutions, along

with the explanatory report which accompanied them, were referred to the committee of the whole above mentioned; and on the 11th of the same month, the house proceeded to consider them. After a discussion in the committee, the piracy bill and its amendments, having been adopted, were reported, and both were concurred in by the house. The following day, the bill as amended, being then on its passage, a motion was debated and negatived, to recommit the bill to a select committee, with an instruction to strike out the last section of the amendment. The bill then passed, and was ordered to be returned, as amended, to the Senate.

On the same day, a motion prevailed to discharge the committee of the whole from the further consideration of the bill, and the resolutions which accompanied the report; and the particular resolution already recited, being under consideration to try the sense of the House on its merits, it was moved to lay it on the table. The yeas and nays having been ordered on this motion, it was rejected by a majority of 78 to 35 members. It having been again proposed to postpone the resolution till the ensuing or second session of the same Congress, and this proposal being also determined in the negative, the resolution was engrossed, read the third time, passed, and ordered to be transmitted to the Senate on the same day with the piracy bill.

The amendments of this bill underwent like scrutiny and debate in the Senate, and were finally concurred in, the day after they were received from the House of Representatives, without any division apparent on the journal of that House.

The resolution which had been received by the Senate, at a different hour of the same day, was read a second time on the 15th of May, 6*] was *further taken up and considered, as in committee of the whole, reported to the House without amendment, and ordered, after debate, to pass to a third reading. But this being the last day of the session of Congress, and a single member objecting "that it was against one of the rules of the Senate to read it the third time on the same day without unanimous consent," it remained on the table of that body, on its final adjournment, after an ineffectual effort to suspend one of their rules, against which many of the friends of the resolution felt themselves compelled, by their invariable usage, to vote in union with its enemies.

One of the objections to the resolution in the Senate was founded upon the peculiar relation of that branch of the national legislature to the executive, in the ratification of treaties; which seemed, in the opinion of those who urged this argument, to interdict their concurrence in a request of the President to institute any negotiation whatever.

A cotemporary exposition of the object of the amendments of the piracy bill, and the resolution which the House of Representatives adopted by so large a majority, will be found in the report which accompanied them, from the committee on the suppression of the slave trade, and which is hereto annexed. (A) Those objects, it will be seen, were in perfect accordance with each other. They were designed to introduce, by treaty, into the code of international law, a principle deemed by the committee essential to the abolition of the African slave trade that it should be denounced and treated as piracy by the civilized world.

The resolution being joint, and having failed in the Senate, for the reason already stated, the subject of it was revived in the House of Representatives, at a very early period of the succeeding session of Congress, by a call for information from the executive, which, being received, was referred to a committee of the same title with the last. Their report, after reviewing all the antecedent measures of the United States for the suppression of the slave trade, urgently recommended the co-operation of the American and British navy against this traffic, under the guarded provisions of a common treaty, authorizing the practice of a qualified and reciprocal right of search.

This report, which is also annexed, closed with a resolution requesting "the President of the United States to enter into such arrangements as he might deem suitable and proper, with one or more of the maritime powers of Europe, for the effectual abolition of the African slave trade." (B.)

The United States had, by the treaty of Ghent, entered into a formal stipulation with Great Britain, "that both the contracting parties *shall use their best endeavors to [*7 accomplish the entire abolition of this traffic."

The failure of the only joint attempt which had been made by England and America, at the date of this report, to give effect to this provision; being ascribable, in part, to a jealousy of the views of the former, corroborated by the language and conduct of one of the principal maritime powers of Europe in relation to the same topic, the committee referred to the decision of Sir William Scott, in the case of the French ship Le Louis, to demonstrate that Great Britain claimed no right of search, in peace, but such as the consent of other nations should accord to her by treaty; and sought it by a fair exchange, in this tranquil mode, for the beneficient purpose of an enlarged humanity.

Certain facts, disclosed by the diplomatic correspondence of France and England during the pendency of that case in the British Court of Admiralty, were calculated to guard the sympathies of America from being misguided by the language of the former power.

The painful truth was elicited that France had evaded the execution of her promise at Vienna, to Europe and mankind. That she had, long after the date of that promise, tolerated, if she had not cherished, several branches of a traffic which she had concurred in denouncing to be the opprobrium of Christendom, and which she had subsequently bound herself, by the higher obligations of a solemn treaty, to abolish, as inconsistent with the laws of God and nature.

Succeeding events in the councils of the French nation have not impaired the force of this testimony. What authority can be accorded to the moral influence of a government which insults the humanity of a generous and gallant people, by pleading, in apology for the

breach of its plighted faith, that its subjects required the indulgence of this guilty traffic?

The Emperor Napoleon, who re-established this commerce on the ruins of the French Republic, also abolished it again when he sought to conciliate the people of France, during that transient reign, which immediately preceded his final overthrow.

Congress adjourned without acting on this report.

By an instruction to the committee on the suppression of the slave trade, of the 15th of January, 1822, the same subject was a third time brought directly before the House of Representatives. The instruction called the attention of the committee to the present condition of the African slave trade; to the defects of any of the existing laws for its suppression, and to their appropriate remedies. In the re-
8*] port, made in obedience *to this instruction, on the 12th of April, 1822, the committee state that after having consulted all the evidence within their reach, they are brought to the mournful conclusion that the traffic prevailed to a greater extent than ever, and with increased malignity; that its total suppression, or even sensible diminution, cannot be expected from the separate and disunited efforts of one or more states, so long as a single flag remains to cover it from detection and punishment. They renew, therefore, as the only practicable and efficient remedy, the concurrence of the United States with the maritime powers of Europe, in a modified and reciprocal exercise of the right of search.

In closing their report, the committee add, in effect, that they "cannot doubt that the people of America have the intelligence to distinguish between the right of searching a neutral on the high seas, in time of war, claimed by some belligerents, and that mutual, restricted and peaceful concession, by treaty, suggested by the committee, and which is demanded in the name of suffering humanity." The committee had before intimated that the remedy which they recommended to the House of Representatives presupposed the exercise of the authority of another department of the government; and that objections to the exercise of this authority, in the mode which they had presumed to suggest, had hitherto existed in that department. Their report, also annexed, closed with a resolution differing in no other respect from that of the preceding session, than that it did not require the concurrence of the Senate, for the reason already suggested. (C.)

The report and resolution were referred to a committee of the whole, and never farther considered.

After a delay till the 20th of the succeeding February, a resolution was submitted to the House, which was evidently a part of the same system of measures, for the suppression of the slave trade, which had been begun by the act of the 3d of March, 1819, and followed up by the connected series of reports and resolutions, which the committee have reviewed, and which breathe the same spirit.

This resolution, in proposing to make the slave trade piracy, by the consent of mankind, sought to supplant, by a measure of greater rigor, the qualified international exchange of the right of search for the apprehension of the African slave dealer, and the British system of mixed tribunals, created for his trial and punishment; a system of which experience, and the recent extension of the traffic that it sought to limit, had disclosed the entire inefficacy.

The United States had already established the true denomination and *grade of this [*9 offense, by a municipal law. The resolution contemplated, as did the report which accompanied and expounded that law, the extension of its principle, by negotiation, to the code of all nations.

It denounced the authors of this stupendous iniquity as the enemies of the human race, and armed all men with authority to detect, pursue, arrest and punish them.

Such a measure, to succeed to its fullest extent, must have a beginning somewhere. Commencing with the consent of any two states, to regard it as binding on themselves only, it would, by the gradual accession of others, enlarge the sphere of its operation, until it embraced, as the resolution contemplated, all the maritime powers of the civilized world.

While it involved of necessity the visit and search of piratical vessels, as belligerent rights against the common enemies of man, it avoided all complexity, difficulty and delay in the seizure, condemnation and punishment of the pirate himself. It made no distinction in favor of those pirates who prey upon the property, against those who seize, torture and kill, or consign to interminable and hereditary slavery, the persons of their enemies.

Your committee are at a loss for the foundation of any such discrimination. It is believed that the most ancient piracies consisted in converting innocent captives into slaves; and those were not attended with the destruction of one-third of their victims, by loathsome confinement and mortal disease.

While the modern, therefore, accords with the ancient denomination of this crime, its punishment is not disproportionate to its guilt. It has robbery and murder for its mere accessories, and moistens one continent with blood and tears, in order to curse another by slow consuming ruin, physical and moral.

One high consolation attends upon the new remedy for this frightful and prolific evil. If once successful, it will forever remain so, until, being unexerted, its very application will be found in history alone.

Can it be doubted that if ever legitimate commerce shall supplant the source of this evil in Africa, and a reliance on other supplies of labor, its use elsewhere, a revival of the slave trade will be as impracticable as a reversion to barbarism? That, after the lapse of a century from its extinction, except where the consequences of the crime shall survive, the stories of the African slave trade will become as improbable among the unlearned, as the expeditions of the heroes of Homer?

The principle of the law of 1820, making the slave trade a statutory piracy, and of the resolution of the House of Representatives, of May, *1823, which sought to render this de- [*10 nunciation of that offense universal, cannot, therefore, be misunderstood.

It was not misconceived by the House of

Representatives, when ratified with almost unprecedented unanimity.

An unfounded suggestion has been heard, that the abortive attempt to amend the resolution, indicated that it was not considered as involving the right of search. The opposite conclusion is the more rational, if not, indeed, irresistible; that having, by the denomination of the crime, provided for the detection, trial and punishment of the criminal, an amendment, designing to add what was already included in the main proposition, would be superfluous, if not absurd. But no such amendment was rejected. The House of Representatives, very near the close of the session of 1823, desirous of economizing time, threatened to be consumed by a protracted debate, entertained the previous question, while an amendment, the only one offered to the resolution, was depending. The effect of the previous question was to bring on an immediate decision upon the resolution itself, which was adopted by a vote of 131 members to 9.

It is alike untrue that the resolution was regarded with indifference. The House had been prepared to pass it without debate, by a series of measures, having their origin in 1819, and steadily advancing to maturity.

Before the resolution did pass, two motions had been submitted, to lay it on the table, and to postpone it to a future day. The former was resisted by an ascertained majority of 104 to 25; the latter, without a division.

Is the House now ready to retrace its steps? The committee believe not. Neither the people of America, nor their representatives, will sully the glory they have earned by their early labor, and steady perseverance, in sustaining, by their federal and state governments, the cause of humanity at home and abroad.

The calamity inflicted upon them by the introduction of slavery, in a form, and to an extent forbidding its hasty alleviation by intemperate zeal, is imputable to a foreign cause, for which the past is responsible to the present age. They will not deny to themselves, and to mankind, a generous co-operation in the only efficient measure of retributive justice, to an insulted and afflicted continent, and to an injured and degraded race.

In the independence of Spanish and Portuguese America, the committee *behold [*11 a speedy termination of the few remaining obstacles to the extension of the policy of the resolution of May, 1823.

Brazil cannot intend to resist the voice of the residue of the continent of America; and Portugal, deprived of her great market for slaves, will no longer have a motive to resist the common feelings of Europe. And yet, while from the Rio de la Plata to the Amazon, and through the American Archipelago, the importation of slaves covertly continues, if it be not openly countenanced, the impolicy is obvious, of denying to the American shore the protective vigilance of the only adequate check upon this traffic.

Your committee forbear to enter upon an investigation of the particular provision of a depending negotiation, nor do they consider the message referred to them as inviting any such inquiry.

They will not regard a negotiation to be dissolved, which has approached so near consummation, nor a convention as absolutely void, which has been executed by one party, and which the United States, having first tendered, should be the last to reject.

(A.)

Report of the Committee to whom was referred, at the commencement of the present session of Congress, so much of the President's Message as relates to the Slave Trade, accompanied with a bill to incorporate the American Society for colonizing the free people of color of the United States.

MAY 8, 1820.—Read twice, and, with the bill, committed to the committee of the whole House on the bill from the Senate, to continue in force an act to protect the commerce of the United States, and punish the crime of piracy, etc. etc.

The committee on the slave trade, to whom was referred the memorial of the president and board of managers of the American society for colonizing the free people of color of the United States, have, according to order, had under consideration the several subjects therein embraced, and report:

That the American society was instituted in the city of Washington, on the 28th of December, 1816, for the benevolent purpose of affording [*12] ing *to the free people of color of the United States the means of establishing one or more independent colonies on the western coast of Africa. After ascertaining, by a mission to that continent, and other preliminary inquiries, that their object is practicable, the society requests of the Congress of the United States a charter of incorporation, and such other legislative aid as their enterprise may be thought to merit and require.

The memorialists anticipate from its success consequences the most beneficial to the free people of color themselves, to the several states in which they at present reside, and to that continent which is to be the seat of their future establishment. Passing by the foundation of these anticipations, which will be seen in the annual reports of the society and their former memorials, the attention of the committee has been particularly drawn to the connection which the memorialists have traced between their purpose and the policy of the recent act of Congress, for the more effectual abolition of the African slave trade.

Experience has demonstrated that this detestable traffic can be nowhere so successfully assailed as on the coast upon which it originates. Not only does the collection and embarkation of its unnatural cargoes consume more time than their subsequent distribution

and sale in the market for which they are destined, but the African coast, frequented by the slave ships, is indented with so few commodious or accessible harbors, that, notwithstanding its great extent, it could be guarded by the vigilance of a few active cruisers. If to these be added colonies of civilized blacks, planted in commanding situations along that coast, no slave ship could possibly escape detection; and thus the security, as well as the enhanced profit which now cherishes this illicit trade, would be effectually counteracted. Such colonies, by diffusing a taste for legitimate commerce among the native tribes of that fruitful continent, would gradually destroy among them, also, the only incentive of a traffic which has hitherto rendered all African labor insecure, and spread desolation over one of the most beautiful regions of the globe. The colonies, and the armed vessels employed in watching the African coast, while they cooperated alike in the cause of humanity, would afford to each other mutual succor.

There is a single consideration, however, added to the preceding view of this subject, which appears to your committee, of itself, conclusive of the tendency of the views of the memorialists to further the operation of the act of the 3d of March, 1819. That act not only revokes the authority antecedently given 13*] to the several state and territorial *governments, to dispose, as they pleased, of those African captives who might be liberated by the tribunals of the United States, but authorizes and requires the President to restore them to their native country. The unavoidable consequence of this just and humane provision is, to require some preparation to be made for their temporary succor, on being relanded upon the African shore. And no preparation can prove so congenial to its own object, or so economical, as regards the government charged with this charitable duty, as that which would be found in a colony of the free people of color of the United States. Sustained by the recommendations of numerous societies in every part of the United States, and the approving voice of the legislative assemblies of several states, without inquiring into any other tendency of the object of the memorialists, your committee do not hesitate to pronounce it deserving of the countenance and support of the general government. The extent to which these shall be carried, is a question not so easily determined.

The memorialists do not ask the government to assume the jurisdiction of the territory, or to become, in any degree whatever, responsible for the future safety or tranquility of the contemplated colony. They have prudently thought that its external peace and security would be most effectually guarded, by an appeal in its behalf to the philanthropy of the civilized world, and to that sentiment of retributive justice, with which all Christendom is at present animated towards a much injured continent.

Of the constitutional power of the general government to grant the limited aid contemplated by the accompanying bill and resolutions, your committee presume there can exist no shadow of doubt; and they leave it to a period of greater national prosperity to determine how far the authority of Congress, the resources of the national government, and the welfare and happiness of the United States, will warrant or require its extension

Your committee are solemnly enjoined by the peculiar object of their trust, and invited by the suggestion of the memorialists, to inquire into the defects of the existing laws against the African slave trade. So long as it is in the power of the United States to provide additional restraints upon this odious traffic, they cannot be withheld, consistently with justice and the honor of the nation.

Congress have heretofore marked, with decided reprobation, the authors and abettors of this iniquitous commerce, in every form which it assumes; from the inception of its unrighteous purpose in America, *through all [*14 the subsequent stages of its progress, to its final consummation; the outward voyage; the cruel seizure and forcible abduction of the unfortunate African from his native home, and the fraudulent transfer of the property thus acquired. It may, however, be questioned, if a proper discrimination of their relative guilt has entered into the measure of punishment annexed to these criminal acts.

Your committee cannot perceive wherein the offense of kidnapping an unoffending inhabitant of a foreign country; of chaining him down for a series of days, weeks and months, amidst the dying and the dead, to the pestilential hold of a slave ship; of consigning him, if he chance to live out the voyage, to perpetual slavery in a remote and unknown land, differs in malignity from piracy, or why a milder punishment should follow the one than the other crime.

On the other hand, the purchase of the unfortunate African, after his enlargement from the floating dungeon which wafts him to the foreign market, however criminal in itself, and yet more in its tendency to encourage this abominable traffic, yields in atrocity to the violent seizure of his person, his sudden and unprepared separation from his family, his kindred, his friends and his country, followed by all the horrors of the middle passage. Are there not united in this offense all that is most iniquitous in theft, most daring in robbery, and cruel in murder? Its consequences to the victim, if he survives, to the country which receives him, and to that from which he is torn, are alike disastrous. If the internal wars of Africa, and their desolating effect, may be imputed to the slave trade—and that the greater part of them must now, cannot be questioned—this crime, considered in its remote as well as its proximate consequences, is the very darkest in the whole catalogue of human iniquities; and its authors should be regarded as hostes humani generis.

In proposing to the House of Representatives to make such part of this offense as occurs upon the ocean, piracy, your committee are animated, not by the desire of manifesting to the world the horror with which it is viewed by the American people, but by the confident expectation of promoting, by this example, its more certain punishment by all nations, and its absolute and final extinction.

May it not be believed, that when the whole civilized world shall have denounced the slave trade as piracy, it will become as unfrequent

as any other species of that offense against the law of nations? Is it unreasonable to suppose that negotiations will, with greater facility, introduce into that law such a provision as is here proposed, when it shall have been already incorporated into the separate code of each state?

15*] *The maritime powers of the Christian world have, at length, concurred in pronouncing sentence of condemnation against this traffic. The United States, having led the way in forming this decree, owe it to themselves not to follow the rest of mankind in promoting its vigorous execution.

If it should be objected that the legislation of Congress would be partial, and its benefit, for a time a least, local, it may be replied that the constitutional power of the government has already been exercised in defining the crime of piracy, in accordance with similar analogies, to that which the committee have sought to trace between this general offense against the peace of nations and the slave trade.

In some of the foreign treaties, as well as in the laws of the United States, examples are to be found of piracies, which are not cognizable, as such, by the tribunals of all nations. Such is the unavoidable consequence of any exercise of the authority of Congress, to define and punish this crime. The definition and punishment can bind the United States alone.

A bill from the Senate, making further provision for the exercise of this constitutional power, being now before the House of Representatives, your committee beg leave to offer such an amendment of its provisions as shall attain the last object which they have presumed to recommend.

(B.)

Report of the Committee to which was referred so much of the President's Message as relates to the Slave Trade.

FEBRUARY 9, 1821.—Read, and ordered to lie upon the table

The committee, to which is referred so much of the President's message as relates to the slave trade, and to which are referred the two messages of the President, transmitting, in pursuance of the resolution of the House of Representatives, of the 4th of December, a report of the Secretary of State, and enclosed documents relating to the negotiations for the suppression of the slave trade, report:

That the committee have deemed it advis-

16*] able, previous to entering *into a consideration of the proposed co-operation to exterminate the slave trade, to take a summary review of the constitution and laws of the United States relating to this subect. It will disclose the earnestness and zeal with which this nation has been actuated, and the laudable ambition that has animated her councils to take a lead in the reformation of a disgraceful practice, and one which is productive of so much human misery; it will, by displaying the constant anxiety of this nation to suppress the African slave trade, afford ample testimony that she will be the last to persevere in measures wisely digested, to effectuate this great and most desirable object, whenever such measures can be adopted in consistency with the leading principles of her local institutions.

In consequence of the existence of slavery in many of the states when British colonies, the habits and means of carrying on industry could not be suddenly changed; and the constitution of the United States yielded to the provision that the migration or importation of such persons, as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808.

But, long antecedent to this period, Congress legislated on the subject, wherever its power extended, and endeavored, by a system of rigorous penalties, to suppress this unnatural trade.

The act of Congress of the 22d of March, 1794, contains provisions that no citizen or citizens of the United States, or foreigner, or any other person coming into, or residing within the same, shall, for himself, or any other person whatsoever, either as master, factor or owner, build, fit, equip, load or otherwise prepare any ship or vessel, within any port or place of the United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves to any foreign country; or for the purpose of procuring from any foreign kingdom, place or country, the inhabitants of such kingdom, place or country, to be transported to any foreign country, port or place whatever, to be sold or disposed of as slaves, under the penalty of the forfeiture of any such vessel, and of the payment of large sums of money by the persons offending against the directions of the act.

By an act of the 3d of April, 1798, in relation to the Mississippi territory, to which the constitutional provision did not extend, the introduction of slaves, under severe penalties, was forbidden, and every slave imported contrary to the act was to be entitled to freedom.

By an act of the 10th of May, 1800, the citizens, or residents of this country, were prohibited from holding any right or property in vessels *employed in transporting slaves [*17 from one foreign country to another, on pain of forfeiting their right of property, and also double the value of that right in money, and double the value of their interest in the slaves; nor were they allowed to serve on board of vessels of the United States, employed in the transportation of slaves from one country to another, under the punishment of fine and imprisonment; nor were they permitted to serve on board foreign ships employed in the slave trade. By this act, also, the commissioned vessels of the United States were authorized

to seize vessels and crews employed contrary to the act.

By an act of the 28th of February, 1803, masters of vessels were not allowed to bring into any port (where the laws of the state prohibited the importation) any negro, mulatto or other person of color not being a native, a citizen or registered seaman, of the United States, under severe penalties; and no vessel, having on board persons of the above description, was to be admitted to an entry; and if any such person should be landed from on board of any vessel, the same was to be forfeited.

By an act of the 2d of March, 1807, the importation of slaves into any port of the United States was to be prohibited after the first of January, 1808, the time prescribed by the constitutional provision. This act contains many severe provisions against any interference or participation in the slave trade, such as heavy fines, long imprisonments, and the forfeiture of vessels. The President was also authorized to employ armed vessels to cruise on any part of the coast where he might judge attempts would be made to violate the act, and to instruct the commanders of armed vessels to seize, and bring in, vessels found on the high seas, contravening the provisions of the law.

By an act of the 20th of April, 1818, the laws, in prohibition of the slave trade, were further improved; this act is characterized with a peculiarity of legislative precaution, especially in the eighth section, which throws the labor of proof upon the defendant, that the colored persons brought into the United States by him had not been brought in contrary to the laws.

By an act of the 3d of March, 1819, the power is continued in the President, to employ the armed ships of the United States to seize and bring into any port any vessel engaged in the slave trade by citizens or residents of the United States; and such vessels, together with the goods and effects on board, are to be forfeited and sold, and the proceeds to be distributed in like manner as is provided by law for the distribution of prizes taken from an enemy; and the officers and crew are to undergo 18*] *the punishments inflicted by previous acts. The President, by this act, is authorized to make such regulations and arrangements as he may deem expedient, for the safe keeping, support and removal, beyond the limits of the United States, of all such negroes, mulattoes or persons of color, as may have been brought within its jurisdiction, and to appoint a proper person or persons, residing on the coast of Africa, as agent or agents for receiving the negroes, mulattoes or persons of color, delivered from on board of vessels seized in the prosecution of the slave trade.

And in addition to all the aforesaid laws, the present Congress, on the 15th of May, 1820, believing that the then existing provisions would not be sufficiently available, enacted, that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in the whole or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such ship or vessel, and on foreign shore seize, any negro or mulatto, not held to service or labor, by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring, or carry, or shall receive such negro or mulatto, on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction shall suffer death.

The immoral and pernicious practice of the slave trade has attracted much public attention in Europe, within the last few years, and in a congress at Vienna, on the 8th of February, 1815, five of the principal powers made a solemn engagement, in the face of mankind, that this traffic should be made to cease; in pursuance of which, these powers have enacted municipal laws to suppress the trade. Spain, although not a party to the original engagement, did, soon after, in her treaty with England, stipulate for the immediate abolition of the Spanish slave trade, to the north of the equator, and for its final and universal abolition on the 30th of May, 1820.

Portugal, likewise, in her treaty in 1817, stipulated that the Portuguese slave trade on the coast of Africa should entirely cease to the northward of the equator, and engaged that it should be unlawful for her subjects to purchase or trade in slaves, except to the southward of the line; the precise period at which the entire abolition is to take place in Portugal does not appear to be finally fixed; but the Portuguese ambassador, in the presence of the congress at Vienna, declared that Portugal, faithful to *her principles, would not re- [*19 fuse to adopt the term of eight years, which term will expire in the year 1823.

At this time, among the European states, there is not a flag which can legally cover this inhuman traffic to the north of the line; nevertheless, experience has proved the inefficacy of the various and rigorous laws which have been made in Europe and in this country; it being a lamentable fact that the disgraceful practice is even now carried on to a surprising extent. During the last year, Captain Trenchard, the commander of the United States sloop of war the Cyane, found that part of the coast of Africa which he visited, lined with vessels, engaged, as it is presumed, in this forbidden traffic. Of these, he examined many; and five, which appeared to be fitted out on American account, he sent into the jurisdiction of the United States for adjudication. Each of them, it is believed, has been condemned, and the commanders of two of them have been sentenced to the punishment prescribed by the laws of the United States.

The testimony recently published, with the opinion of the presiding judge of the United States Court of the southern district in the state of New York, in the case of the schooner Plattsburg, lays open a scene of the grossest fraud that could be practiced to deceive the officers of government, and conceal the unlawful transaction.

The extension of the trade for the last 25 or 30 years must, in a degree, be conjectural; but the best information that can be obtained on the subject, furnishes good foundation to believe that, during that period, the number of

slaves withdrawn from western Africa amounts to upwards of a million and a half; the annual average would be a mean somewhere between fifty and eighty thousand.

The trade appears to be lucrative in proportion to its heinousness; and, as it is generally inhibited, the unfeeling slave dealers, in order to elude the laws, increase its horrors; the innocent Africans, who are mercilessly forced from their native homes in irons, are crowded in vessels and situations which are not adapted for the transportation of human beings; and this cruelty is frequently succeeded, during the voyage to their destination, with dreadful mortality. Further information on this subject will appear in a letter from the Secretary of the Navy, enclosing two other letters, marked 1 and 2, and also by the extract of a letter from an officer of the Cyane, dated April 10, 1820, which are annexed to this report. While the slave trade exists, there can be no prospect of civilization in Africa.

However well disposed the European powers 20*] may be to effect a practical *abolition of the trade, it seems generally acknowledged that, for the attainment of this object, it is necessary to agree upon some concerted plan of cooperation; but, unhappily, no arrangement has as yet obtained universal consent.

England has recently engaged in treaties with Spain, Portugal, and the Netherlands, in which the mutual right of visitation and search is exchanged. This right is of a special and limited character, as well in relation to the number and description of vessels as to space; and to avoid possible inconveniences, no suspicious circumstances are to warrant the detention of a vessel; this right is restricted to the simple fact of slaves being on board.

These treaties contemplate the establishment of mixed courts, formed of an equal number of individuals of the two contracting nations, the one to reside in a possession belonging to His Britannic Majesty; the other within the territory of the other respective power. When a vessel is visited and detained, it is to be taken to the nearest court, and, if condemned, the vessel is to be declared a lawful prize, as well as the cargo, and are to be sold for the profit of the two nations; the slaves are to receive a certificate of emancipation, and to be delivered over to the government on whose territory the court is which passes sentence, to be employed as servants or free laborers; each of the governments binds itself to guaranty the liberty of such portion of these individuals as may be respectively assigned to it. Particular provisions are made for remuneration, in case vessels are not condemned after trial, and special instructions are stipulated to be furnished to commanders of vessels possessing the qualified right of visitation and search.

These powers entertain the opinion that nothing short of the concession of a qualified right of visitation and search can practically suppress the slave trade. An association of armed ships is contemplated, to form a species of naval police, to be stationed principally in the African seas, where the commanders of the ships will be enabled to co-operate in harmony and concert.

The United States have been earnestly invited, by the principal Secretary of State for foreign affairs of the British government, to join in the same, or similar arrangements; and this invitation has been sanctioned and enforced by a unanimous vote of the House of Lords and Commons, in a manner that precludes all doubts as to the sincerity and benevolence of their design.

In answer to this invitation, the President of the United States has expressed his regret that the stipulations in the treaties communicated, are *of a character to which the peculiar [*21 situation and institutions of the United States do not permit them to accede.

The objections made are contained in an extract of a letter from the Secretary of State, under date of the 2d of November, 1818, in which it is observed that, 'in examining the provisions of the treaties communicated by Lord Castlereagh, all the essential articles appear to be of a character not adaptable to the institutions or to the circumstances of the United States. The powers agreed to be reciprocally given to the officers of the ships of war of either party, to enter, search, capture and carry into port for adjudication, the merchant vessels of the other, however qualified and restricted, is most essentially connected with the institution, by each treaty, of two mixed courts, one of which is to reside in the external or colonial possession of each of the two parties respectively. This part of the system is indispensable to give it that character of reciprocity, without which the right granted to the armed ships of one nation, to search the merchant vessels of another, would be rather a mark of vassalage than of independence. But to this part of the system, the United States, having no colonies either on the coast of Africa, or in the West Indies, cannot give effect. That, by the constitution of the United States, it is provided that the judicial power of the United States shall be vested in a supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish. It provides that judges of these courts shall hold their offices during good behavior; and that they shall be removable by impeachment, or conviction of crimes and misdemeanors. There may be doubts, whether the power of the government of the United States is competent to institute a court for carrying into execution their penal statutes beyond the territories of the United States—a court consisting partly of foreign judges, not amenable to impeachment for corruption, and deciding upon statutes of the United States without appeal.

"That the disposal of the negroes found on board of the slave trading vessels, which might be condemned by the sentence of these mixed courts, cannot be carried into effect by the United States; for, if the slaves of vessels condemned by the mixed courts should be delivered over to the government of the United States as freemen, they could not, but by their own consent, be employed as servants or free laborers. The condition of the blacks being, in this Union, regulated by municipal laws of the separate states, the government of the United States can neither guaranty their liberty in the states where they could only be received as slaves, nor control them in the states where they would *be recognized as free. [*22

That the admission of a right in the officers of foreign ships of war, to enter and search the vessels of the United States in time of peace, under any circumstances whatever, would meet with universal repugnance in the public opinion of this country; and that there would be no prospect of a ratification, by advice and consent of the senate, to any stipulation of that nature. That the search by foreign officers, even in time of war, is so obnoxious to the feelings and recollections of this country, that nothing could reconcile them to the extension of it, however qualified or restricted, to a time of peace; and that it would be viewed in a still more aggravated light, if, as in the treaty with the Netherlands, connected with a formal admission that even vessels under convoy of ships of war of their own nation should be liable to search by the ships of war of another."

The committee will observe, in the first instance, that a mutual right of search appears to be indispensable to the great object of abolition; for, while flags remain as a cover for this traffic, against the right of search by any vessel except of the same nation, the chance of detection will be much less than it would be if the right of search was extended to vessels of other powers; and as soon as any one nation should cease to be vigilant in the discovery of infractions practiced on its own code, the slave dealers would avail themselves of a system of obtaining fraudulent papers, and concealing the real ownership under the cover of such flags, which would be carried on with such address as to render it easy for the citizens or subjects of one state to evade their own municipal laws; but if a concerted system existed, and a qualified right of mutual search was granted, the apprehension of these piratical offenders would be reduced to a much greater certainty; and the very knowledge of the existence of an active and vigorous system of co-operation would divert many from this practice, as the unlawful trade would become too hazardous for profitable speculation.

In relation to any inconveniences that might result from such an arrangement, the commerce of the United States is so limited on the African coast that it could not be much affected by it; and as it regards economy, the expense of stationing a few vessels on that coast would not be much greater than to maintain them at any other place.

The committee have briefly noticed the practical results of a reciprocal right of search, as it bears on the slave trade; but the objection as to the propriety of ceding this right remains. It is with deference that the committee undertake to make any remarks upon it. They bear in recollection the opinions entertained in this 23*] country on the practice of searching *neutral vessels in time of war; but they cannot perceive that the right under discussion is, in principle, allied, in any degree, to the general question of search; it can involve no commitment, nor is it susceptible of any unfavorable inference on that subject; and even if there were any affinity between the cases, the necessity of a special agreement would be inconsistent with the idea of existing rights; the proposal itself, in the manner made, is a total abandonment, on the part of England, of any claim to visit and search vessels in a time of peace, and this question has been unequivocally decided in the negative in her admiralty courts.

Although it is not among the objections that the desired arrangement would give any color to a claim or right of search in time of peace, yet, lest the case in this respect may be prejudiced in the minds of any, the committee will observe that the right of search, in time of peace, is one that is not claimed by any power as a part of the law of nations. No nation pretends that it can exercise the right of visitation and search upon the common and unappropriated parts of the sea, except upon the belligerent claim. A recent decision in the British Admiralty Court, in the case of the French slave ship Le Louis, is clear and decisive on this point. The case is annexed to this report.

In regard, then, to the reciprocal right wished to be ceded it is reduced to the simple inquiry whether, in practice, it will be beneficial to the two contracting nations. Its exercise, so far as it relates to the detention of vessels, as it is confined to the fact of slaves being actually on board, precludes almost the possibility of accident or much inconvenience.

In relation also to the disposal of the vessels and slaves detained, an arrangement, perhaps, could be effected, so as to deliver them up to the vessels of the nation to which the detained vessel should belong. Under such an understanding, the vessels and slaves delivered to the jurisdiction of the United States might be disposed of in conformity with the provisions of our own act of the 3d of March, 1819; and an arrangement of this kind would be free from any of the other objections.

An exchange of the right of search, limited in duration, or to continue at pleasure, for the sake of experiment, might, it is anxiously hoped, be so restricted to vessels and seas, and with such civil and harmonious stipulations, as not to be unacceptable.

The feelings of this country on the general question of search, have often been roused to a degree of excitement that evince their unchangeable character; but the American people will readily see the distinction between the cases; the one, in its exercise to the extent claimed, will *ever produce irritation, [*24 and excite a patriotic spirit of resistance; the other is amicable and charitable; the justness and nobleness of the undertaking are worthy of the combined concern of Christian nations.

The detestable crime of kidnapping the unoffending inhabitants of one country, and chaining them to slavery in another, is marked with all the atrociousness of piracy; and, as such, it is stigmatized and punishable by our own laws.

To efface this reproachful stain from the character of civilized mankind, would be the proudest triumph that could be achieved in the cause of humanity. On this subject, the United States, having led the way, owe it to themselves to give their influence and cordial co-operation to any measure that will accomplish the great and good purpose. But this happy result, experience has demonstrated, cannot be realized by any system, except a concession by the maritime powers to each other's ships of war, of a qualified right of search. If this object was generally attained, it is confidently believed that the active exertions of even a few nations

would be sufficient entirely to suppress the slave trade.

The slave dealers could be successfully assailed on the coast upon which the trade originates, as they must necessarily consume more time in the collection and embarkation of their cargoes than in the subsequent distribution in the markets for which they are destined; this renders that coast the most advantageous position for their apprehension; and, besides, the African coast, frequented by the slave ships, is indented with so few commodious or accessible harbors, that, notwithstanding its great extent, it could be guarded by the vigilance of a small number of cruisers. But if the slave ships are permitted to escape from the African coast, and to be dispersed to different parts of the world, their capture would be rendered uncertain and hopeless.

The committee, after much reflection, offer the following resolution:

Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President of the United States be requested to enter into such arrangements as he may deem suitable and proper, with one or more of the maritime powers of Europe, for the effectual abolition of the African slave trade.

25*] *Case of the French slave ship Le Louis, extracted from the 12th annual report of the African Institution, printed in 1818.

This vessel sailed from Martinique on the 30th of January, 1816, on a slave trading voyage to the coast of Africa, and was captured near Cape Mesurado, by the Sierra Leone colonial vessel of war, the Queen Charlotte, after a severe engagement which followed an attempt to escape, in which eight men were killed and twelve wounded of the British; and, proceedings having been instituted against Le Louis in the Vice-Admiralty Court of Sierra Leone, as belonging to French subjects, and as fitted out, manned and navigated for the purpose of carrying on the slave trade, after the trade had been abolished both by the internal laws of France, and by the treaty between that country and Great Britain, the ship and cargo were condemned as forfeited to His Majesty.

From this sentence an appeal having been made to the High Court of Admiralty, the cause came on for hearing, when the court reversed the judgment of the inferior court, and ordered the restitution of the property to the claimants.

The judgment of Sir William Scott was given at great length. The directors will advert to such points of it as are immediately connected with their present subject. "No doubt," he said, "could exist that this was a French ship, intentionally engaged in the slave trade." But, as these were facts which were ascertained in consequence of its seizure, before the seizor could avail himself of this discovery, it was necessary to inquire whether he possessed any right of visitation and search; because, if the discovery was unlawfully produced, he could not be allowed to take advantage of the consequences of his own wrong.

The learned judge then discussed, at considerable length, the question, whether the right of search exists in time of peace. And he decided it without hesitation in the negative. "I can find," he says, "no authority that gives the right of interruption to the navigation of states in amity, upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. No nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim." He admits, indeed, and with just concern, that if this right be not conceded in time of peace, it will be extremely difficult to suppress the traffic in slaves.

"The great object, therefore, ought to be, to obtain the concurrence of other nations, by application, by remonstrance, by example, by every peaceable instrument which men can employ to attract the consent of *men. But [*26 a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose."

"If this right," he adds, "is imported into a state of peace, it must be done by convention; and it will then be for the prudence of states to regulate, by such convention, the exercise of right, with all the softenings of which it is susceptible."

The judgment of Sir Walter Scott would have been equally conclusive against the legality of this seizure, even if it could have been established in evidence that France had previously prohibited the slave trade by her municipal laws. For the sake of argument, however, he assumes that the view he has taken of the subject might, in such a case, be controverted. He proceeds, therefore, to inquire how far the French law had actually abolished the slave trade at the time of this adventure. The actual state of the matter, as collected from the documents before the court, he observes, is this:

"On the 27th of July, 1815, the British minister at Paris writes a note to Prince Talleyrand, then minister to the King of France, expressing a desire on the part of his court to be informed whether, under the law of France as it then stood, it was prohibited to French subjects to carry on the slave trade. The French minister informs him, in answer, on the 30th of July, that the law of the Usurper on that subject was null and void (as were all his decrees), but that His Most Christian Majesty had issued directions that, on the part of France, "the traffic should cease, from the present time, everywhere, and forever."

"In what form these directions were issued, or to whom addressed, does not appear; but, upon such authority, it must be presumed that they were actually issued. It is, however, no violation of the respect due to that authority to inquire what was the result or effect of those directions so given; what followed in obedience to them in any public and binding form. And I fear I am compelled to say that nothing of the kind followed, and that the directions must

have slept in the portfolio of the office to which they were addressed; for it is, I think, impossible that if any public and authoritative ordinance had followed, it could have escaped the sleepless attention of many persons in our own country, to all public foreign proceedings upon this interesting subject. Still less would it have escaped the notice of the British resident minister, who, at the distance of a year and a half, is compelled, on the part of his own court, to express a curiosity to know what laws, ordinances, instructions, and other public and ostensible acts, had passed for the abolition of the slave trade.

27*] *"On the 30th of November, in the same year (1815), the additional article of the definitive treaty, a very solemn instrument, most undoubtedly, if formally and publicly executed, and it is in these terms: 'The high contracting parties, sincerely desiring to give effect to the measures on which they deliberated at the congress of Vienna, for the complete and universal abolition of the slave trade, and having each, in their respective dominions, prohibited, without restriction, their colonies and subjects from taking any part whatever in this traffic, engage to renew, conjointly, their efforts, with a view to insure final success to the principle which they proclaimed in the declaration of the 8th of February, 1815, and to concert, without loss of time, by their ministers at the court of London, the most effectual measures for the entire and definitive abolition of the traffic, so odious and so highly reproved by the laws of religion and nature.'

"Now, what are the effects of this treaty? According to the view I take of it, they are two, and two only; one declaratory of a fact, the other promissory of future measures. It is to be observed that the treaty itself does not abolish the slave trade; it does not inform the subjects that that trade is hereby abolished, and that, by virtue of the prohibitions therein contained, its subjects shall not, in future, carry on the trade; but the contracting parties mutually inform each other of the fact that they have, in their respective dominions, abolished the slave trade, without stating at all, the mode in which that abolition had taken place."

"It next engages to take future measures for the universal abolition.

"That, with respect to both the declaratory and promissory parts, Great Britain has acted with the optima fides, is known to the whole world, which has witnessed its domestic laws, as well as its foreign negotiations.

"I am very far from intimating that the government of this country did not act with perfect propriety in accepting the assurance that the French government had actually abolished the slave trade, as a sufficient proof of the fact; but the fact is now denied by a person who has a right to deny it; for, though a French subject, he is not bound to acknowledge the existence of any law which has not publicly appeared; and the other party having taken upon himself the burthen of proving it in the course of a legal inquiry, the court is compelled to demand and expect the ordinary evidence of such a disputed fact. It was not till the 15th of January, in the present year (1817), that the British resident minister applies for the communication I have described, of all laws, instructions, ordinances, and so on; he receives in return what is delivered *by the [*28 French minister as the ordinance, bearing date only one week before the requested communication, namely, the 8th of January. It has been asserted, in argument, that no such ordinance has yet, up to this very hour, even appeared in any printed or public form, however much it might import both French subjects, and the subjects of foreign states, so to receive it.

"How the fact may be, I cannot say; but I observe it appears before me in a manuscript form; and by inquiry at the Secretary of State's office, I find it exists there in no other plight or condition.

"In transmitting this to the British government, the British minister observes it is not the document he had reason to expect; and, certainly, with much propriety; for how does the document answer his requisition? His requisition is for all laws, ordinances, instructions, and so forth. How does this, a simple ordinance, professing to have passed only a week before, realize the assurance given on the 30th of July, 1815, that the traffic 'should cease, from the present time, everywhere and forever?' or how does this realize the promise made in November, that measures should be taken, without loss of time, to prohibit not only French colonists, but French subjects likewise, from taking any part whatever in this traffic? What is this regulation in substance? Why, it is a mere prospective colonial regulation, prohibiting the importation of slaves into the French colonies from the 8th of January, 1817.

"Consistently with this regulation, even if it does exist, in the form and with the force of a law, French subjects may be yet the common carriers of slaves to any foreign settlement that will admit them, and may devote their capital and their industry, unmolested by law, to the supply of any such markets.

"Supposing, however, the regulations to contain the fullest and most entire fulfillment of the engagement of France, both in time and in substance, what possible application can a prospective regulation of January, 1817, have to a transaction of March, 1816?

"Nobody is now to be told that a modern edict which does not appear, cannot be presumed; and that no penal law of any state can bind the conduct of its subjects, unless it is conveyed to their attention in a way which excludes the possibility of honest ignorance. The very production of a law professing to be enacted in the beginning of 1817, is a satisfactory proof that no such law existed in 1816, the year of this transaction. In short, the seizor has entirely failed in the task he has undertaken, in proving the existence of a prohibitory law, enacted by the legal government of France, which can be applied to the present transaction."

29*] *(C.)

Report of the Committee on the Suppression of the Slave Trade; made in the House of Representatives, April 12, 1822.

The committee on the suppression of the slave trade, to whom was referred a resolution of the House of Representatives, of the 15th of January last, instructing them to inquire whether the laws of the United States prohibiting that traffic have been duly executed; also, in the general operation thereof; and, if any defects exist in those laws, to suggest adequate remedies therefor; and to whom many memorials have been referred touching the same subject; have, according to order, had the said resolution and memorials under consideration, and beg leave to report:

That, under the just and liberal construction put by the Executive on the act of Congress of March 3d, 1819, and that of the 15th of May, 1820, inflicting the punishment of piracy on the African slave trade, a foundation has been laid for the most systematic and vigorous application of the power of the United States, to the suppression of that iniquitous traffic. Its unhappy subjects, when captured, are restored to their country, agents are there appointed to receive them, and a colony, the offspring of private charity, is rising on its shores, in which such as cannot reach their native tribes, will find the means of alleviating the calamities they may have endured before their liberation.

When these humane provisions are contrasted with the system which they supersede, there can be but one sentiment in favor of a steady adherence to their support. The document accompanying this report, and marked A, states the number of Africans seized or taken within or without the limits of the United States, and brought there, and their present condition.

It does not appear to your committee that such part of the naval force of the country as has been hitherto employed in the execution of the laws against this traffic, could have been more effectually used for the interest and honor of the nation. The document marked B is a statement of the names of the vessels, and their commanders, ordered upon this service, with the dates of their departure, etc. The first vessel destined for this service arrived upon the 30*] coast of Africa in March, 1820, *and in the few weeks she remained there, sent in for adjudication four American vessels, all of which were condemned. The four which have been since employed in this service, have made five visits (the Alligator having made two cruises in the past summer), the whole of which have amounted to a service of about ten months by a single vessel; within a period of nearly two years; and since the middle of last November, the commencement of the healthy season on that coast, no vessel has been, nor, as your committee is informed, is under orders for that service.

The committee are thus particular on this branch of their inquiry, because unfounded rumors have been in circulation that other branches of the public service have suffered from the destination given to the inconsiderable force above stated, which, small as it has been, has, in every instance, been directed, both in its outward and homeward voyage, to cruise in the West India seas.

Before they quit this part of their inquiry, your committee feel it their duty to state that the loss of several of the prizes made in this service is imputable to the size of the ships engaged in it. The efficacy of this force, as well as the health and discipline of the officers and crews, conspire to recommend the employment of no smaller vessel than a corvette or a sloop of war, to which it would be expedient to allow the largest possible complement of men; and, if possible, she should be accompanied by a tender, or vessel drawing less water. The vessels engaged in this service should be frequently relieved, but the coast should at no time be left without a vessel to watch and protect its shores.

Your committee find it impossible to measure with precision the effect produced upon the American branch of the slave trade, by the laws above mentioned, and the seizures under them. They are unable to state, whether those American merchants, the American capital and seamen, which heretofore aided in this traffic, have abandoned it altogether, or have sought shelter under the flags of other nations. It is ascertained, however, that the American flag, which heretofore covered so large a portion of the slave trade, has wholly disappeared from the coasts of Africa. The trade, notwithstanding, increases annually, under the flags of other nations. France has incurred the reproach of being the greatest adventurer in this traffic, prohibited by her laws; but it is to be presumed that this results not so much from the avidity of her subjects for this iniquitous gain, as from the safety which, in the absence of all hazard of capture, her flag affords to the greedy and unprincipled adventurers of all nations. It is neither candid nor just to impute to a gallant and high-minded people the exclusive commission of crimes, which the abandoned *of [*31 all nations are alike capable of perpetrating, with the additional wrong to France herself, of using her flag to cover and protect them. If the vigor of the American navy has saved its banner from like reproach, it has done much to preserve unsullied its high reputation, and amply repaid the expense charged upon the public revenue by a system of laws to which it has given such honorable effect.

But the conclusion to which your committee has arrived, after consulting all the evidence within their reach, is, that the African slave trade now prevails to a great extent, and that its total suppression can never be effected by the separate and disunited efforts of one or more states; and as the resolution to which this report refers, requires the suggestion of some remedy for the defects, if any exist, in the system of laws for the suppression of this traffic, your committee beg leave to call the attention of the House to the report and accompanying documents submitted to the last Congress by the committee on the slave trade, and to make

the same a part of this report. That report proposes, as a remedy for the existing evils of the system, the concurrence of the United States with one or all the maritime powers of Europe, in a modified and reciprocal right of search, on the African coast, with a view to the total suppression of the slave trade.

It is with great delicacy that the committee have approached this subject, because they are aware that the remedy which they have presumed to recommend to the consideration of the House, requires the exercise of the power of another department of this government, and that objections to the exercise of this power, in the mode here proposed, have hitherto existed in that department.

Your committee are confident, however, that these objections apply rather to a particular proposition for the exchange of the right of search, than to that modification of it which presents itself to your committee. They contemplate the trial and condemnation of such American citizens as may be found engaged in this forbidden trade, not by mixed tribunals, sitting in a foreign country, but by existing courts of competent jurisdiction in the United States. They propose the same disposition of the captured Africans now authorized by law; and, least of all, their detention in America.

They contemplate an exchange of this right, which shall be in all respects reciprocal; an exchange which, deriving its sole authority from treaty, would exclude the pretension, which no nation, however, has presumed to set up, that this right can be derived from the law of nations; and further, they have limited it, in their 32*] conception of its application, *not only to certain latitudes, and to a certain distance from the coast of Africa, but to a small number of vessels to be employed by each power, and to be previously designated. The visit and search, thus restricted, it is believed, would insure the co-operation of one great maritime power, in the proposed exchange, and guard it from the danger of abuse.

Your committee cannot doubt that the people of America have the intelligence to distinguish between the right of searching a neutral on the high seas, in time of war, claimed by some belligerents, and that mutual, restricted and peaceful concession by treaty, suggested by your committee, and which is demanded in the name of suffering humanity.

In closing this report, they recommend to the House the adoption of the following resolution, viz.:

Resolved, That the President of the United States be requested to enter into such arrangements as he may deem suitable and proper, with one or more of the maritime powers of Europe, for the effectual abolition of the slave trade.

The following resolution was submitted to the House of Representatives, on the 10th of February, 1823, and adopted the 28th of the same month:

Resolved, that the President of the United States be requested to enter upon, and to prosecute, from time to time, such negotiations with the several maritime powers of Europe and America as he may deem expedient for the effectual abolition of the African slave trade, and its ultimate denunciation, as piracy, under the law of nations, by the consent of the civilized world.

(B.)

Spanish Decree.

"The introduction of negro slaves into America was one of the first measures which my predecessors dictated for the support and prosperity of those vast regions, soon after their discovery. The impossibility of inducing the Indians to engage in different useful though 33*] painful labors, *arising from their complete ignorance of the conveniences of life, and the very small progress they had made in the arts of social existence, required that the working of the mines, and the cultivation of the soil, should be committed to hands more robust and active than theirs.

This measure, which did not create slavery, but only took advantage of that which existed through the barbarity of the Africans, by saving from death their prisoners, and alleviating their sad condition, far from being prejudicial to the negroes transported to America, conferred upon them not only the incomparable blessing of being instructed in the knowledge of the true God, and of the only religion in which the Supreme Being desires to be adored by His creatures, but likewise all the advantages which accompany civilization without subjecting them, in their state of servitude, to a harder condition than that which they endured in freedom, when free in their native country. Nevertheless, the novelty of this system demanded prudence in its execution; and thus it happened that the introduction of negro slaves into America depended always on particular licenses, which my predecessors granted according to circumstances of places and times, till the era when untrained slaves were generally permitted to be imported, both in national and foreign vessels, by the royal proclamations of the 28th of September, 1789, the 12th of April, 1798, and the 22d of April, 1804; in each of which the different places for their introduction were determined. All this clearly evinced that the Christian wisdom of my predecessors considered always these provisions as exceptions to the law, and dependent on variable conditions. Although the license granted the 22d of April, 1804, had not expired, when Divine Providence restored me to the throne to which it had destined me, and of which an unjust usurper had perfidiously attempted to deprive me, the disturbances and dissensions excited in my American dominions, during my absence, immediately fixed my sovereign attention; and meditating incessantly on the most appropriate means of reestablishing good order in these

remote possessions, and giving them all the encouragement of which they are capable, I was not slow in perceiving that the circumstances which had induced my predecessors to permit the traffic in slaves on the coast of Africa, and their introduction into both Americas, had entirely changed. In these provinces the number of indigenous negroes has increased prodigiously, and even that of free negroes, under the fostering care of a mild government, and the Christian humanity of the Spanish proprietors; the number of the white inhabitants has likewise been much augmented, and the climate is not now so prejudicial to the lat-
34*] ter as it was before the *soil was cleared of wood, and subjected to cultivation. The advantage, likewise, which resulted to the inhabitants of Africa from their transporation to a civilized country, is not now so urgent or exclusive, since an enlightened nation has undertaken the glorious task of civilizing them in their own land. At the same time, the general progress of improvement in Europe, and the spirit of humanity which directed its late transactions, in restoring the political edifice which the wickedness of a usurped government had shaken to its foundation, have excited among European sovereigns a desire to see this traffic abolished; and at the Congress of Vienna, agreeing on the necessity of the abolition, they occupied themselves in facilitating its execution, by the most amicable negotiations with those powers which had colonies, meeting in me that disposition which became so laudable an undertaking. Those considerations moved my royal mind to inform itself from enlightened persons, zealous for the prosperity of my states, as to the effects which the abolition of the traffic would produce on them. Having seen their reports, and being desirous to attain certainty in a matter of so grave importance, I transmitted them to my council of the Indies, with my royal order, of the 14th of June, 1815, that it might communicate to me its opinion and advice. Having collected all these copious materials, and having examined the proposition which the same supreme tribunal laid before me in its deliberation of the 15th of February, 1816; answering to the confidence which I repose in it, and coinciding with its opinion respecting the abolition of the traffic in slaves; and co-operating with the King of Great Britain by a solemn treaty, embracing all the points of reciprocal interest, involved in this important transaction; and determining that the time for the abolition was arrived, the interest of my American states being duly reconciled with the sentiments of my royal mind, and the wishes of all the sovereigns, my friends and allies; I have decreed as follows:

"Art. 1. From this day forward, I prohibit all my subjects, both in the Peninsula and in America, from going to buy negroes on the coasts of Africa, north of the line. The negroes who may be bought on the said coasts shall be declared free in the first port of my dominions at which the ship in which they are transported shall arrive. The ship itself, together with the remainder of its cargo, shall be confiscated to the royal treasury, and the purchaser, the captain, the master, and pilot, shall be irrevocably condemned to ten years' transportation to the Philippines.

"Art. II. The above punishment does not attach to the trader, the *captain, the [*35 master, and pilot, of the vessels which sail from any port of my dominions, for the coasts of Africa, north of the line, before the 22d of November of the present year; to which period I grant, besides, an extension of six months, counting from the above date, to complete their voyages.

"Art. III. From the 30th of May, 1820, I equally prohibit all my subjects, as well in the Peninsula as in America, from going to purchase negroes along those parts of the coast of Africa which are to the south of the line, under the same penalties imposed in the first article of this decree; allowing, likewise, the space of five months from the above date to complete the voyages that may be undertaken before the above-mentioned 30th of May, in which the traffic in slaves shall cease in all my dominions, as well in Spain as in America.

"Art. IV. Those who, using the permission which I grant till the 30th of May, 1820, shall purchase slaves on that part of the coast of Africa which lies south of the line, shall not be allowed to carry more slaves than five to two tons of tonnage of their vessel; and any persons contravening this enactment shall be subjected to the penalty of losing all the slaves on board, who shall be declared free at the first port of my dominions in which the ship arrives.

"Art. V. This computation is made without a reference to those who may be born during the voyage, or to those who may be serving on board as sailors or servants.

"Art. VI. Foreign vessels, which may import negroes into any port of my dominions, shall be subjected to the regulations prescribed in this decree; and in case of contravening them, shall be subjected to the penalties contained in it.

"And, my royal pleasure being that the above decree should circulate in my dominions of America and Asia, for its punctual observance, I communicated it to my Supreme Council of the Indies, signed with my own hand, under date of the 22d of September last past; and on its being published in that tribunal the 1st instant, a resolution passed that steps should be taken to enforce it, and that the said tribunal should, for such purpose, circulate this, my royal cedula, by which I direct all my viceroys, presidents, courts of judicature, commandants-general, governors and intendants of the Indies, of the adjacent, and of the Philippine Islands, to keep, fulfill and execute, and cause to be kept, fufilled and executed, all that has been enjoined in this my sovereign determination, without transgressing or contravening, or permitting to be transgressed or contravened, its contents in any way; causing it, for that *purpose, to be published as an order, [*36 not only in the capital cities, but also in the chief towns of jurisdiction of their respective districts, and communicating it likewise, each in his territory, to the tribunals, justices, authorities and persons, who in any way may be bound to observe it. And this my royal cedula shall be attended to by the accountants'-general offices of my said council. Dated, Madrid, the ——— December, 1817.

"Your majesty prohibits forever all your subjects of the Peninsula as well as of Amer-

ica, from purchasing negroes on the coasts of Africa, enacting that voyages for that purpose may not be undertaken to the coasts north of the equator, after the 22d of November, nor to those south of the equator, after the 30th of May, 1820, under the penalties specified."[1]

(G.)

Portuguese Edict.

"I, the King, make known to those to whom the present Alvará, having the force and effect of a law, shall come, that as the abolition of the slave trade in the ports of the coast of Africa, north of the equator, established by the ratification of the treaty, dated the 22d of January, 1815, and of the additional convention, dated the 28th of July, 1817, requires the adoption of fresh measures, which, fixing just and adequate penalties that shall attach to offenders, may afford to judges and other persons charged with the execution of those measures, a standard for deciding upon such cases as shall occur relative to this object, think proper to ordain as follows:

"Art. I. All persons, of whatsoever quality or condition, who shall proceed to fit out or prepare vessels for the traffic in slaves, in any part of the coast of Africa lying north of the equator, shall incur the penalty of the loss of the slaves, who shall be declared free, with a destination hereinafterwards mentioned. The vessels engaged in the traffic shall be confiscated, with all their tackle and appurtenances, together with the cargo, of whatever it may consist, which shall be on board on account of 37*] *the owners or freighters of such vessel, and of the owners of such slaves. The officers of such vessel—to wit, the captain or master, the pilot and supercargo—shall be banished for five years to Mozambique, and each shall pay a fine equivalent to the pay or other profits which he was to gain by the adventure. Policies of insurance cannot be made on such vessels, or their cargoes; and if they are made, the assurers who shall knowingly make them shall be condemned in triple the amount of the stipulated premium.

"Art. II. All persons, of whatever rank or condition, who shall import slaves into Brazil, in foreign vessels, shall incur the same penalty of the loss of the slaves, who shall become freemen, and be provided for as hereinafter directed.

"Art. III. Information shall be received relative to all the above cases. And if the vessel and her cargo have been confiscated, half of the whole proceeds of the property, sold by public auction, as well as half of the fines, shall be given to the informer, and the other half shall be paid into my royal treasury, to which the whole produce shall belong, if there be no informer. In case, however, of a vessel having been captured by a ship of war, such vessel and her cargo shall be subject to the provisions specified in the seventh article of the regulations concerning the mixed commission, annexed, under number 3, to the above convention of July the 28th, 1817. But in case the ship should be captured or confiscated, it shall not be lawful to commence an action for the recovery of such ship and cargo, except within a term not exceeding three years, to reckon from the date of the ship's entrance into the port where she has unloaded; after the expiration of which period, the said action shall be inadmissible and void.

"Art. IV. Informations, and all proceedings inclusive of the final sentence and execution, shall be brought before the judges appointed to try causes respecting contraband goods and embezzlement, in any place or district whither the slaves have been carried, or before any other magistrate or judge competent to decide on those matters, to whom I deem proper to commit this jurisdiction, as well as the authority requisite for carrying into execution the sentences passed by the mixed commission, in cases cognizable by the latter, and for trying and determining other cases that may occur, as also those accruing from them, allowing the party to bring an appeal conformably to the ordinance. It shall, however, be lawful for either of the parties to apply to the mixed commission, for them to determine whether or not the case have reference to the abolition; in which event, the proceedings upon it shall be delivered *up to the commission in the [*38 state in which they are; and whatever the commission may decide, shall be carried into effect.

"Art. V. The slaves made over to my royal treasury in the manner specified in the above seventh article of the regulations concerning the mixed commission, and those declared free by the above article (as it would be unjust to abandon them without support), shall be delivered into the office of the judge of the district, or where there is none, into that of the judge charged to watch over the rights of the Indians, whose powers I enlarge with that jurisdiction, to serve as freedmen for fourteen years in any public service of the navy, the fortresses, agriculture, or manual trades, as may be thought most convenient, being for that purpose enrolled in the respective stations; or shall be hired out to individuals of known property and probity, who shall be bound to support, clothe, and instruct them, teaching them some handicraft or labor that may be agreed upon, during the stipulated period; the terms and the conditions of which shall be renewed as often as necessary till the fourteen years are expired; the time of servitude may be shortened by two or more years, according as the good conduct of these persons may entitle them to the enjoyment of full freedom. In case these freedmen are destined for the public service, the officer who shall have authority in the respective stations to which they are assigned shall nominate a proper person to fix the period as above mentioned, who shall be responsible for their education and treatment. They shall have as curator a person of known probity, who shall be nominated every three

1.—B. p. 3.

years by the judge, and approved by the judicial council or governor, and captain-general of the province. To him it shall belong to provide everything which may contribute to their well-being, to testify abuses that may affect them, to procure their release after their proper term of service, and enforce generally, for their benefit, the observance of the laws prescribed for the protection of orphans, in as far as those laws are applicable to them, to the end that whatever is ordered concerning them may be strictly executed.

"Art. VI. In the ports to the south of the equator, where the traffic in slaves is still permitted, the regulations passed in the law of the 24th of November, 1813, shall be observed, with the following modifications: The distinction between vessels which shall exceed or shall not exceed 201 tons shall be abolished, and the number of slaves shall be regulated according to the tonnage of the vessel, in the proportion of five to every two tons, according to the ancient measure. The prohibition respecting marks made with iron on the body of the slaves, shall 39*] not extend to *marks imprinted with silver carimbos, which, being excepted, shall be permitted. It shall be allowed to the persons who own or freight slave vessels, to use, indiscriminately, iron or copper kettles, provided the latter every voyage be tinned anew, which shall be ascertained by proper officers visiting those vessels. If surgeons do not sail on board such vessels, on account of the impossibility of procuring them, or for some other reason equally conclusive, the owners shall be obliged to carry with them black sangradores, experienced in the treatment of the diseases with which the slaves are commonly afflicted, and, in the remedies proper for curing them; because, in regard to all these objects, experience has evinced the necessity of specifying the provisions set forth in this Alvará, which, under the above modifications, shall be observed in all its details.

"Art. VII. Whereas, the alteration affected in the slave trade by the restrictions contained in the above treaty and additional convention requires considerable modifications in the provisions of the former laws enacted on this subject, independent of the last change, which will tend to render many of them void, I think proper to order that it shall be permitted to import into the ports of Brazil, slaves from any ports where this traffic is not prohibited, and that the freight shall continue to be settled by the parties.

"The present injunctions shall be strictly complied with; wherefore I direct the Tribunal of the Privy Council, of Conscience and of Orders; the President of my Royal Exchequer; the Council of my Royal Treasury; the Chief Justice of the Supreme Court of Appeals in Brazil; the President of the Tribunal of Bahia; the Governors and Captains-General; and the other Governors of Brazil, and of my dominions beyond sea; also all the Ministers of Justice, and other persons whom the present Alvará may concern, to comply with and observe the same, notwithstanding any decision that may be at variance with it, and which I rescind for this end only; and it shall have the force and effect of a letter issued by the Chancellery, though it be not actually issued by the same, and though its validity extend beyond a year, notwithstanding the law to the contrary. Given at the palace of Rio de Janeiro, the 28th of January, 1818."

40*] *(C.)

Cases referred to in the argument of the Antelope.

The Amedie, 1 Acton's Rep., 240.

This was an American vessel captured by a British cruiser, in the latter part of the year 1807, on her way from Bonny, on the coast of Africa, to Mantanzas, in the Island of Cuba, with 105 slaves on board. She was libeled in the Vice-Admiralty Court of Tortola, and condemned as engaged in an illegal trade. From this sentence an appeal was prosecuted to the High Court of Appeals.

The first reason assigned by the captors for the condemnation of this vessel was, that "this ship was proceeding from Africa, with a cargo there laden, to Mantanzas, in the Island of Cuba, being a part of a colony then belonging to His Majesty's enemies, contrary to the prohibitions of the order of His Majesty in council, of the 11th day of November, 1807."

The second reason assigned was, that "the voyage was contrary to the prohibitory laws of the United States of America, made for abolishing the slave trade, which had been officially notified to the Lords of Appeal by the act of the American government in the case of The Chance, Brown, master; and although such laws of a foreign state may not amount to a direct or substantive ground of condemnation in a court of prize, yet they may and ought to exclude an American claimant from the benefit of those relaxations of the law of war which, in favor of neutral states, have been introduced by His Majesty's instructions, in regard to their commerce with the colonies of His Majesty's enemies; a privilege which can only be understood to be granted to neutral governments as a branch of their national commerce, and not as an invitation to lawless individuals to engage in a trade which the neutral state itself has prohibited, and desires to discourage."

The third ground of condemnation assigned by the captors was, "that Scott, the supercargo and lader of the slaves, is admitted to have an interest therein, which is liable to confiscation, he being a British subject, by the statute of 46 Geo. III., cap. 52."

Judgment.—Sir Wm. Grant: in the case of

The Amedie, it must be considered, on the evidence produced to the court, and from the 41*] situation *of this vessel at the time of capture, that she was employed in carrying slaves from the coast of Africa to a Spanish colony. We are of opinion this appears to have been the original design and purpose of the voyage, notwithstanding the pretense set up to veil the real intention of the proprietor. The American claimant, however, complains of the injury and interruption he has sustained in carrying on his usual and lawful trade, that of importing slaves for the purpose of sale, and calls upon the Prize Court to redress the grievance, and repair the damage he has sustained by the capture and unjust detention of this vessel.

On the different occasions when cases of this description formerly came before the court, the slave trade was liable to considerations very different from those which now belong to it. So far as respected the transportation of slaves to the colonies of foreign nations, this trade has been prohibited by the laws of America only; this country had taken no notice of that prohibition; our law sanctioned the trade, which it was the policy of the American law first to restrict, and finally to abolish. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state, of which this court could not take any cognizance, and of course could not be called upon to enforce; nor could it possibly bar a party in a court of prize. But by the alteration which has since taken place in our law, the question stands now upon very different grounds. We do now, and did at the time of this capture, take an interest in preventing that traffic in which this ship was engaged. The slave trade has since been totally abolished in this country, and our legislature has declared the African slave trade is contrary to the principles of justice and humanity. Whatever opinions, as private individuals, we before might have entertained upon the nature of this trade, no court of justice could with propriety have assumed such a position as the basis of any of its decisions, whilst it was permitted by our own law; but we do now lay down as a principle, that this is a trade which cannot, abstractedly speaking, be said to have a legitimate existence; I say abstractedly speaking, because we cannot legislate for other countries; nor has this country a right to control any foreign legislature that may think proper to dissent from this doctrine, and give permission to its subjects to prosecute this trade. We cannot, certainly, compel the subjects of other nations to observe any other than the first and generally received principles of universal law. But thus far we are now entitled to act, according to our law, and to hold that, prima facie, the trade is altogether illegal, and thus to throw on a claimant the whole burden of proof; *in order to show that, [*42 by the particular law of his own country he is entitled to carry on this traffic. As the case now stands, we think that no claimant can be heard in an application to a court of prize for the restoration of the human beings he carried unjustly to another country, for the purpose of disposing of them as slaves. The consequence of making such proof is not now necessary to determine; but where it cannot be made, the party must be considered to have failed in establishing his asserted right. We are of opinion, upon the whole, that persons engaged in such a trade cannot, upon principles of universal law, have a right to be heard upon a claim of this nature in any court. In the present case, the claimant does not bring himself within the protection of the law of his own country; he appears to have been acting in direct violation of that law, which admits of no right of property such as he claims; ours is express and satisfactory upon the subject.

Where, therefore, there is no right established to carry on this trade, no claim to restitution of this property can be admitted. We are hence of opinion the sentence of the court below was valid, and ought to be affirmed.

The Fortuna, 1 Dodson's Rep., 81.

This was the case of a vessel bearing the Portuguese flag, captured by a British cruiser, in October, 1810, and sent into Plymouth as prize.

It appeared in evidence that she sailed from New York, under American colors, in the month of July, 1810; and ostensibly owned by an American citizen; that she went to Madeira, landed a part of her cargo, and about a week before her departure from thence, a bill of sale of the ship was executed to a native of Madeira, a Portuguese subject; and in consequence of this sale, Portuguese papers obtained, and the portuguese flag assumed. It appeared, from an inspection of the vessel, and other evidence in the case, that the object of the voyage was to procure a cargo of slaves on the coast of Africa.

Judgment.— Sir William Scott: "An American ship, quasi American, is entitled, upon proof, to immediate restitution; but she may forfeit, as other neutral ships may, that title, by various acts of misconduct, by violation of belligerent rights most clearly and universally. But though this prize law looks primarily to violations of belligerent rights as grounds of confiscation in vessels not actually belonging to the enemy, it has extended itself a good deal beyond considerations of that description *only. It has been established, by recent [*43 decisions of the Supreme Court, that the court of prize, though properly a court purely of the law of nations, has a right to notice the municipal law of this country in the case of a British vessel, which, in the course of a prize proceeding, appears to have been trading in violation of that law, and to reject a claim for her on that account. That principle has been incorporated into the prize law of this country within the last twenty years, and seems now fully incorporated. A late decision, in the case of The Amedie, seems to have gone the length of establishing a principle. that any trade contrary to the general law of nations, although not tending to, or accompanied with, any in-

fraction of the belligerent rights of that country, whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation. The Amedie was an American ship, employed in carrying on the slave trade; a trade which this country since its own abandonment of it, has deemed repugnant to the law of nations, to justice and humanity, though without presuming so to consider and treat it, where it occurs in the practice of the subjects of a state which continues to tolerate and protect it by its own municipal regulations; but it puts upon the parties who are found in the occupations of that trade, the burthen of showing that it was so tolerated and protected; and, on failure of producing such proof, proceeds to condemnation, as it did in the case of that vessel. How far that judgment has been universally concurred in and approved, is not for me to inquire. If there be those who disapprove it, I am certainly not at liberty to include myself in that number, because the decisions of that court bind authoritatively the judicial conscience of this; its decisions must be conformed to, and its principles practically adopted. The principle laid down in that case appears to be, that the slave trade, carried on by a vessel belonging to a subject of the United States, is a trade which, being unprotected by the domestic regulations of their legislature and government, subjects the vessel engaged in it to a sentence of condemnation. If the ship should therefore turn out to be an American actually so employed—and it matters not, in my opinion, in what stage of the employment, whether in the inception or the consummation of it—the case of The Amedie will bind the conscience of this court to the effect of compelling it to pronounce a sentence of confiscation."

"I can have no rational doubt of her (The Fortuna's) real character; and, under the authority of the case of The Amedie, I condemn her and her cargo."

44*] *The Donna Marianna, 1 Dodson's Rep. 91.

This was the case of a vessel seized as she was proceeding to Cape Coast for a cargo of slaves, under the Portuguese flag. It appeared in evidence that she was originally an American vessel, had been bona fide sold to a British subject, and was now claimed as Portuguese property on the ground that she had been since conveyed to a Portuguese merchant. The court condemned the ship, as being a British vessel engaged in the slave trade.

Sir William Scott: "It would be a monstrous thing, where a ship, admitted to have been at one time British property, is found engaging in this traffic, to say that however imperfect the documentary evidence of the asserted transfer may be, and however startling the other circumstances of the case, no inquiry shall be made into the real ownership. Here are on board this vessel only papers of mere form, and which are in contradiction with each other, leaving the whole transaction of the transfer in great doubt and obscurity; and if the court were to be prohibited, under such circumstances, from inquiry into the reality of the Portuguese title, one sees how easily the provisions of the legislature would be defeated."

"I can have no doubt that this court is bound judicially to consider this as a British vessel, and that this Portuguese disguise has been assumed for the mere purpose of protecting the property of British merchants in a traffic which it was not lawful for them to engage in."

The Diana, 1 Dodson's Rep. 95.

This was the case of a vessel, under Swedish colors, seized at Cape Mount, on the coast of Africa, on the 10th of September, 1810, by a British cruiser, and carried to Sierra Leone, where proceedings were instituted against the vessel and cargo. At the time of the seizure she had exchanged her outward cargo for 120 slaves, part of which she had received on board. An information was filed on the part of the captors, and a claim made for the ship and cargo, as the property of a subject of the King of Sweden. The vessel and cargo were condemned in the Vice-Admiralty Court at Sierra Leone, from which an appeal was prosecuted to the High Court of Admiralty.

The condemnation also took place on a principle which this court cannot in any manner recognize, inasmuch as the sentence affirms 45*] *"that the slave trade, from motives of humanity, hath been abolished by most civilized nations, and it is not at the present time legally authorized by any." This appears to me to be an assertion by no means sustainable. This court is disposed to go as far in discountenancing this odious traffic as the law of nations and the principles recognized by English tribunals, will warrant it in doing, but beyond these principles it does not feel itself at liberty to travel. It cannot proceed on a sweeping anathema of this kind against property belonging to the subjects of foreign independent states. The position laid down in the sentence of the court below, that the slave trade is not authorized by any civilized state, is, unfortunately, by means correct, the contrary being notoriously the fact, that it is tolerated by some of them. This trade was at one time we know, universally allowed by the different nations of Europe, and carried on by them to a greater or less extent, according to their respective necessities. Sweden, having but small colonial possessions, did not engage very deeply in the traffic, but she entered into it so far as her convenience required for the supply of her own colonies. The trade, which was generally allowed, has been since abolished by some particular countries; but I am yet to learn that Sweden[1] has prohibited its subjects from engag-

1.—The treaty of concert and subsidy between His Majesty and the King of Sweden, which was signed at Stockholm on the 3d of March, 1813, has been made public since the date of this judgment. By an article of this treaty, the King of Sweden engages "to forbid and prohibit, at the period of

ing in the traffic, or that she has abstained from it either in act or declaration. Our own country, it is true, has taken a more correct view of the subject, and has decreed the abolition of the slave trade, as far as British subjects are concerned; but it claims no right of enforcing its prohibition against the subjects of those states which have not adopted the same opinion with respect to the injustice and immorality of the trade.

The principle which has been extracted by the judge of the court below, from the case of The Amedie, is the reverse of the real principle there laid down by the Superior Court, which was, that where the municipal laws of the country to which the parties belong have prohibited the trade, the tribunals of this country will hold it to be illegal, upon the general prin-
46*] ciples *of justice and humanity, and refuse restitution of the property; but on the other hand, though they consider the trade to be generally contrary to the principles of justice and humanity, where not tolerated by the laws of the country, they will respect the property of persons engaged in it under the sanction of the laws of their own country. The Lords of Appeal did not mean to set themselves up as legislators for the whole world, or presume in any manner to interfere with the commercial regulations of other states, or to lay down general principles that were to overthrow their legislative provisions with respect to the conduct of their own subjects. It is highly fit that the judge of the court below should be corrected in the view which he has taken of this matter, since the doctrine laid down by him in this sentence is inconsistent with the peace of this country and the rights of other states.

The proceedings of this court, as of appeal, have been commenced and carried on by both parties in the manner in which instance causes are usually conducted. A libel has been brought on the one side, to which a negative issue has been given on the other. Objections, however, have been taken to the jurisdiction, upon two grounds. In the first place it has been said that the sentence of the court below, condemning the property of the crown, was a prize sentence, and, consequently, that the appeal ought to have been made to the Privy Council, and not to the Instance Court of Admiralty, which is a mere municipal tribunal. It has likewise been said that, supposing this court to be possessed of an appellate jurisdiction, still it has no jurisdiction over the question itself, which depends altogether upon the jus gentium. But I think the proceedings of the parties have sufficiently founded the jurisdiction in the cause; and I am by no means clear that a court of civil jurisdiction might not otherwise have adjudicated on a question of this kind, and have excluded a claim asserted to be founded on principles contrary to general justice. The general injustice of a claim may be the subject of cognizance in a municipal court; a claim founded on privacy, or any other act which, in the general estimation of mankind, is held to be illegal and immoral, might, I presume, be rejected in any court upon that ground alone. I am of opinion, therefore, that neither of the objections which have been taken are founded. After issue has been given here by the captors, as in an instance court, they cannot object to the competency of the court to entertain the question; and I am by no means willing to put the parties to the expense and inconvenience of commencing proceedings de novo before another tribunal.

On the part of the appellants it is, I think, sufficiently established in *evidence, that [*47 the ship and cargo are Swedish property; whilst, on the other side, there is nothing but a general suggestion that they may belong to American citizens. It may, perhaps, be true, that persons of that country have dishonestly engage themselves in this traffic under color of the Swedish flag, and the Island of St. Bartholomew may be a convenient resort for such an illegal purpose; but there is nothing in this particular case which can lead to a grave suspicion, much less to a legal conclusion, that this ship is not bonæ fidei the property of Swedish subjects.

The question, then, is, whether the slave trade is permitted by the law of Sweden. I have before stated that this trade was, till of late years, generally allowed by the tastes of Europe, when, from motives of humanity, some of them were induced to abolish it, as far as their own subjects were concerned. It does not appear that anything has been done by Sweden in the way of abjuring it, much less that she has issued any positive declaration to that effect. The court is certainly inclined to hold that it lies on the individual making the claim to show that the law of his country countenances the trade; but, in this particular instance, that demand appears to be satisfied; sufficiently, at least, to throw on the other party the onus of proving that it is not so allowed. The indorsement upon the past, signed by the Swedish governor, that this vessel was "bound to the coast of Guinea, for slaves," raises a presumption of the legality of the trade, and shifts the burthen of proof from the claimant to the captor. It is not necessary that there should be an immediate act of the Swedish government itself on board, declaring what the precise state of the law may be; the court is bound to accept the declaration and authority of the governor, as it appears upon the pass, if not contradicted. I do not find that the authenticity of this pass is at all denied by the judge of the court below; he goes on the broad and sweeping ground that all dealing in slaves is unlawful, because the trade is not authorized by any civilized state, which is certainly an incorrect and erroneous statement. If the captors had it in their power to prove that Sweden had abolished this trade, they should now have produced that proof; for they must have been aware that the sentence of the judge could never be supported on the principles stated by him in his judgment. The sanction of the colonial governor has been produced by the claimants; and I

the cession of Guadaloupe, the introduction of slaves from Africa into the said island, and the other possessions in the West Indies of His Swedish Majesty, and not to permit Swedish subjects to engage in the slave trade; an engagement which (it is said) His Swedish Majesty is the more willing to contract, as this traffic has never been authorized by him," though it had never been prohibited, and therefore had been tolerated in practice upon the principles then generally received.

6 L. ed. 395

am clearly of opinion, under this authority standing before me, and standing uncontradicted, that Sweden has not abolished the slave trade.

48*] *The King's Advocate: From private information, I understand that Sweden never, at any time, engaged in this trade.

Court: Have you any documents to produce by which that fact can be made to appear? Can I presume, that the Swedish governor, who granted this pass, was acting contrary to the laws of his own country? It is impossible for me, upon mere private information, to say that such was the fact. If anything can be produced in the way of evidence, it must be offered to the court before which this case may be carried on appeal. With every disposition to sustain the disinclination which has of late been justly shown to the slave trade, I feel myself under a necessity of reversing this sentence, which appears to be founded on a false and dangerous principle, inconsistent with the rights of independent states, and, consequently, with the peace and safety of this country.

The only remaining point is, respecting these few Portuguese slaves which were found on board the ship. It appears that they belong to the master of the Portuguese schooner, which had been lying at Cape Mount, but was driven to sea by stress of weather whilst he was on shore, and that himself and his slaves had been taken on board this ship out of charity. In the absence of all proof I shall not presume that he had been acting in opposition to the laws of his own country, and the treaty relative to the slave trade between Great Britain and Portugal.

Sentence reversed.

Madrazo v. Willes, 5 Sergt. & Lowb., 313.

A foreigner, who is not prohibited from carrying on the slave trade by the laws of his own country, may, in a British court of justice, recover damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board of a ship then employed by him in carrying on the African slave trade.

The declaration stated that the plaintiff was a subject of the King of Spain, and that on the 12th of July, 1817, at Havana, in the Island of Cuba, he was lawfully possessed of a certain brig, called, etc., and continued so possessed until the committing of the trespasses after mentioned, to wit, at, etc.; and that the said brig was, to wit, on, etc., lawfully cleared out for a certain voyage in the slave trade, to wit, from Havana to the coast of Africa, and back; and that, on the 16th of January, 1818, on the high seas, to wit, off Cape St. Paul's, on the coast of Africa, defendant, with force and arms, seized the said brig, together with her stores, etc., and 300 slaves, and also divers goods, etc., on board of the said brig, and kept and detained them for a long time 49*] *and converted and disposed of the slaves, goods, etc., to his own use; by means whereof the said brig was prevented from further prosecuting the said voyage, and the plaintiff deprived of great gains which would have accrued from the slaves and goods, and from taking on board other slaves and other goods, and from carrying them to the Island of Cuba. Plea, not guilty. At the trial at the last London sittings after Michaelmas term, it appeared that the defendant, who was a captain in the royal navy, had, on the 16th of January, 1818, off Cape St. Paul's, unlawfully taken possession of the ship of the plaintiff, a Spanish merchant, which was engaged in the slave trade on the coast of Africa. The only question which arose was as to the amount of damages. It occurred to the Lord Chief Justice at the trial, that the plaintiff was not entitled to recover the value of the slaves in an English court of justice; and accordingly he desired the jury to find their verdict separately for each part of the damage, giving to the defendant liberty to move to reduce the verdict to the smaller sum, in case the court should agree with him on the point. The jury found a verdict for the plaintiff, damages £21,180; being for the deterioration of the ship's stores and goods, £3,000, and for the supposed profit of the cargo of slaves, £18,180. And now,

Jervis moved for a rule nisi to reduce the damages to £3,000. By the 47 Geo. III., c. 36, the slave trade, and all dealings connected with it, were declared unlawful. It follows, therefore, as a consequence, that no one can be allowed to recover damages in respect of a cargo of slaves. And the 51 Geo. III., c. 23, goes still further, for it declares that trade to be contrary to the principles of justice, humanity and sound policy. Now, it being the duty of English courts of justice to be guided by those principles, no one, whether he be a foreigner or an Englishman, can be permitted there to claim any compensation in respect of such a traffic. The 58 Geo. III., c. 36, is, indeed relied on by the other side; but that act, which was passed with a view of carrying into effect a treaty with Spain on this subject, ought not to affect the present question. Indeed, the fourth article of the treaty is strongly in favor of the defendant; for it provides that the British government shall make compensation, out of a sum provided by parliament to Spanish merchants, for the seizure of their ships, which would seem to prove that, independently of that, such merchants had no other remedy.

Abbott, C. J. On further consideration, it appears to me that there is no sufficient ground for reducing this verdict to the smallest sum found by the jury. Considering the very extensive language used in the two *acts of [*50 parliament to which we have been referred, I had at first thought that it was not competent, even for a foreigner, to come into an English court of justice and there to recover damages for a loss sustained by him in the prosecution of a trade declared by the British legislature, in such strong language, to be unlawful. It was with that view that I directed the jury to separate the damages in this case; for it occurred to me, that though the plaintiff might not be entitled to recover for the slaves, still, inasmuch as, at all events, the defendant ought to have taken away the slaves promptly, if at

all, the subsequent detention of the ship was an injury, for which the plaintiff was entitled to compensation. But I am now satisfied that the words used by the legislature, although large and extensive, can only be taken to be applicable to British subjects. By the 58 Geo. III., c. 36, it appears that a treaty had been made with Spain, for the prohibition of an important branch of the trade; and that, with regard to the remainder, special provisions had been made, and a special court constituted for the purpose of settling the disputes which might occur. Now, that shows most strongly, that but for such a treaty, the trade would have been perfectly legal in a Spaniard; and the 10th section of that act, by which a certain sum is provided as a full compensation for all losses sustained in consequence of the seizure of vessels previously to the ratification of that treaty, seems to me to corroborate most strongly this view of the subject; for it enables the parties sued to plead that clause in bar of the action, which would obviously have been unnecessary, if under the previous acts no action could have been maintained at all. This clause, therefore, seems to me to be a legislative recognition of a foreigner's right of suit. And by the 11th and 12th sections it is provided that all suits commenced in the courts of admiralty shall proceed, if commenced; and that the damages, etc., when recovered, shall be paid to the government of this country. All these clauses, taken together, appear to me to show that what occurred to me at nisi prius, was not a sound exposition of the law. I am therefore of opinion that the verdict for the larger sum found by the jury is right, and that we ought to refuse this rule.

Bayley, J. I do not think that there is sufficient doubt in this case to induce us to grant a rule. A British court of justice is always open to the subjects of all countries in amity with us, and they are entitled to compensation for any wrongful act done by a British subject to them. It is no answer to the present action to say that it would not be maintainable by a British subject; for the only questions are, whether the act of the defendant be wrongful, and what injury the plaintiff 51*] has sustained *from it. Although the language used by the legislature, in the statute referred to, is undoubtedly very strong, yet it can only apply to British subjects, and can only render the slave trade unlawful if carried on by them; it cannot apply, in any way, to a foreigner. It is true, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action. But it is not; and as a Spaniard cannot be considered as bound by the acts of the British legislature prohibiting this trade, it would be unjust to deprive him of a remedy for the wrong which he has sustained. He had a legal property in the slaves, of which he has, by the defendant's act, been deprived. The 58 Geo. III., c. 36, proceeds on this principle; and the provisions referred to by my Lord Chief Justice seem to me to be conclusive on the subject. I think, therefore, that we ought not to disturb this verdict.

Holroyd, J. However much I may regret that any damages can be recoverable for such a subject as this, yet I think we are bound to say that this plaintiff is entitled to them. I agree with the construction which has been put on the 58 Geo. III., c. 36; and I think, that even independently of that act, the action would have been maintainable for the loss of the slaves.

Best, J. The statutes which have been referred to, speak in just terms of indignation of the horrible traffic in human beings; but they speak only in the name of the British nation. The declaration of the British legislature, that the slave trade is contrary to justice and humanity, cannot affect the subjects of other countries, or prevent them from carrying on this trade out of the limits of the British dominions. The assertion of a right to control the subjects of other states in this respect, would be inconsistent with that independence which we acknowledge that every foreign government possesses. If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is impossible to say that the slave trade is contrary to what may be called the common law of nations. It was, until lately, carried on by all the nations of Europe. A practice so sanctioned can only be rendered illegal by the consent of all the powers. Most of the states of Christendom have now consented to the abolition of the slave trade, and concurred with us in declaring it to be unjust and inhuman. The subjects of any of these states could not, I think, maintain an action in the courts of this country for any injury happening to them in the prosecution of this trade; but Spain has reserved to herself a right of carrying *it on in that [*52 part of the world where this transaction occurred. Her subjects could not legally be interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this country for an injury sustained by them from such an interruption. These principles are confirmed by the decisions of the Court of Admiralty, and also by a judgment of Sir William Grant, pronounced at the cockpit. The cases to which I allude are, The Fortuna. The Donna Marianna, and The Diana, in the Admiralty Court; and The Amedie, before the privy council. (Dodson's Ad. Rep. 81, 91, 95.) These cases establish this rule, that ships which belong to countries that have prohibited the slave trade, are liable to capture and condemnation, if found employed in such trade; but that the subjects of countries which permit the prosecution of this trade cannot be interrupted while carrying it on. It is clear, from these authorities, that the slave trade is not condemned by the general law of nations. The subjects of Spain have only to look to the municipal laws of their own country, and cannot be affected by any laws made by our government. The rule for reducing the damages, in this case, must therefore be refused.

Rule refused.

ROSE'S NOTES

COMPLETELY REVISED EDITION

1917

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ON THE

UNITED STATES REPORTS.

X WHEATON.

10 Wheat. 1-50, 60 L. Ed. 253, WAYMAN v. SOUTHARD.

Supreme Court has jurisdiction when case is adjourned from circuit of only those points on which judges were divided.

Approved in Ward v. Chamberlain, 2 Black, 435, 17 **L. Ed. 323**, where court refused to pass on questions not involved in points certified; dissenting opinion in Dow v. Johnson, 100 U. S. 173, **25 L. Ed. 638**, arguing that court did not have jurisdiction except as to specific points on which judges were divided; Paving Co. v. Molitor, 113 U. S. 616, **28 L. Ed. 1108**, 5 Sup. Ct. 621, denying jurisdiction where certificate presented mixed questions of law and fact and involved merits of controversy; dissenting opinion in Ex parte Crane, 5 Pet. 206, **8 L. Ed. 98**, to point that jurisdiction of court over causes sent up on certificate of division should be strictly construed; Baker v. Biddle, 1 Bald. 406, Fed. Cas. 764, arguendo.

Definiteness of question to be certified. Note, **31 L. R. A. 395.**

Under general grant of power to carry enumerated powers into execution, Congress can make laws to carry Federal judgments into execution.

Cited in Knox Co. v. Aspinwall, 24 How. 384, **16 L. Ed. 738**, holding Congress could pass laws authorizing Federal courts to issue mandamus to compel county officers to levy a tax for purpose of satisfying judgment of said court against the county; Riggs v. Johnson Co., 6 Wall. 187, **18 L. Ed. 773**, holding Congress could make laws authorizing Federal courts to compel defendant county to levy tax to satisfy judgment of such court, notwithstanding injunction from State court to prevent such levy; United States v. Drennan, Hempst. 325, Fed. Cas. 14,992, to point that Congress having exercised its power to make laws carrying into execution Federal court judgments, United States could proceed to satisfy judgment in its favor against deceased's estate, notwithstanding local probate law; Bank v. Thompson, 173 Ill. 599, **64 Am. St. Rep. 140**, 50 N. E. 1090, holding Con-

gress had power to adopt State laws relating to process and executions, and adoption of Illinois law, making lien of judgment of State courts coextensive with their jurisdictions, made lien of judgments of Federal courts in Illinois coextensive with their jurisdictions; Thayer v. Hedges, 23 Ind. 146, upholding power of Congress to provide for issue of legal tender treasury notes; Lafayette etc. R. R. Co. v. Geiger, 34 Ind. 213, holding, where State legislature has power to authorize counties to subscribe for stock, it has power by implication to provide means for raising money therefor; Polk v. Douglas, 6 Yerg. 211, to effect that Federal government had exclusive authority to regulate process of Federal courts.

Jurisdiction of court over cause does not terminate with the judgment, but continues until its satisfaction.

Approved in D. B. Martin Co. v. Shannonhouse, 203 Fed. 519, holding that where money held in custody of clerk of Federal court under its judgment, it could not be attached under writ issued out of State court; Ferriday v. Middlesex Banking Co., 118 Ala. (790), 43 South. 411, and Please v. Rathbun-Jones Engineering Co., 228 Fed. 279, both holding jurisdiction of Federal court continued until decree was satisfied; American Shipbuilding Co. v. Whitney, 190 Fed. 110, holding that Federal court had no jurisdiction to enjoin taking deposition in State court; Central Vermont Ry. Co. v. Redmond, 189 Fed. 688, holding that where public service commission had made order, and appeal taken to State court, which affirmed order, Federal court had no jurisdiction to enjoin commissioners; Union Pac. R. Co. v. Flynn, 180 Fed. 569, holding that over action brought in Federal court to review proceedings in State court, Federal court cannot take jurisdiction; United States v. Dolla, 177 Fed. 104, 21 Ann. Cas. 665, 100 C. C. A. 521, holding that word "case" is used in act March 3, 1891, does not include proceeding for naturalization and Circuit Court of Appeals has no jurisdiction to review it; Collin County Nat. Bank v. Hughes, 152 Fed. 415, 81 C. C. A. 556, holding that court rendering judgment has power to revive it; Security Trust Co. v. Union Trust Co., 134 Fed. 302, Rev. Stats., § 720, prohibiting restraining of State court proceedings, prohibits restraint of execution sale; Corbitt v. Farmers' Bank, 114 Fed. 604, holding money paid into court pending litigation is not subject to attachment from other courts; Phelps v. Mutual Reserve Fund Life Assn., 112 Fed. 458, holding petition, after return of execution nulla bona, stating that life insurance premiums were due defendant and payable out of the State, and praying for appointment of receiver to collect premiums, was not commencement of new suit; Leathe v. Thomas, 97 Fed. 138, 139, holding an order enjoining sheriff from proceeding with collection of execution lawfully issued is within prohibition of Rev. Stats., § 720; Hopkins v. Levandowski, 250 Ill. 374, 95 N. E. 497, holding that where under statute municipal court had jurisdiction, but no provisions were made for proceedings after judgment, writ of restitution should issue; School Directors Dist. No. 153 v. School Directors Dist. 154, 232 Ill. 325, 83 N. E. 850, holding power to tax not

being judicial court has no jurisdiction to find amount that should have been levied against property; Knox Co. v. Aspinwall, 24 How. 384, 16 L. Ed. 738, holding Federal court had authority to issue mandamus to compel county commissioners to levy tax to satisfy judgment for interest on county bonds; Riggs v. Johnson Co., 6 Wall. 187, 194, 18 L. Ed. 773, 776, holding similarly notwithstanding State court had perpetually enjoined county from levying such tax; Ex parte Flippin, 94 U. S. 350, 24 L. Ed. 195, holding Federal court had authority to issue writ to carry its judgment into effect; Covell v. Heyman, 111 U. S. 183, 28 L. Ed. 393, 4 Sup. Ct. 358, holding property seized under process of Federal court is in custody of such court, and cannot be recovered by action of replevin in State court; Tefft v. Sternberg, 40 Fed. 6, 5 L. R. A. 225, where Federal Circuit Court declined to take jurisdiction when State court in possession of property subject of litigation; In re Forsyth, 78 Fed. 304, denying application for mandamus to compel clerk to pay surplus money in custody of Federal court to receiver of corporation appointed by State court; United States v. Drennan, Hempst. 325, Fed. Cas. 14,992, holding that United States having right to sue estates of deceased persons in Federal courts, court can proceed to execute judgment in spite of restrictions of local probate law; Campbell v. Hadley, 1 Sprague, 472, Fed. Cas. 2358, holding Federal court had jurisdiction of suit on bond for jail liberties given to secure same for prisoner under process of said court; dissenting opinion in Edwards v. Nicholson, 13 La. 586, arguing against jurisdiction of State court of suit against United States marshal acting under execution from Federal court; dissenting opinion in United States v. Jones, 5 Utah, 557, 18 Pac. 236, contending that jurisdiction of territorial court included the power to grant or deny separate trials to defendants jointly indicted; Ex parte Holman, 28 Iowa, 104, 105, 4 Am. Rep. 168, 169, holding Federal court could issue mandamus to compel tax levy to satisfy its judgment against a county, and State court could not interfere; Wheeling v. Mayor, 1 Hughes, 94, Fed. Cas. 17,502, where Circuit Court refused mandamus, holding it could issue writ only to execute its own judgment; Darst v. Duncan, 6 Fed. Cas. 1198, holding proceedings in suit ended upon execution of final process, and State court had no authority thereafter to release prisoner under State insolvent law; Dudley's Case, 7 Fed. Cas. 1156, holding levy on bankrupt's property after petition filed, but before decree, to constitute lien which could not be annulled by subsequent decree; Pollock v. County, 19 Fed. Cas. 948, sustaining authority of United States Circuit Court to award attachment against county commissioners to execute judgment against county; Thompson v. Phillips, 1 Bald. 267, 271, Fed. Cas. 13,974, sustaining power of court to direct marshal in executing judgment; Clark v. Binninger, 3 Bank. Reg. 129, 38 How. Pr. 342, holding Federal court proceeding in bankruptcy not entitled to partnership assets already in possession of State court officer in proceedings for dissolution of the partnership.

Adoption of State practice as to writs and executions in Supreme Court.

Approved in Holden v. Stratton, 198 U. S. 214, 49 L. Ed. 1022, 25 Sup. Ct. 656, exemption of life insurance policies under bankrupt act of 1898, § 6, where they are exempted by State law, is not qualified by § 70a; Cohen v. United States, 214 Fed. 28, 130 C. C. A. 417, holding qualifications of witnesses have nothing to do with "mode of process"; Ex parte N. K. Fairbank Co., 194 Fed. 994, holding that where affidavit for disqualification of judge, shows no prejudice exists, mere filing does not disqualify; General Electric Co. v. Hurd, 171 Fed. 986, holding judgment barred upon which no execution had issued in ten years; Johnson v. Crawford, 154 Fed. 764, holding Federal court authorized under Pa. Act of 1842 to issue warrant for arrest of judgment debtor; Steele v. Buel, 104 Fed. 972, holding provisions of bankruptcy act 1898, section 6, providing that act not affect allowance to bankrupts of exemptions prescribed by State law, establishes rule of exemption for entire act; United States Bank v. Halstead, 10 Wheat. 54, 63, 6 L. Ed. 265, 267, holding Kentucky statute, passed after act of 1789, not applicable to process issued out of Federal court in Kentucky; Beers v. Haughton, 9 Pet. 359, 360, 361, 9 L. Ed. 157, 158, holding regulations of State law as to bail and imprisonment could be adopted by rule of Federal court under process act of 1828; United States v. Knight, 14 Pet. 314, 316, 10 L. Ed. 472, 473, holding process act of 1828, adopting State laws then in force respecting executions, in Maine extended to imprisoned debtor the privilege of the jail limits; McCracken v. Hayward, 2 How. 614, 616, 11 L. Ed. 400, 401, holding Circuit Court could, under process act of 1828, adopt, by rule, process pointed out by State law, but under said process act, if such rule does not conform substantially to the provisions of the State law, it is void; Homer v. Brown, 16 How. 365, 14 L. Ed. 975, holding writ of right might be brought in Federal courts in Massachusetts to recover corporeal hereditaments in fee simple, notwithstanding it was abolished by Massachusetts legislature after the process act, then in force, was adopted; Ward v. Chamberlain, 2 Black, 440, 17 L. Ed. 325, holding that process act of 1828 adopted State laws rendering decrees of Federal courts for payment of money, liens on real estate; Railroad Co. v. National Bank, 102 U. S. 53, 26 L. Ed. 75, in illustrating argument that State laws do not always apply to Federal courts; Ex parte Boyd, 105 U. S. 651, 26 L. Ed. 1202, holding party recovering judgment in common-law cause in Federal court in New York, entitled to State law remedy to execute his judgment, such remedy having been adopted for Federal courts there by United States Revised Statutes, section 916; Fink v. O'Neil, 106 U. S. 276, 277, 278, 279, 27 L. Ed. 198, 199, 1 Sup. Ct. 328, 329, 330, holding Revised Statutes, section 916, adopted Wisconsin law of exemptions existing at time of its enaction; Lamaster v. Keeler, 123 U. S. 389, 31 L. Ed. 242, 8 Sup. Ct. 201, holding law of Nebraska, governing proceedings for stay of execution, passed subsequent to Revised Statutes, sections 914 and 916, not adopted by rule of court, was not applicable to Federal courts there; Cooke v. Avery, 147 U. S. 387, 37 L. Ed. 213, 13

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Sup. Ct. 345, holding remedies for satisfying judgments provided by State laws passed after Revised Statutes, section 916, but adopted by rule of Federal court, apply to judgments of such court; Hudson v. Parker, 156 U. S. 281, 39 L. Ed. 425, 15 Sup. Ct. 452, upholding authority of Supreme Court to make rules for Federal courts; Ross v. Duval, 13 Pet. 64, 10 L. Ed. 60, where held if State statute of limitation on judgment be regarded as a process act, it was adopted by United States process act of 1828, and was applicable to judgment of Federal court rendered before that time; Perkins v. City, 5 Biss. 322, Fed. Cas. 10,991, holding act of 1872, adopted State mode of service of process then existing, and law is obligatory on Federal courts; New England Screw Co. v. Bliven, 3 Blatchf. 242, Fed. Cas. 10,156, holding State law respecting attachment, not adopted by rule of Federal court, did not apply to Federal court; County v. Sears, 20 Blatchf. 28, 31, 9 Fed. 11, 13, applying reasoning to law governing equity procedure, holding court could adopt equity rule providing that State law govern liens created by attachment; County v. Jones, 21 Blatchf. 149, 152, 13 Fed. 577, 579, holding court could adopt equity rule providing that State law govern liens created by attachment; United States v. Sturgis, 14 Fed. 811, holding, under State procedure, United States District Court had power to suspend lien of judgment pending appeal; The Hudson, 15 Fed. 176, holding District Court has authority to regulate its practice in admiralty, when exigencies arise not provided for by law or Supreme Court; Sowles v. Witters, 46 Fed. 498, where held when State law respecting enforcement of judgment adopted by rule of United States court, question as to whether marshal has conformed thereto is a Federal question; Bellows v. Sowles, 52 Fed. 528, holding State law by vesting exclusive jurisdiction in State probate courts to distribute estates of deceased persons could not limit equity jurisdiction of United States court; United States v. Arnold, 69 Fed. 992, 34 U. S. App. 177, holding Illinois statute of 1893, respecting imprisonment for nonpayment of fine or judgment, not applicable to United States courts, because it was a law regulating process and had not been adopted by rule of court; Beers v. Haughton, 1 McLean, 230, Fed. Cas. 1230, holding, under process act of 1828, court could adopt rule conforming to State law that no person should be imprisoned under any process who had been released under State insolvency law, as to the particular demand; Gaines v. Travis, Abb. Adm. 430, Fed. Cas. 5180, holding act of 1841, adopting prospective State legislation on subject of imprisonment for debt, virtually repealed as to admiralty by act of 1842, and admiralty rules adopted pursuant thereto; Koning v. Bayard, 2 Paine, 257, Fed. Cas. 7924, holding, in New York, liens of judgments of Federal courts and procedure to satisfy same within operation of New York laws; Springer v. Foster, 1 Story, 602, Fed. Cas. 13,265, holding Massachusetts insolvent law passed subsequent to United States process acts, not adopted by rule of court, could not operate to dissolve attachment in Federal court; Springer v. Foster, 2 Story, 387, Fed. Cas. 13,266, holding Massachusetts insolvent law of 1838 could not operate to dissolve attachment in Federal

court; United States v. Conway, Hempst. 313, Fed. Cas. 14,849, holding State law regulating sale of property, on execution, was constitutional and properly adopted by rule of Federal court; Jones v. Vanzants, 4 McLean, 606, Fed. Cas. 7504, holding law of Ohio, passed in 1831, providing that suit should not abate by death of party, not applicable to Federal court, never having been adopted by rule thereof; Moan v. Wilmarth, 3 Wood. & M. 402, Fed. Cas. 9686, calling attention to analogy between process acts and acts conforming to State laws respecting imprisonment for debt in construing latter; United States v. Knight, 3 Sumn. 369, Fed. Cas. 15,539, holding act of 1800, respecting imprisoned debtors, adopted only State laws then in force on the subject; United States v. Knight, 3 Sumn. 373, 375, Fed. Cas. 15,539, holding process act of 1828, adopted State laws relating to allowance of jail liberties to prisoners under process from Federal courts; Hall v. Perott, 1 Bald. 126, Fed. Cas. 5942, holding Pennsylvania law relating to juries, passed after 1789, not applicable to Federal courts; Picquet v. Swan, 5 Mason, 38, Fed. Cas. 11,134, holding State law relating to process which had been for a long time conformed to by Federal court, though never formally adopted by rule, had been adopted in all respects as to which applicable; Lane v. Townsend, 1 Ware, 290, Fed. Cas. 8054, holding Massachusetts law of 1821, relating to bail, adopted by process act of 1828; In re Wyllie, 2 Hughes, 455, Fed. Cas. 18,112, sustaining and construing clause in bankrupt act, adopting State exemption laws existing in 1871; Dobbin v. Alleghany, 7 Fed. Cas. 780, holding Circuit Court rule adopting State law as part only of final process, valid; Ely v. Hanks, 8 Fed. Cas. 601, holding that District Court had power, under process act of 1828, to adopt State law relative to attachment proceedings; Oelrich v. Pittsburgh, 18 Fed. Cas. 599, holding State act exempting stock owned by municipal corporation from execution, passed after process act of 1828, not applicable to Federal courts; Ex parte Hull, 12 Fed. Cas. 853, 854, holding that as Federal bankrupt act was a law regulating remedy, it was applicable to debts contracted prior to its passage; United States v. Stevenson, 1 Abb. (U. S.) 500, Fed. Cas. 16,395, holding long-continued practice of issuing process of attachment in common-law action in District Court, evidence of adoption of such practice by the court in pursuance of process act of 1792, written rule not being indispensable for such adoption; Beck v. Burnett, 22 Ala. 823, 824, holding State redemption law not applicable to Federal courts, where not adopted; Simpson v. Niles, 1 Ind. 203, applying State law governing executions as it stood at date of adoption of process act in 1828, to Federal court making judgment a lien on real estate; Kennerly v. Shepley, 15 Mo. 650, 57 Am. Dec. 222, upholding validity of marshal's execution sale, against objection that it did not conform to State law, regulating execution sales, when made in Missouri before 1828, at a time when the court had adopted no rules; Howe v. Freeman, 14 Gray, 578, holding State laws regulating process which had been adopted, since process act had no application to processes of Federal court; Sellers v. Corwin, 5 Ohio, 404, 24 Am. Dec. 305,

holding judgment of Federal court rendered before process act of 1828, a lien on defendant's lands by virtue of adoption, by rule of said court, of State execution laws; Wood v. Funk, 7 Ohio, 197, holding discharge under insolvent laws of Ohio in force when process act of 1828 adopted, operated to discharge debtor imprisoned under process from United States Circuit Court; Polk v. Douglas, 6 Yerg. 211, 213, 214, holding State redemption law of 1820, not having been adopted by rule of court, did not apply; Hepburn v. Kerr, 9 Humph. 728, 51 **Am. Dec.** 686, holding lands sold under process of Federal court after adoption of process act of 1828, subject to State redemption law of 1820; Rogers v. McKenzie, 1 Heisk. 516, holding State exemption law, passed after adoption of process act of 1828, not operative against execution issued from Federal court; Casseday v. Norris, 49 Tex. 618, holding that under Revised Statutes, section 916, sale of lands under execution by United States marshal, at place other than that required by State statute in force at time of adoption of said section, invalid; Sinclair v. Stanley, 64 Tex. 73, holding title derived from purchaser at sale under execution by United States marshal, made otherwise than as provided by State law, invalid; Fordyce v. Beecher, 2 Tex. Civ. App. 33, 21 S. W. 180, holding State law, providing that discharge of receiver shall not abate pending suit against him, does not apply to receivers appointed by Federal courts on this ground; dissenting opinion in Ex parte Crane, 5 Pet. 210, 8 **L. Ed.** 100, to point that powers of Supreme Court are limited to specified cases, of which power to regulate process and practice are mentioned; Van Hook v. Pendleton, 2 Blatchf. 88, Fed. Cas. 16,852, and Bains v. Schooner, 1 Bald. 564, Fed. Cas. 756, arguendo.

Distinguished in Ross v. Duval, 13 Pet. 60, 61, 10 **L. Ed.** 58, 59, holding act of Virginia, limiting time within which process may issue on a judgment, is not an act regulating process; dissenting opinion in Beers v. Haughton, 9 Pet. 368, 372, 9 **L. Ed.** 160, 162, contending court could not adopt, by rule, a State law arresting or restricting process; United States v. Ames, 1 Wood. & M. 86, Fed. Cas. 14,441, holding State laws cannot be permitted to embarrass object of cession, where jurisdiction over, as well as title to lands have been ceded to the government; Reid v. House, 2 Humph. 582, holding State law requiring registry of judgments in county of judgment debtor's domicile, applies to Federal courts; Adler v. Cole, 12 Wis. 207, 209, holding process acts did not apply to Federal courts in Wisconsin, whose power to adopt rules conforming to State law regulating process, was given by act admitting Wisconsin to the Union.

Lien of judgments in Federal courts. Note, **24 Am. Dec. 312; 47 L. R. A. 471, 472.**

Thirty-fourth section of judiciary act of 1789, making State laws rules of decision for Federal courts, has no application to practice or process.

Approved in Chicago etc. Ry. Co. v. Kendall, 167 Fed. 65, **16 Ann. Cas. 560, 93 C. C. A. 422,** holding that where in action for damages plaintiff

refused to submit to examination of injury, Federal court had power to compel submission independently of local statute; Importers' etc. Bank v. Lyons, 134 Fed. 512, under rule of Circuit Court for eastern district of Pennsylvania on rule to show cause, testimony may be taken by deposition; Dreyfus v. Barton, 98 Miss. 771, 54 South. 256, holding that where under State exemption laws policy of insurance was exempt, policy of bankrupt was exempt and proceeds went to his administrator; Ross v. Duval, 13 Pet. 60, 61, 10 L. Ed. 58, 59, holding State act of limitation on judgments within the rule; Wright v. Bales, 2 Black, 537, 17 L. Ed. 265, holding rules of evidence prescribed by State statute included; Diblee v. Furniss, 4 Blatchf. 262, Fed. Cas. 3888, holding section to include State law allowing party to testify as witness in his own behalf; Clark v. Sohier, 1 Wood. & M. 374, 375, Fed. Cas. 2835, holding State law permitting new trial within three years after judgment taken by default, through mistake of party, is within the section; Derby v. Jacques, 1 Cliff. 439, Fed. Cas. 3817, holding that though writ of right continued as process alone in Federal courts in Massachusetts after abolition by State law, it was barred by final judgment of State court in writ of entry; Sanford v. Portsmouth, 2 Flipp. 108, Fed. Cas. 12,315, holding Federal court not bound by State decision that mandamus is only remedy on municipal bonds; McLean v. County, 16 Fed. Cas. 249, holding that under statute board of county commissioners could sue or be sued in Federal as well as State court; Lane v. Townsend, 1 Ware, 288, Fed. Cas. 8054, holding law relating to taking of bail bond not within section as it related to mode of proceedings; United States v. Rathbone, 2 Paine, 583, Fed. Cas. 16,121, holding State law providing for references in certain cases inapplicable to Federal courts; Beck v. Burnett, 22 Ala. 825, holding State law of redemption being law relating to process is not within rule of section; United States v. Eckford, 6 Wall. 490, 18 L. Ed. 922, holding New York statute directing court where setoff exceeds amount sued for to give defendant judgment for excess, is not applicable to Federal courts, so as to permit defendant to recover by way of setoff against United States; Leitch v. The George Law, 15 Fed. Cas. 267, refusing to allow lien on vessel according to provisions of State law for sum due from master and owner under State law governing pilots; Railroad Co. v. Bank, 102 U. S. 53, 26 L. Ed. 75, to point that State laws respecting practice and process are inapplicable to Federal courts; Polk v. Douglas, 6 Yerg. 214, holding acts relating to process not within the section; In re Metzger, 17 Fed. Cas. 236, holding New York statute regulating procedure in extradition cases not applicable to Federal court; Thompson v. Phillips, 1 Bald. 275, Fed. Cas. 13,974, holding State law limiting lien of judgment to be rule of property and within section.

Distinguished in Blanchard v. Sprague, 1 Cliff. 290, Fed. Cas. 1516, holding State law making parties competent witnesses, not binding on Federal court in suit in equity; Goodyear v. Prov. Co., 2 Cliff. 369, Fed. Cas. 5583, holding doctrine had no application to equity; Austen v. Miller,

5 McLean, 156, Fed. Cas. 661, holding decision of State court that certain commercial paper was not a promissory note did not bind Federal court, as it was question of mercantile law; Lamson v. Mix, 14 Fed. Cas. 1056, holding rule did not extend to court of equity, but neglecting to expressly distinguish case.

Proviso in a statute is generally intended to restrain or modify the enacting clause.

Approved in In re Matthews, 109 Fed. 614, holding under mechanic's lien law, Ark. Acts 1895, p. 217, giving mechanics priority over other liens, except over prior liens given for raising funds to erect building, that money raised must actually be used in building; Wilkins v. United States, 96 Fed. 840, holding that defacement of revenue stamps, the designing of which Congress has left to the administrative branch of government, is criminal offense; San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 251, 135 Pac. 974, where an act declared that certain taxes imposed upon telephone companies were in lieu of all other taxes and licenses, they were exempt from license fee under city ordinance; United States v. Macfarland, 18 App. D. C. 126, mandamus will not lie to compel issuance of deed unless proviso of act to effect that all taxes must have been paid is complied with; McDougal v. State, 183 Ind. 170, 108 N. E. 525, in prosecution for violation of statute containing proviso exempting licensed druggists, it was error to exclude evidence that accused was such druggist; Lichtensteiger v. State, 89 Neb. 359, 131 N. W. 624, holding that as package was labeled as required under proviso of act, selling of it by defendant was not penal offense; Marsh v. Nichols, 128 U. S. 616, **32 L. Ed. 542**, 9 Sup. Ct. 172, holding an act of Congress not retroactive, by reason of proviso contained therein; United States v. Church, 36 Fed. 305, where minister of gospel not included in proviso to contract labor act, he comes within provisions of act; United States v. One Hundred and Thirty-two Packages, 65 Fed. 983, where United States Revised Statutes, section 3449, is construed with reference to act to which it was originally a proviso; Boston etc. Co. v. Hudson, 68 Fed. 760, 25 U. S. App. 257, confining effect of proviso to that act alone to which it is the proviso; Pearce v. Bank, 33 Ala. 702, limiting operation of proviso in act extending bank charter to time beginning with the date from which extended; Railway Co. v. Kennerly, 74 Ala. 590, refusing to construe proviso to act granting powers to corporation so as to enlarge powers granted by enacting clause; Ex parte Lusk, 82 Ala. 522, 2 South. 142, adopting that construction of section of State Constitution whereby proviso thereto becomes operative in restraining enacting clause in preference to one by which proviso would be superfluous; Wells F. & Co. v. Board, 56 Cal. 203, holding proviso to section of Constitution relating to boards of equalization modifies enacting clause; State v. County, 23 Fla. 486, 3 South. 194, restricting operation of proviso to section of Constitution to which it is attached; Commrs.

v. State, 24 Fla. 268, 4 South. 797, construing proviso as qualifying clause to section of Constitution to which it is attached; Dodd v. State, 18 Ind. 63, construing saving clause in statute as restricting and explaining what goes before; Church v. City, 36 Ind. 344, 10 **Am. Rep.** 40, applying rule in construing tax law; Rice v. Keokuk, 15 Iowa, 583, holding limitation of proviso contained in an amendatory section to city charter which repeals proviso in original section, is merely substituted for limitation of latter without altering meaning of enacting clause; State v. Stapp, 29 Iowa, 553, in argument of court that matters contained in proviso must be insisted on by defense; Corbin v. Beebee, 36 Iowa, 342, where proviso construed to take cases of the class mentioned therein out of restriction of enacting clause; Lodge v. Hocking, 60 N. J. L. 442, **64 Am. St. Rep.** 598, 38 Atl. 694, holding proviso to section of by-laws to fraternal society could not operate to give powers not elsewhere given; Lanning v. Administrator, 17 N. J. Eq. 234, refusing to extend scope of proviso beyond that of the enacting clause, which it limited; Campbell v. Wiggins, 85 Tex. 428, 21 S. W. 601, construing proviso to exemption act as taking out of operation of enacting clause particular cases in proviso mentioned; Graves v. State, 6 Tex. App. 235, holding proviso limited the enacting clause and prevented holding of courts under the act until arrival of time prescribed by act for holding at place named in proviso; Commonwealth v. Ford, 29 Gratt. 688, holding proviso to exemption act limited its effect by withdrawing judgment debtor's property from its operation in the cases enumerated in the proviso; State v. Bellew, 86 Wis. 195, 56 N. W. 784, where there was an exception in a statute immediately followed by proviso, held, no contrary intention appearing, proviso restricted exception alone.

Distinguished in Carroll v. State, 58 Ala. 401, holding rule not applicable where clause in State Constitution, though preceded by word "provided," was not proviso as disclosed by language and context.

The words "suits at common law" include proceedings after judgment as well as those before.

Cited in Ex parte Towles, 48 Tex. 433, construing word "suits" in Texas Constitution.

The laws of Union may permit agency of State officers to administer Federal regulations.

Cited in The British Prisoners, 1 Wood. & M. 70, Fed. Cas. 12,734, holding preliminary examination by State magistrate of prisoners sought to be extradited under treaty with Great Britain, competent.

Connecticut law requiring mittimus in civil cases applies to State officers and courts, and was not adopted by process act for Federal courts.

Approved in King v. Davis, 137 Fed. 239, 241, Va. Code, 1887, § 3566, providing that no lis pendens binds bona fide purchaser, unless memo-

randum filed in office of clerk of court where land lies, does not apply to Federal courts; Boyle v. Zacharie, 6 Pet. 659, 8 L. Ed. 536, holding that State law, whereby injunction staying proceedings under fieri facias operated as supersedeas, not adopted by process act; Duncan v. Darst, 1 How. 306, 11 L. Ed. 141, holding that Pennsylvania law, permitting a judge of State court to release imprisoned debtor upon giving bond and security to appear and take benefit of State insolvent law, does not give such judge jurisdiction to discharge Federal prisoner; McNutt v. Bland, 2 How. 17, 11 L. Ed. 162, holding debtor imprisoned under process from Federal courts could not be discharged by State judge under law applicable exclusively to persons committed under process from State courts; United States v. Humphreys, 3 Hughes, 205, Fed. Cas. 15,422, and Carroll v. Watkins, 1 Abb. (U. S.) 480, Fed. Cas. 2457, holding Virginia law, requiring docketing of judgments to make them liens on real estate, not applicable to Federal judgments, as it requires agency of State officer; Darst v. Duncan, 6 Fed. Cas. 1195, holding State court judge had no authority, by virtue of State insolvent law and process act, to release debtor imprisoned under process from Federal court; Duncan v. Klinefelter, 5 Watts, 143, 30 Am. Dec. 297, holding Pennsylvania law, permitting judge of State court to release imprisoned debtor upon his giving bond to appear and take benefit of State insolvent law, does not give such judge jurisdiction to discharge Federal prisoner; Fordyce v. Beecher, 2 Tex. Civ. App. 33, 21 S. W. 179, holding State law as to receiver, by its terms peculiarly applicable to State courts, does not apply to receivers appointed by Federal courts; Lockhurst v. West, 7 Met. 237, where held that State law respecting discharge of imprisoned debtor giving particular authorities and directions to State officers, not applicable to Federal courts; In re Freeman, 2 Curt. 494, 495, Fed. Cas. 5083, holding act of Congress of 1841 did not adopt future laws of Massachusetts, restricting and modifying imprisonment for debt, which contain provisions incapable of being administered by Federal courts.

Functions belonging strictly to one of co-ordinate branches of government cannot be delegated to or assumed by another branch.

Approved in United States v. Grimaud, 220 U. S. 517, 55 L. Ed. 567, 31 Sup. Ct. 480, applying rule in proceedings of criminal nature against use of reserve without permit; Monongahela Bridge Co. v. United States, 216 U. S. 192, 54 L. Ed. 441, 30 Sup. Ct. 368, and Union Bridge Co. v. United States, 204 U. S. 378, 51 L. Ed. 530, 27 Sup. Ct. 367, holding in proceeding on criminal information against company for refusal to alter bridge, act delegating legislative or judicial power to officer was not unconstitutional; Louisville etc. R. Co. v. Interstate Commerce Commission, 184 Fed. 122, upholding delegation of power by Congress to interstate commerce commission to prescribe railroad rates for future; Oregon R. & Navigation Co. v. Campbell, 173 Fed. 974, upholding Oregon railroad commission act of 1907; Southern Pac. Co. v. United States, 171 Fed. 362,

96 C. C. A. 252, holding provision of act allowing shipper of cattle to extend time of their confinement not unconstitutional; United States v. Shannon, 151 Fed. 870, applying rule in suit to enjoin person using reserve for grazing; United States v. Matthews, 146 Fed. 307, holding void 30 Stat. 34, making it criminal to violate rules thereafter made by Secretary of Interior for protection of forest reservations; United States v. Baltic Mills Co., 124 Fed. 41, holding advertisement in English newspaper for first class weavers for mills in Connecticut is within act March 3, 1891, chapter 551, section 3, making it penal to assist or encourage migration of aliens, and proviso in reference to State's advertisement does not apply; Dastorvignes v. United States, 122 Fed. 35, holding 30 Stat. 35 (U. S. Comp. Stats. 1901, p. 1540), relating to forest reserves is not unconstitutional because it delegates legislative power to administrative officer; Hair v. Burnell, 106 Fed. 285, holding mandamus is proper remedy to compel president and secretary of corporation to issue certificate of stock to purchase of stock at execution sale; Whaley v. State, 168 Ala. 160, 30 L. R. A. (N. S.) 499, 52 South. 943, upholding law authorizing street railroad companies to issue transfers; Matter of La Société Francaise etc., 123 Cal. 528, 56 Pac. 459, holding Cal. Code Civ. Proc., §§ 1275–1279, providing for change of name by court is not unconstitutional as giving court legislative powers; Southern Ry. Co. v. Melton, 133 Ga. 286, 65 S. E. 669, upholding law authorizing railroad commission to make rule requiring railroad companies to furnish cars on request; People v. Brady, 271 Ill. 103, 110 N. E. 866, upholding grant of power to Federal reserve board to grant to national banks right to act as trustee, executor, administrator, etc., under rules prescribed by board; Arnett v. State, 168 Ind. 183, 8 L. R. A. (N. S.) 1192, 80 N. E. 154, upholding act of 1897, providing for metropolitan police force in certain cities; Blair v. Ostrander, 109 Iowa, 206, 77 Am. St. Rep. 533, 80 N. W. 330, holding although Iowa Acts 1878, chapter 129, section 2, requiring Federal judgments to be filed in county where land is situated to make them liens, was void, it was made effectual by acts of Congress 1888, chapter 729; State v. Johnson, 61 Kan. 831, 60 Pac. 1077, holding chapter 28, Laws of Special Session 1898 (Kan.), entitled "An act creating a court of visitation," etc., is void, as commingling legislative, judicial and administrative powers; Robey v. Commissioners of Prince George's County, 92 Md. 161, 48 Atl. 50, holding Supp. Code Md., article XXXVI, section 2, requiring circuit judges to approve claims against county for officer's fees, invalid; King v. Concordia Fire Ins. Co., 140 Mich. 268, 103 N. W. 620, holding void Comp. Laws 1897, §§ 5170–5179, empowering commission to draft standard form of policy, with power to alter it, and to fix time when use of policy should become obligatory; West Jersey etc. R. R. Co. v. Board of Public Utility Commrs., 87 N. J. L. 177, 94 Atl. 60, upholding public utilities act of 1911; Stanton v. Board of Supervisors, 191 N. Y. 432, 17 L. R. A. (N. S.) 830, 84 N. E. 381, holding that law conferring authority on supervisors to change county seat on petition to be ratified by electors is not invalid;

Trustees of Saratoga Springs v. Saratoga Gas etc. Co., 191 N. Y. 133, 14 Ann. Cas. 606, 18 L. R. A. (N. S.) 713, 83 N. E. 695, upholding act of 1905, providing for appointment of commission empowered to fix gas and electric rates; In re Davies, 168 N. Y. 102, 61 N. E. 121, holding anti-monopoly act (Laws 1899, c. 690), compelling justices of Supreme Court to appoint referee upon request of attorney general, to take testimony necessary to prepare complaint, is not unconstitutional; Ex parte Francis, 72 Tex. Cr. 351, 165 S. W. 172, holding police powers to municipalities can be delegated by legislature; State v. Public Service Commission, 77 Wash. 548, Ann. Cas. 1915D, 202, 137 Pac. 1064, upholding provision of public service commission law of 1911, empowering commission to order construction of spur tracks; Union Lime Co. v. Railroad Commission, 144 Wis. 532, 129 N. W. 609, upholding provision of laws 1909, c. 481, § 1797–11m, authorizing railroad commission to require railroad to construct spur tracks; Minneapolis etc. Ry. Co. v. Railroad Commission, 136 Wis. 163, 17 L. R. A. (N. S.) 821, 116 N. W. 911, construing Laws 1905, pp. 556, 559, 560, relating to regulation of rates by commission and providing for review of order of commission; Sabre v. Rutland R. Co., 86 Vt. 362, 377, Ann. Cas. 1915C, 1269, 85 Atl. 699, 706, construing Laws 1906, No. 126, relating to railroad commission; Board of Supervisors v. Duke, 113 Va. 99, 73 S. E. 458, upholding act of 1908, relating to petition to Circuit Court by electors of unincorporated town, for incorporation; dissenting opinion in Steen v. Meyers, 253 Ill. 214, 97 N. E. 300, majority upholding that act authorizing abbreviated forms of orders in records; Grafton County Electric Light Co. v. State, 77 N. H. 507, 93 Atl. 1035, and Henry v. Cherry, 30 R. I. 34, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006, 24 L. R. A. (N. S.) 991, 73 Atl. 105, both arguendo; People's R. R. Co. v. Memphis R. R. Co., 10 Wall. 50, 19 L. Ed. 848, holding legislature could not delegate to mayor and aldermen power to grant franchise for twenty-five years; In re Kollock, 165 U. S. 537, 41 L. Ed. 817, 17 Sup. Ct. 448, holding constitutional a delegation of authority by revenue act to commissioner of internal revenue and Secretary of Treasury to determine what marks, stamps and brands should be placed on packages of oleomargarine; United States v. Ormsbee, 74 Fed. 209, holding act valid which grants to Secretary of War power to supervise government canals, and rules made in pursuance thereof have force of law; White v. Toledo etc. R. R. Co., 79 Fed. 135, 51 U. S. App. 58, 59, holding constitutional Revised Statutes, section 862, giving Supreme Court power to prescribe forms and modes of obtaining evidence, and holding amendment to equity rule 67, adopted pursuant thereto, valid; In re Chicago, 64 Fed. 901, holding assessment proceedings for municipal improvement, being exercise of taxing power and a legislative act, cannot be removed to Federal court; Ex parte Hill, 38 Ala. 451, holding Confederate Congress could delegate to its officers exclusive authority to decide upon eligibility for military service; Van De Griff v. Haynie, 28 Ark. 275, holding legislature could delegate power to determine taxable values and could select its agents; Pratt v. Allen, 13

Conn. 129, holding legislature had authority to pass act removing sheriffs from office contingent upon passage of a constitutional amendment committing their election to people; Railway Co.'s Appeal, 69 Conn. 594, 37 Atl. 1086, **39 L. R. A. 800**, legislature could not delegate to judiciary power to regulate location, construction and operation of street railways, that being distinctively legislative power; Territory v. Scott, 3 Dak. Ter. 398, 20 N. W. 407, holding investiture of territorial legislature with legislative powers by act of Congress not a delegation of legislative powers, but an exercise of administrative functions of Congress; s. c., p. 416, 20 N. W. 415, sustaining validity of provisions of act providing for selection by commissioners of location of seat of government; dissenting opinion in Coleman v. Newby, 7 Kan. 87, 88, 95, arguing that legislature could not delegate to Supreme Court authority to adopt rule prescribing method of appeal; dissenting opinion in Moore v. Allen, 7 J. J. Marsh. 655, holding adoption by act of Congress of 1800, of prospective legislation of States on subject of prison bounds, not a delegation of legislative powers; Hurst v. Warner, 102 Mich. 243, **47 Am. St. Rep. 528, 26 L. R. A. 491**, 60 N. W. 441, holding act granting State board of health power to make certain regulations did not delegate legislative powers; State v. Railway Co., 38 Minn. 299, 37 N. W. 787, holding grant of authority to commission to determine what are reasonable rates and fares not a delegation of legislative power; In re Griner, 16 Wis. 435, 437, holding act of Congress, giving President power to make rules and regulations for calling out militia, not a delegation of legislative power; Dobbin v. Alleghany, 7 Fed. Cas. 779, sustaining authority of Federal court to adopt State process law; Mabry v. Baxter, 11 Heisk. 690, holding a law unconstitutional as to that part which was judicial; Robertson v. State, 109 Ind. 137, 10 N. E. 610, in discussion of powers of the three departments of government; State v. Mayor, 118 Ind. 387, **4 L. R. A. 81**, 21 N. E. 254, appointment to office an executive function which legislature could not exercise in absence of express constitutional grant; Evansville v. State, 118 Ind. 442, 443, **4 L. R. A. 99**, 21 N. E. 272, legislature could not fill vacancy in office in absence of express constitutional grant; State v. Mayor, 118 Ind. 460, **4 L. R. A. 72**, 21 N. E. 278, legislature may not assume executive function of appointment to office; State v. Hyde, 121 Ind. 26, 33, 22 N. E. 646, 648, holding appointment to office an executive function not within powers of legislature; Koehler v. Hill, 60 Iowa, 655, 15 N. W. 635, discussing powers of judiciary and sustaining their power to declare a law unconstitutional; Powell v. State, 17 Tex. App. 361, denying to the legislature the power to determine by enactment the meaning of the words "former jeopardy" in State Constitution.

Appointment to office as executive or legislative function. Note, **13 Am. St. Rep. 135.**

Delegation of power to regulate carriers. Note, **32 L. R. A. (N. S.) 647, 649.**

A contract is governed by the law with reference to which it is made.

Approved in Punney v. Nelson, 183 U. S. 148, 46 L. Ed. 127, 22 Sup. Ct. 54, holding California stockholders of a Colorado corporation, whose charter specified that it was to transact business in California, are bound by Cal. Civ. Code, § 322, relating to liability of stockholders; Home Land etc. Co. v. McNamara, 145 Fed. 19, contract made in Illinois for purchase of cattle then in Montana, to be there delivered, is governed, as to damages for its breach, by law of Montana; Mutual Life Ins. Co. v. Hill, 97 Fed. 267, holding insurance policy of New York company applied for and issued from office in Washington, and proof of death and payment were to be made in New York, it is New York contract; Keatley v. Grand Fraternity, 2 Boyce (Del.), 517, 82 Atl. 297, holding that were in application for insurance, false answers were given, and under law of State where contract was made, forfeiture of policy depended upon the materiality of such answers, question of materiality was for jury; Cable v. McElhoe, 58 Ind. App. 650, 108 N. E. 795, holding that chattel mortgage, if valid in State where executed, is valid in State to which chattels removed; Johnson v. New York Life Ins. Co., 109 Iowa, 709, 78 N. W. 906, holding life insurance policy issued in New York by corporation thereof is a contract of such State, where application provides it is to be construed under the laws of said State; Midland etc. Co. v. Solomon, 71 Kan. 187, 79 Pac. 1078, bond and mortgage on land here, governed by its terms by Colorado laws, is enforceable here, though interest would be higher than allowed by local laws; Mayer v. Roche, 77 N. J. L. 682, 26 L. R. A. (N. S.) 766, 75 Atl. 236, where note was dated and payable in New York, defendant, married woman, and resident of New Jersey, who signed, was responsible, it not appearing where it was delivered to payee; Lamar v. Micou, 114 U. S. 220, 29 L. Ed. 94, 5 Sup. Ct. 858, holding guardian appointed by court of State, not ward's domicile, is governed, in accounting for his investments, by law of the ward's domicile; Pritchard v. Norton, 106 U. S. 136, 27 L. Ed. 108, 1 Sup. Ct. 112, applying rule in construing sureties' appeal bond; Watts v. Camors, 115 U. S. 362, 29 L. Ed. 409, 6 Sup. Ct. 95, construing clause of charter-party in accordance with principles of admiralty law, because contract made with reference to it and not to a State law; Coghlan v. Railroad Co., 142 U. S. 109, 35 L. Ed. 954, 12 Sup. Ct. 152, holding contract made in South Carolina to be performed in England is governed by English law; Insurance Co. v. Robison, 54 Fed. 582, where insurance policy applied for in Iowa, issued in New Jersey, delivered in Iowa, where premium paid and policy to take effect, held the laws of Iowa govern; Insurance Co. v. Trust Co., 72 Fed. 418, 37 U. S. App. 692, 38 L. R. A. 55, insurance policy providing Pennsylvania shall be place of contract is governed by laws of Pennsylvania, though insured resided elsewhere; Equitable Assur. Soc. v. Nixon, 81 Fed. 799, 48 U. S. App. 487, where insurance policy applied for in Washington Territory in New York company was held governed by New York law; Union etc. Ins. Co. v. Pollard, 94 Va. 151, 64 Am. St. Rep. 717, 36 L. R. A. 272, 26

S. E. 422, stipulation in insurance policy fixing Ohio as place of making, fixes laws of Ohio as those with reference to which it was made.

Conflict of laws as to interest and usury. Note, 62 L. R. A. 37.

What cannot be done directly from defect of power cannot be done indirectly.

Approved in Ex parte Miller, 129 Ala. 137, 30 South. 613, holding injunction preventing defendants from proceeding with ejectment suit is violated by proceeding to judgment after injunction is granted and before bond is filed, when writ of possession is served after bond filed; Insurance Co. v. Doyle, 6 Biss. 465, Fed. Cas. 6160, holding where Wisconsin statute that nonresident corporation should not remove causes to Federal court, held unconstitutional, as statute providing for revoking license of such corporation applying for such removal also unconstitutional; Ex parte Bibb, 44 Ala. 155, holding legislature not having power to make Circuit Courts could not ratify judgment of illegal Circuit Court.

The Supreme Court will not consider the constitutionality of a State law where not necessary for determination of case.

Cited in dissenting opinion in Broson v. Kinzie, 1 How. 324, 11 L. Ed. 148, arguing that a State law prescribing procedure on sale of mortgaged premises under decree, never having been adopted by Federal court, was not before Supreme Court for consideration; Cook v. Gray, 2 Houst. 470, 81 Am. Dec. 189, refusing to regard certain decisions as authority for a doctrine claimed to have been enunciated therein upon constitutionality of laws not before court for construction; Baker v. Biddle, 1 Bald. 406, Fed. Cas. 764, to point that jurisdiction of Federal courts is limited.

Miscellaneous. Cited in Patton v. Brady, Exrx., 184 U. S. 620, 46 L. Ed. 719, 22 Sup. Ct. 497, holding necessity of war revenue provided by Congress cannot be reviewed by the courts; State v. Brodigan, 37 Nev. 256, 141 Pac. 992, holding that where words were omitted from statute, construction can be used to supply them where intent is manifest; Zumstein v. Mullen, 67 Ohio St. 409, 66 N. E. 143, holding in construing Ohio act of October 22, 1902, relating to organization of cities, the intention of the legislature being clear, no other rule of construction shall be considered; Town of Weston v. Ralston, 48 W. Va. 189, 36 S. E. 454, holding erroneous decision of State court is final and conclusive unless an appeal is taken to Federal court; United States v. Murphy, 82 Fed. 899, construing word "process" in Revised Statutes, section 602; Ex parte Crane, 5 Pet. 200, 8 L. Ed. 96, as precedent for considering jurisdictional questions first. Miscited in McRoberts v. Lyon, 79 Mich. 33, 44 N. W. 163.

10 Wheat. 51–66, 6 L. Ed. 264, UNITED STATES BANK v. HALSTEAD.

Congress possesses uncontrolled power to legislate with respect to form and effect of executions issued upon Federal judgments.

Cited in Bank v. Thompson, 173 Ill. 599, **64 Am. St. Rep. 140**, 50 N. E. 1090, holding Congress had power to adopt State laws relating to process; United States v. Drennon, Hempst. 325, Fed. Cas. 14,992, holding Congress having power to make laws to carry into execution Federal court judgments, government could proceed under such laws to satisfy such judgment in its favor, notwithstanding provisions of local probate law; Ward v. Chamberlin, 29 Fed. Cas. 175, arguendo.

State practice adopted for Federal courts subject to changes by rules.

Approved in Hills & Co. v. Hoover, 220 U. S. 337, **Ann. Cas. 1912C, 562, 55 L. Ed. 488**, 31 Sup. Ct. 402, replevin by owner of copyright not prosecuted to judgment, to enforce forfeiture of infringing copies, precludes subsequent action of assumpsit for penalty; General Electric Co. v. Hurd, 171 Fed. 986, holding that judgment on which no execution had issued in ten years was presumed to be paid; Johnson v. Crawford, 154 Fed. 764, holding that warrant of arrest against debtor may issue out of Federal court under Pennsylvania statute; King v. Davis, 137 Fed. 241, Va. Code, § 3566, providing that no lis pendens binds bona fide purchaser of realty unless memorandum filed in office of clerk of court in county where land lies does not apply to Federal courts; Beers v. Haughton, 9 Pet. 359, 360, 361, **9 L. Ed. 157, 158**, holding regulations of State law as to bail, and exemption of party from imprisonment, could be adopted by rule of Federal court under process act of 1828; Ross v. Duval, 13 Pet. 64, **10 L. Ed. 60**, where held, if State statute of limitation on judgment be regarded as process act, it was adopted by process act of 1828, and was applicable to judgment of Federal court rendered before that time; United States v. Knight, 14 Pet. 314, **10 L. Ed. 472**, holding process act of 1828 adopting State laws then in force respecting process, in Maine extended to imprisoned debtor the privilege of jail limits; McCracken v. Hayward, 2 How. 614, 616, **11 L. Ed. 400, 401**, holding Federal court could, under process act of 1828, adopt, by rule, process pointed out by State law, but where such a rule did not conform thereto, it was void; Ward v. Chamberlain, 2 Black, 440, **17 L. Ed. 325**, holding that process act of 1828 adopted State laws rendering decrees of Federal courts, in equity suits for payment of money, liens on real estate; Ex parte Boyd, 105 U. S. 651, **26 L. Ed. 1202**, holding, where party recovers judgment in common-law cause in Federal court in New York, he is entitled to remedy provided by State law to execute his judgment, such remedy having been secured to him by United States Revised Statutes, § 916; Fink v. O'Neil, 106 U. S. 276, 278, **27 L. Ed. 198**, 1 Sup. Ct. 328, holding Revised Statutes, section 916, adopted Wisconsin law of exemptions existing at time of its enaction; Hudson v. Parker, 156 U. S. 281, **39 L. Ed. 425**, 15 Sup. Ct. 452, sustaining authority of Supreme Court to make rules for Federal courts; Steam Co. v. Sears, 20 Blatchf. 28, 30, 9 Fed. 11, 12, 13, holding Federal court could adopt equity rule providing that State law govern liens created by attachment; Steam Co. v. Jones, 21 Blatchf. 150,

13 Fed. 577, holding that Federal court could adopt equity rule providing that State law govern lien created by attachment; United States v. Sturgis, 14 Fed. 812, holding, under sections of United States Revised Statutes governing forms and modes of proceedings in common-law suits and rule of court adopting State procedure, United States District Court had power to suspend lien of judgment pending appeal; United States v. Arnold, 69 Fed. 991, 34 U. S. App. 177, holding writ of ca. sa. authorized in Federal courts by section 14 of judiciary act of 1789, and Revised Statutes, section 716, and not affected by Illinois statute of 1893, limiting its use; Koning v. Bayard, 2 Paine, 257, Fed. Cas. 7924, holding New York law regulating liens of judgments, in force, in 1789, applied to Federal court there; United States v. Conway, Hempst. 313, Fed. Cas. 14,849, holding State law regulating sale of property on execution was constitutional and properly adopted by Federal court; Springer v. Foster, 1 Story, 602, Fed. Cas. 13,265, holding Massachusetts insolvent law of 1838 did not dissolve an attachment issued from Federal court; Springer v. Foster, 2 Story, 387, Fed. Cas. 13,266, holding Massachusetts law, passed subsequent to Federal process acts, and not adopted by rule of court, could not operate to dissolve attachment issued from Federal court; United States v. Knight, 3 Sumn. 369, Fed. Cas. 15,539, holding act of 1800, respecting imprisoned debtors, adopted only the State laws then in force on the subject; s. c., p. 375, holding process act of 1828 adopted State laws relating to allowance of jail liberties to prisoners under process from Federal courts; Picquet v. Swan, 5 Mason, 38, Fed. Cas. 11,134, holding State law relating to process which had been for a long time conformed to by Federal court, though never formally adopted by rule, had been adopted in all respects as to which it was applicable; Hall v. Perott, 1 Bald. 126, Fed. Cas. 5942, holding Pennsylvania law relating to juries, passed in 1805, not applicable to Federal courts; In re Freeman, 2 Curt. 495, Fed. Cas. 5083, holding act of Congress of 1841 did not adopt prospective legislation of Massachusetts restricting and modifying imprisonment for debt; Gaines v. Travis, Abb. Adm. 429, Fed. Cas. 51,180, holding State legislation, subsequent to process acts, respecting imprisonment for debt, has no application to admiralty courts; Feidler v. Carpenter, 2 Wood. & M. 214, Fed. Cas. 4759, where Federal court in Massachusetts conformed to practice, in respect to pleading, which existed in State in 1789; Dobbin v. Alleghany, 7 Fed. Cas. 780, holding Circuit Court rule adopting State law as part only of final process, valid; Oelrich v. Pittsburgh, 18 Fed. Cas. 599, holding State act exempting stock owned by municipal corporation from execution, passed after process act of 1828, not applicable to Federal courts; Ex parte Hull, 12 Fed. Cas. 853, 854, holding Federal bankrupt act applicable to debts contracted prior to its passage; Beck v. Burnett, 22 Ala. 823, holding State redemption law inapplicable to Federal courts where not adopted for them by court rule or Congress; Simpson v. Niles, 1 Ind. 204, applying State process laws as to judgment liens as they stood at date of process act of 1828, to Federal court; Howe v. Freeman, 14 Gray,

578, holding State process laws, subsequent to process act, had no application to processes of Federal court; Kennerly v. Shepley, 15 Mo. 650, **57 Am. Dec. 222**, sustaining validity of United States marshal's execution sale, against objection that it did not conform to State law regulating execution sales, when made in Missouri before 1828, when the court had adopted no rules; Woodley v. Gilliam, 67 N. C. 239, holding sale by United States marshal under execution from Federal court, according to State practice, as it was in 1789, gave title to vendee, and subsequent sale by sheriff under State court execution issued after that from Federal court, void; Sellers v. Corwin, 5 Ohio, 406, **24 Am. Dec. 306**, holding State execution laws adopted by rule of Federal court; Wood v. Funk, 7 Ohio, 197, holding discharge under Ohio insolvent law, in force when process act of 1828 adopted, operated to discharge prisoner under process from Federal court; Hepburn v. Kerr, 9 Humph. 729, **51 Am. Dec. 687**, holding lands sold under process of Federal court after 1828, subject to State redemption law of 1820; Thompson v. Avery, 11 Utah, 233, 39 Pac. 835, holding judgments of Federal courts in the territory were liens on real estate when so by the laws of the territory; Van Hook v. Pendleton, 2 Blatchf. 88, Fed. Cas. 16,852, and Towne v. Smith, 1 Wood. & M. 132, Fed. Cas. 14,115, Bains v. Schooner, 1 Bald. 563, 564, Fed. Cas. 756, arguendo.

Distinguished in Beers v. Haughton, 9 Pet. 368, 372, **9 L. Ed. 160, 162**, dissenting opinion, contending Federal courts could not adopt by rule State law arresting or restraining process; Yonley v. Lavender, 27 Ark. 262, holding litigant who obtained judgment in Federal courts against an administrator in his fiduciary capacity, could not proceed directly against estate, but was remitted to the State Probate Court for payment; Moore v. Allen, 7 J. J. Marsh. 657, holding act of 1800, conforming to State laws respecting imprisoned debtors, adopted future legislation of the States on the subject; Adler v. Cole, 12 Wis. 207, holding process acts did not apply to Federal courts in Wisconsin, whose power to adopt rules was given by act admitting Wisconsin to the Union; Hardemann v. Downer, 39 Ga. 428, in argument upon question of constitutionality of retroactive exemption law; Planters' Bank v. Sharp, 6 How. 330, **12 L. Ed. 459**, in argument upon constitutionality of retroactive exemption law; Boyle v. Zacharie, 6 Pet. 659, **8 L. Ed. 536**, holding certain State law as to injunction was peculiar municipal regulation not adopted by process acts; Carroll v. Watkins, 1 Abb. (U. S.) 480, Fed. Cas. 2457, and United States v. Humphreys, 3 Hughes, 204, Fed. Cas. 15,422, holding State law requiring recording of judgments in order for them to become liens on real estate not applicable to judgment of Federal court, being peculiar municipal regulation requiring agency of State officer; Darst v. Duncan, 6 Fed. Cas. 1195, and Duncan v. Klinefelter, 5 Watts, 143, **30 Am. Dec. 297**, holding State court judge had no authority to release debtor imprisoned under process from Federal court.

Modified in McNutt v. Bland, 2 How. 17, **11 L. Ed. 162**, holding process acts did not adopt State laws peculiarly applicable to State courts and officers, and, therefore, debtor imprisoned under process from Federal courts could not be discharged by State judge, under such law; Fordyce v. Beecher, 2 Tex. Civ. App. 33, 21 S. W. 180, holding State law, by its terms peculiarly applicable to State courts, does not apply to receivers appointed by Federal courts.

Words "principles and usages of law," in fourteenth section of judiciary act, include local State laws, and do not restrict to common law.

Cited in Grantland v. Memphis, 12 Fed. 288, to point that Revised Statutes, section 716, permit the Federal courts to issue writs of scire facias, according to usages of State law; Adler v. Cole, 12 Wis. 211, arguing that attachment could be issued from Federal court in common-law action according to State laws.

Denied in dissenting opinion in Ex parte Crane, 5 Pet. 210, **8 L. Ed. 100**, majority holding, power to issue mandamus granted to Supreme Court thereby.

Power conferred on United States courts to alter processes and modes of proceeding not delegation of legislative power.

Approved in Blair v. Ostrander, 109 Iowa, 206, **77 Am. St. Rep. 533**, 80 N. W. 330, holding though Acts Iowa 1878, c. 129, § 2, requiring filing of Federal court judgments to make them liens was invalid when passed, it was made effectual by Acts Congress 1888, c. 729; dissenting opinion in Ex parte Francis, 72 Tex. Cr. 351, 165 S. W. 172, majority holding that where prohibitory statute was dependent on election, such fact did not make it unconstitutional; White v. Toledo etc. R. R. Co., 79 Fed. 135, 51 U. S. App. 59, upholding grant to Supreme Court of power to prescribe forms and modes of obtaining evidence; Ex parte Hill, 38 Ala. 451, holding Confederate Congress could delegate to its officers exclusive authority to decide upon eligibility for military service; dissenting opinion in Coleman v. Newby, 7 Kan. 88, arguing that legislature could not delegate to State Supreme Court authority to adopt rule prescribing method of appeal; Moore v. Allen, 7 J. J. Marsh. 655, dissenting opinion, to effect that adoption by act of Congress of 1800, of prospective State legislation on subject of prison bounds, not a delegation of legislative power; In re Griner, 16 Wis. 437, holding act of Congress giving President power to make rules and regulations for calling out militia not a delegation of legislative power; Ward v. Chamberlin, 29 Fed. Cas. 178, sustaining grant to Supreme Court by act of Congress of authority to regulate process of Federal courts.

Long, practical construction of statute should be given great weight by court construing it.

Approved in State v. Carter, 174 Ala. 279, 56 South. 979, holding in quo warranto proceedings against justice of peace, court should regard

contemporaneous construction of Constitution; Hill v. Tohill, 225 Ill. 393, 8 Ann. Cas. 423, 80 N. E. 256, holding law held valid for fifty years constitutional; Higgins v. Brown, 1 Okl. Cr. 48, 94 Pac. 709, upholding sections 16 and 20 of enabling act with reference to transfer of causes; State v. Nashville Baseball Club, 127 Tenn. 304, Ann Cas. 1914B, 1243, 154 S. W. 1154, and Higgins v. Brown, 20 Okl. 371, 94 Pac. 709, both holding where particular construction of statute has been long acquiesced in and accepted as correct, presumption exists that such construction was correct; Talcott v. Pine Grove, 1 Flipp. 156, Fed. Cas. 13,735, construing statute authorizing bond issue in accordance with practical legislative and departmental action thereon; People v. Thompson, 155 Ill. 485, 40 N. E. 317, holding constitutional an apportionment of senatorial districts by legislature under this rule; Clark v. Mowyer, 5 Mich. 468, construing provision of tax laws in accordance with practical construction long given it by auditors general; McPherson v. Secretary of State, 92 Mich. 383, 31 Am. St. Rep. 591, 16 L. R. A. 478, 52 N. W. 471, sustaining law for electing presidential electors by districts, because contemporaneous construction of Federal Constitution permitted such a law; Bridges v. Shallcross, 6 W. Va. 576, upholding validity of an act of legislature on ground of contemporaneous practical construction of State Constitution permitting such legislation; Railway Co. v. Miller, 19 W. Va. 421, holding court should regard contemporaneous practical construction of Constitution in deciding upon constitutionality of law exempting a corporation from taxation under conditions; Railway Co. v. Mills, 85 Mich. 647, 48 N. W. 1009, holding constitutional statute giving authority to municipalities to permit construction of street railways.

Provision of judiciary act, adopting local law as rule of decision, does not apply to the local law of procedure.

Cited in United States v. Eckford, 6 Wall. 490, 18 L. Ed. 922, holding New York statute as to setoff does not apply to suit brought by government in Federal court; Beck v. Burnett, 22 Ala. 825, holding State redemption law not binding on Federal courts; Thompson v. Phillips, 1 Bald. 275, Fed. Cas. 13,974, holding State law limiting lien of judgment to be a rule of property, and adopted for Federal courts; In re Metzger, 17 Fed. Cas. 236, holding New York statute regulating procedure in extradition cases not applicable to Federal courts.

Jurisdiction of court over cause does not terminate with judgment, but continues until its satisfaction.

Approved in Leathe v. Thomas, 97 Fed. 139, holding under Rev. Stats., § 720, Federal court will not enjoin sheriff from proceeding under execution issued out of State court; United States v. Lesnet, 9 N. M. 275, 50 Pac. 322, holding under N. M. Laws 1891, p. 123, § 5, providing for appeals, an appeal does not lie from a judgment assigning to intervener, a homestead from lands sold on execution; dissenting opinion in State ex rel. v.

Smith, 158 Ind. 562, see 63 N. E. 25, 64 N. E. 18, majority holding provisions of Acts 1889, p. 422, § 1, providing for deductions on account of mortgage is not an exemption; Riggs v. Johnson Co., 6 Wall. 194, 18 L. Ed. 776, holding Federal court might mandamus a county to levy taxes to satisfy Federal judgment; Darst v. Duncan, 6 Fed. Cas. 1198, holding proceedings in suit ended upon execution of final process and State court had no authority thereafter to release prisoner under State insolvent law; United States v. Drennen, Hempst. 325, Fed. Cas. 14,992, holding that United States having right to sue estates of decedents in Federal courts, court could proceed to execute judgment in its favor in spite of restrictions of State probate law; Ex parte Holman, 28 Iowa, 104, 106, 4 Am. Rep. 168, 169, holding Federal court could issue mandamus to compel tax levy to satisfy its judgment against a county, and State court could not interfere; Friedman v. Israel, 26 Fed. 805, holding that when case was rightfully removed from State to Federal court, latter had authority to order marshal to take property attached by former court, from sheriff; United States v. Lesnet (N. M.), 50 Pac. 322, holding judgment on an intervention to save a homestead from execution sale, merely supplemental to the action out of which execution grew.

The Supreme Court does not consider the constitutionality of law where not necessary for determination of case.

Cited in dissenting opinion in Bronson v. Kinzie, 1 How. 324, 11 L. Ed. 148, arguing that a State law prescribing procedure on sale of mortgaged premises under decree, never having been adopted by Federal court, was not before Supreme Court for construction; McCracken v. Hayward, 2 How. 617, 11 L. Ed. 401, arguing constitutionality of State law regulating procedure on sales under execution, never adopted by Federal court, was not a question for the decision of the Supreme Court; dissenting opinion in Thorne v. San Francisco, 4 Cal. 156, and Cook v. Gray, 2 Houst. 471, 81 Am. Dec. 189, refusing to regard certain decisions of Federal Supreme Court as authority upon question of constitutionality of law.

10 Wheat. 66, 6 L. Ed. 268, BANK OF UNITED STATES v. JANUARY.

Congress, by process acts of 1789 and 1792, adopted writ of ca. sa. in all States in which it was in use as State process.

Cited in Moore v. Allen, 3 J. J. Marsh. 617, holding ca. sa. could issue from United States courts in Kentucky after its abolition in Kentucky by act passed in 1821.

10 Wheat. 66–133, 6 L. Ed. 268, THE ANTELOPE.

Slave trade is contrary to the law of nature.

Cited in Osborn v. Nicholson, 1 Dill. 224, Fed. Cas. 10,595, reversed in 13 Wall. 657, 20 L. Ed. 694, in argument, that no recovery can be had on promissory note given in Arkansas, before secession, for price

of slave; dissenting opinion in McElvain v. Mudd, 44 Ala. 73, in argument against recovery on promissory note given in 1864, for price of slaves, and in favor of validity of ordinance of constitutional convention making slave contracts void; Commonwealth v. Ames, 18 Pick. 211, where court refused to return to her owner slave voluntarily brought into Massachusetts; Jackson v. Phillips, 14 Allen, 564, in discussion sustaining bequests for benefit of fugitive slaves, and applying same to benefit of freedmen after abolition of slavery. See also Sims' Case, 7 Cush. 314, 315, note to decision.

Governments abolishing slave trade are bound to recognize its existence, and rights growing out of it, of citizens of countries where it is not prohibited.

Cited in Osborn v. Nicholson, 13 Wall. 657, 661, **20 L. Ed. 694, 695**, holding recovery could be had upon promissory note given in Arkansas for purchase of slave before secession; Dole v. Insurance Co., 2 Cliff. 419, 421, Fed. Cas. 3966, applying principle by analogy in holding that destruction of American vessel by Confederate cruiser was not an act of piracy, under international law; Neal v. Farmer, 9 Ga. 569, holding fact of Great Britain having consented to legality of slave trade, did not make African slavery an English institution to which rules of common law were applicable; Commonwealth v. Aves, 18 Pick. 211, to effect that Massachusetts courts should respect rights of citizens of other States, growing out of legal existence of slavery therein, so far as they could be respected under Massachusetts law; Sims' Case, 7 Cush. 314, 315, to point that courts of State where slavery is not recognized, should recognize its legal existence in other States and respect the rights growing out of the institution in such States; King v. Sarria, 69 N. Y. 32, **24 Am. Rep. 133**, where, in suit in New York against special partner in limited partnership in Cuba, the contract of partnership was construed according to Spanish law.

Denied in Osborn v. Nicholson, 1 Dill. 224, Fed. Cas. 10,595, overruled in 13 Wall. 657, **20 L. Ed. 694**, in argument that no recovery can be had on note given before secession for price of clave; dissenting opinion in McElvain v. Mudd, 44 Ala. 73, in argument against recovery on promissory note, given in 1864, for purchase price of slaves.

The courts of one country cannot execute the penal laws of another.

Approved in Schick v. United States, 195 U. S. 76, **49 L. Ed. 105**, 24 Sup. Ct. 826, State v. Warner, 197 Mo. 658, 94 S. W. 964, and Casey v. St. Louis Transit Co., 116 Mo. App. 268, 91 S. W. 431, all arguendo; Carey v. Schmeltz, 221 Mo. 136, 119 S. W. 947, holding that where action was based on penal statute of sister State, appellate court had no jurisdiction; Mohr v. Sands, 44 Okl. 339, 133 Pac. 241, holding courts will not enforce penalty prescribed by laws of another State providing for triple damages against attorney guilty of fraud and deceit; Wisconsin v. Insurance Co., 127 U. S. 290, **32 L. Ed. 243**, 8 Sup. Ct. 1374, denying Federal Supreme

Court's jurisdiction of suit brought by State on its domestic judgment for a State penalty against citizen of another State; In re Ladd, 74 Fed. 40, holding penal law of Nebraska, prohibiting sale of liquors, did not extend to, and was not enforceable in military reservation which had been ceded to the United States; Indiana v. Oil Co., 85 Fed. 873, denying jurisdiction of Federal court because suit brought to enforce penal statute of Indiana; State v. Kirkpatrick, 32 Ark. 120, holding State court had no jurisdiction to punish for perjury, one who had made false oath in violation of act of Congress; Succession of Hernandez, 46 La. Ann. 991, **24 L. R. A.** 842, 15 South. 469, holding law prohibiting marriage of persons divorced for adultery, penal, and has no extraterritorial effect; State v. Underwood, 49 Me. 189, dissenting opinion, arguing court had no jurisdiction to convict prisoner of larceny committed in New Brunswick, because portion of the goods brought to Maine; Voorhies v. Frisbie, 25 Mich. 479, **12 Am. Rep.** 293, denying jurisdiction of State court of suit by assignee to set aside fraudulent conveyance under Federal bankrupt act, because the law was in the nature of a penal enactment; State v. Barnett, 83 N. C. 616, denying jurisdiction of court to punish crime of bigamy committed in Tennessee; State v. Hall, 114 N. C. 911, **41 Am. St. Rep. 822, 28 L. R. A. 59,** 19 S. E. 602, denying jurisdiction of North Carolina courts of murder committed by persons in North Carolina shooting across State line and killing man in Tennessee.

Distinguished in Strait v. Yazoo etc. R. Co., 209 Fed. 161, **49 L. R. A. (N. S.) 1070,** 126 C. C. A. 105, holding provision in Mississippi crossing statute for recovery of specified sum by county for violation of act was enforceable in another State; Interstate Savings etc. Co. v. Wyatt, 27 Colo. App. 218, 220, 147 Pac. 445, 446, holding that suit upon judgment of sister State for usurious interest founded upon statute, could be maintained, such statute not being penal; Great Western Mach. Co. v. Smith, 87 Kan. 333, **Ann. Cas. 1913E, 243, 41 L. R. A. (N. S.) 379,** 124 Pac. 415, holding that as statute of sister State was not entirely penal and suit was brought for debt, plaintiff could recover; Kilton v. Providence Tool Co., 22 R. I. 614, 48 Atl. 1041, holding action to enforce stockholders' liability for debts of corporation, under Gen. Laws R. I., 1896, c. 180, § 22, is not to enforce penalty; Flash v. Connecticut, 109 U. S. 377, **27 L. Ed. 969,** 3 Sup. Ct. 266, holding individual liability of stockholders under a New York law not penalty, and enforceable in another State; Texas etc. Ry. Co. v. Cox, 145 U. S. 604, **36 L. Ed. 833,** 12 Sup. Ct. 908, where Federal court sitting in Texas entertained jurisdiction of suit for damages for injury inflicted in Louisiana under Louisiana law; to the same effect also is Law v. Western Ry. of Ala., 91 Fed. 819; Huntington v. Attrill, 146 U. S. 666, **36 L. Ed. 1127,** 13 Sup. Ct. 227, holding New York statute making officers of a corporation who sign and record false certificate of the amount of its capital stock, liable for its debts, not penal; Railroad Co. v. Babcock, 154 U. S. 198, **38 L. Ed. 961,** 14 Sup. Ct. 981, holding adminis-

trator could recover damages in Minnesota for death of his deceased in Montana, and Montana laws would govern; Tinker v. Van Dyke, 1 Flipp. 528, Fed. Cas. 14,058, holding certain clauses of bankrupt act not penal; dissenting opinion in Attrill v. Huntington, 70 Md. 200, **14 Am. St. Rep. 350**, 16 Atl. 654, arguing that New York statute making officers of a corporation, who sign and record false certificate of amount of its capital stock, liable for its debts, not penal within meaning of rule; Nelson v. C. & O. Ry. Co., 88 Va. 974, **15 L. R. A. 586**, 14 S. E. 838, holding damages recoverable in Virginia for killing deceased in West Virginia, according to West Virginia law. See also Railroad Co. v. Mase, 63 Fed. 116, 27 U. S. App. 238, Railroad v. Ihlenberg, 75 Fed. 879, 43 U. S. App. 726, **34 L. R. A. 398**, and Myers v. Railroad, 69 Minn. 478, **65 Am. St. Rep. 581**, 72 N. W. 695, neglecting to note distinction, holding recovery could be had in one State for injuries inflicted in another, and laws of latter would govern.

Action in one State to enforce cause of action created by statute of another State. Note, **14 Am. St. Rep. 351.**

Territorial extent of criminal jurisdiction. Note, **76 Am. Dec. 673.**

Burden of proof is on claimant to slaves on board captured vessel, to show title in himself.

Cited in Gedney v. L'Amistad, 10 Fed. Cas. 148, 151, where negroes found on vessel seized off coast of Long Island, held entitled to be sent back to Africa, Spanish claimant having failed to prove title to them.

Distinguished in dissenting opinion in De Lacy v. Antoine, 7 Leigh, 449, arguing against release on habeas corpus of negroes claimed as slaves by Portuguese consul, who could show no evidence upon which he based his claim.

Supreme Court being equally divided in opinion, the decree of the lower court was affirmed.

Approved in Charlottesville etc. Ry. Co. v. Rubin, 107 Va. 752, 60 S. E. 101, right of divided court to affirm judgment of lower court rests not on statute but is rule of necessity; Bridge Co. v. Stewart, 3 How. 424, **11 L. Ed. 663**, holding affirmance of decree on former appeal, by divided court, precluded examination on subsequent appeal into question of jurisdiction on such former occasion; Durant v. Essex Co., 7 Wall. 112, **19 L. Ed. 157**, holding conclusive and binding upon the parties an affirmance by divided court, of decree of lower court; Ayres v. Bensley, 32 Cal. 633, holding equal division of State Supreme Court upon motion for rehearing was denial of motion; Kolb v. Swann, 68 Md. 521, 13 Atl. 380, holding judgment of affirmance by equally divided court as final and conclusive as if court were unanimous; Goddard v. Coffin, 2 Ware, 385, Fed. Cas. 5490, to effect that where Circuit Court divided in opinion on motion for judgment, no affirmative order can be made.

Jurisdiction and powers of consuls. Note, **45 L. R. A. 496.**

Duty of conquering with respect to obligations of conquered State. Note, **5 B. R. C. 907.**

Miscellaneous. Cited in The Antelope, 12 Wheat. 546, **6 L. Ed. 723,** another decision in same cause; The Schooner Tilton, 5 Mason, 471, Fed. Cas. 14,054, as an instance of court inquiring into title to captured property; Harrison v. Vose, 9 How. 382, **13 L. Ed. 183,** as instance of consuls acting in behalf of their countrymen.

10 Wheat. 133–146, 6 L. Ed. 284, THE PLATTSBURG.

It is sufficient to incur forfeiture of vessel under slave trade acts if any preparations for illegal voyage are made.

Cited in United States v. Gooding, 12 Wheat. 473, **6 L. Ed. 697,** holding it not to be necessary for conviction that vessel should be completely equipped in an American port, provided guilty intent accompanied the act; The Slavers, 2 Wall. 380, **17 L. Ed. 910,** holding fact that cargo and equipment might have been intended for legal object not available for defense where there was evidence of guilty intent; The Wanderer, 1 Sprague, 519, Fed. Cas. 17,139, where held that circumstance that fitment was incomplete and no part of it exclusively adapted to slave trade would not prevent forfeiture where guilty intent present; Charge to Grand Jury, 30 Fed. Cas. 1027, to effect that forfeiture attaches as soon as any preparation begun with intent to use vessel in slave trade.

Miscellaneous. Cited in The Schooner Tilton, 5 Mason, 471, Fed. Cas. 14,054, as instance of case where court inquired into true title to vessel.

10 Wheat. 146–152, 6 L. Ed. 287, THOMAS v. HARVEY'S HEIRS.

Court of equity will adopt period prescribed by statute of limitations for taking appeal, in prescribing time within which bill of review may be filed.

Approved in Blythe Co. v. Hinckley, 111 Fed. 837, following rule; In re Brown, 213 Fed. 702, and Home St. Ry. Co. v. City of Lincoln, 162 Fed. 138, 89 C. C. A. 133, both holding that as bill was brought after time to appeal had expired, it was too late; In re Holmes, 142 Fed. 394, time within which petition for revision in matter of law under bankrupt act, § 24b, of appealable order, is limited by time fixed by bankruptcy law for appeal; Jorgensen v. Young, 136 Fed. 381, 69 C. C. A. 222, bill of review in court of equity not filed until two years after entry of judgment in original suit entered, and until after time for appeal had expired, is too late; Atlantic Trust Co. v. Dana, 128 Fed. 222, holding where corporation receiver required by order of appointment to defend suits seeking to establish liens against corporation's property, intervened in foreclosure against corporation and litigated claim of complainant therein under mortgage to fund due corporation, decree is binding on all parties to suit in which he was

appointed; Cocke v. Copenhaver, 126 Fed. 147, holding bill of review not for newly discovered evidence can only be maintained for errors of law appearing on face of record and must be filed within time allowed for appeal; Hendryx v. Perkins, 114 Fed. 804, holding no excuse being shown after nine years, neither a bill to vacate decree for fraud, nor a bill of review, can be maintained; Copeland v. Bruning, 104 Fed. 170, holding there being no statute fixing the time within which bills of review must be filed, Federal courts of equity will extend the provision limiting time to time allowed for taking an appeal; Halsted v. Forest Hill Co., 109 Fed. 823, holding Federal court cannot entertain petition in nature of bill of review which is filed after time for taking an appeal; Reed v. Stanley, 97 Fed. 522, holding where party to suit in equity in Circuit Court has no right to appeal to Supreme Court, a bill of review to Circuit Court may be filed in the Circuit Court of Appeals, within time allowed to appeal to that court; Steen v. March, 132 Cal. 618, 64 Pac. 995, holding court of equity will not entertain bill of review for new trial on expiration of time for taking appeal; Watkinson v. Watkinson, 68 N. J. Eq. 641, 642, 60 Atl. 935, bill of review cannot be filed after lapse of three years from final decree; Williams v. Starkweather, 24 R. I. 513, 53 Atl. 870, holding bill of review in equity cannot be maintained when brought more than one year after entry of decree; Keith v. Alger, 124 Fed. 35, holding to maintain bill of review party must show that new evidence substantially affects party; Chamberlin v. Peoria etc. Ry. Co., 118 Fed. 33, holding where no certificate of jurisdictional question is certified by Circuit Court during term, as required by judiciary act March 3, 1891, § 5, the court cannot subsequently make certificate; dissenting opinion in Hendryx v. Perkins, 114 Fed. 826, majority holding bill to impeach prior decree for fraud is original bill and not bill of review; Elmendorf v. Taylor, 10 Wheat. 168, **6 L. Ed.** 294, holding lapse of twenty years barred title based upon elder grant and entry; Taylor v. Benham, 5 How. 263, **12 L. Ed. 145**, where court refused to go behind executor's final account after lapse of twenty years and death of parties; Boon v. Chiles, 10 Pet. 221, **9 L. Ed. 404**, holding complainant's equitable right to have conveyance of legal title barred as to several defendants by lapse of time; Ricker v. Powell, 100 U. S. 109, **25 L. Ed. 529**, affirming decree refusing leave to file bill of review based on errors of law, because petition filed too late; Clark v. Killian, 103 U. S. 769, **26 L. Ed. 608**, holding bill of review filed before time for appeal passed was filed in time; Trust Co. v. Works, 135 U. S. 227, **34 L. Ed. 105**, 10 Sup. Ct. 742, affirming order striking bills of review from the files because not filed until after expiration of time within which to appeal; Taylor v. Insurance Co., 3 McCrary, 486, 17 Fed. 567, where bill of review dismissed because not filed until after time within which writ of error could have been brought; Massie v. Graham, 3 McLean, 52, Fed. Cas. 9263, where leave to file bill denied on ground that due diligence in discovery of new matter not shown, and more than thirty years had elapsed since decree; Baker v.

Biddle, 1 Bald. 419, Fed. Cas. 764, holding bill for account barred by former account and running of period more than equal to statute of limitations; Dunlevy v. Dunlevy, 38 Fed. 462, dismissing bill of review based upon errors on face of the record because not filed until six years after decree entered; McDonald v. Whitney, 39 Fed. 467, and Reed v. Stanley, 89 Fed. 433, 437, dismissing bill of review based upon errors on face of record because petition not filed within time limited for appeal on writ of error; Rector v. Fitzgerald, 59 Fed. 813, 19 U. S. App. 423, holding bill of review could not be allowed after expiration of time limited for taking appeal; Allen v. Currey, 41 Cal. 321, dismissing complaint in nature of bill of review for new trial, on ground of newly discovered evidence, because not filed within time limited for appeal; Fillyau v. Laverty, 3 Fla. 108, where statute limiting time within which to present demands against decedent's estate, applied by analogy to creditor of partnership to which deceased belonged, filing bill in equity to recover partnership debt from deceased's estate; Guerry v. Durham, 11 Ga. 17, holding bill of review could be filed within twenty years, but not after; Coombs v. Jordan, 3 Bland Ch. 327, **22 Am. Dec. 274**, holding statute limiting time within which execution could issue on a judgment at law, would be applied by analogy to decrees in equity; York's Appeal, 110 Pa. St. 82, 2 Atl. 69, where creditor of estate presented claim in Orphans' Court, it was held to be barred by statute of limitations because it would have been so barred in law court; Fenwick v. Macey, 1 Dana (Ky.), 292, holding statute of limitations applies to bar equity of redemption of slaves which had been in adverse possession of original mortgagee more than five years; Morgan v. Railroad Co., 39 W. Va. 28, 19 S. E. 592, applying ten days' limitation within which to appeal, by analogy to application for writ of certiorari; Poole v. Nixon, 19 Fed. Cas. 1000, where possibility of loss of opportunity to file bill of review by expiration of time given as reason for allowing amendment of record pending appeal; United States v. Rico, 27 Fed. Cas. 809, holding District Court had no jurisdiction to entertain bill of review where United States were guilty of laches.

Modified in Ensminger v. Powers, 108 U. S. 302, **27 L. Ed. 736**, 2 Sup. Ct. 651, holding bill of review filed in time, though not within two years after final decree, because while appeal was pending in Supreme Court the control of Circuit Court over decree was suspended; United States v. Samperyac, Hempst. 131, Fed. Cas. 16,216a, holding rule not applicable where bill of review based on newly discovered evidence; Jenkins v. Prewitt, 5 Blackf. (Ind.) 9, holding when bill of review based on newly discovered evidence, time runs from date of discovery; Boyd v. Vanderkemp, 1 Barb. Ch. 288, denying application for leave to answer decree which had been taken as confessed nine years before, and upon which decree had been entered five years before; Hyde v. Lamberson, 1 Idaho, 542, holding advantage could not be taken, on demurrer, of failure to file bill of review in time.

Distinguished in Perkins v. Cartmell, 4 Harr. 274, 275, 42 Am. Dec. 755, 756, where held since legacies were not within statute of limitations respecting actions and entries concerning lands, the exceptions thereto were not applicable in equity to demand for payment of legacy, but the same was barred for staleness.

Limitations in equity. Note, 12 Am. Dec. 372.

Time within which bill of review must be brought. Note, 6 Ann. Cas. 330, 332.

Leave to file bill of review on ground of newly discovered evidence rests in the sound discretion of the court.

Approved in Hopkins v. Hebard, 194 Fed. 309, 114 C. C. A. 261, affirmed in Hopkins v. Hebard, 235 U. S. 291, 59 L. Ed. 234, 35 Sup. Ct. 26, holding that as new evidence may result in mischief to innocent parties, review asked for should be denied; Acord v. Western Pocahontas Corporation, 156 Fed. 995, holding that no sufficient excuse showing for failure to present newly discovered evidence at trial, bill should not be filed; Dexter v. Arnold, 5 Mason, 314, Fed. Cas. 13,259, discussing circumstances under which leave should be given by court, but dismissing bill on merits; Massie v. Graham, 3 McLean, 52, Fed. Cas. 9263, where court in exercise of its discretion, denied leave to file bill; Elliott v. Balcom, 11 Gray, 300, since leave to file bill of review not founded on errors in record lies in discretion of the court, findings on petition to file same are not conclusive nor evidence of facts set out in bill; Maddox v. Apperson, 14 Lea, 617, where court dismissed bill in exercise of its sound discretion.

Nature and scope of bills of review. Note, 20 Am. Dec. 163.

Bills of review for newly discovered matter. Note, 20 Am. Dec. 170, 172.

Bills of review in federal courts for newly discovered evidence. Note, 14 Ann. Cas. 194.

Who is entitled to file bill of review. Note, Ann. Cas. 1914C, 128.

Right of bill of review as dependent upon interest. Note, 36 L. R. A. 387.

Matters which rest in the discretion of the lower court are not subject to review by the Supreme Court.

Cited in Steines v. Franklin Co., 14 Wall. 22, 20 L. Ed. 818, where court refused to review action of Supreme Court of Missouri in denying motion for rehearing; Richer v. Powell, 100 U. S. 107, 25 L. Ed. 528, affirming decree refusing leave to file bill of review based on newly discovered evidence, because it rested in the sound discretion of the court.

Nonjoinder of parties complainant in bill in equity not ground for review where defendant not injuriously affected thereby.

Cited in Bryan v. Stevens, 4 Fed. Cas. 511, holding trustees of a license to use patent within certain territory need not join their cestuis que trust in suit to enjoin infringement.

Miscellaneous. Cited in Irwin v. Meyrose, 2 McCrary, 249, 7 Fed. 536, where court sustained demurrer to bill of review which alleged no new matter; Dexter v. Arnold, 5 Mason, 314, Fed. Cas. 3856, containing discussion of considerations which should influence the court in exercise of its discretion; Perkins v. Rogers, 35 Ind. 141, 9 Am. Rep. 652, to point that advantage could be taken of bar of statute of limitations by demurrer.

10 Wheat. 152-181, 6 L. Ed. 289, ELMENDORF v. TAYLOR.

The United States courts adopt construction of State laws by State courts.

Approved in Hartford Ins. Co. v. Chicago etc. Ry. Co., 175 U. S. 100, 44 L. Ed. 89, 20 Sup. Ct. 37, holding questions of public policy affecting contracts are governed by laws of the State unless violating United States law, Constitution, treaties, or principles of mercantile law; In re Progressive Wall Paper Corp., 229 Fed. 493, holding under New York law, corporation had no power to issue bonds for antecedent debt; Shaw v. Goebel Brewing Co., 202 Fed. 412, 45 L. R. A. (N. S.) 1090, 120 C. C. A. 470, holding assignee of certificates of shares barred from maintaining suit for transfer under section 35, companies act 1862-1909, of Great Britain; Commonwealth of Pennsylvania v. Fidelity & Deposit Co., 180 Fed. 296, holding surety liable on supersedeas bond under Pennsylvania law; Zeiger v. Pennsylvania R. Co., 158 Fed. 811, 86 C. C. A. 69, holding that nonresident alien cannot maintain action for wrongful death under Pennsylvania statute; York v. Washburn, 129 Fed. 567, 64 C. C. A. 132, applying rule in determining invalidity of lease of realty under State statute of frauds; Parker v. Moore, 115 Fed. 802, holding dealings in futures being void in South Carolina (Rev. Stats., § 1859 et seq.), Circuit Court for district of South Carolina will not enforce contract for sale of cotton in future; Thompson v. M'Connell, 107 Fed. 36, holding under Rev. Stats. Tex. 1895, art. 2396, homestead of insolvent being exempt from execution it cannot be subjected to Federal judgment; Louisville & N. R. Co. v. Lansford, 102 Fed. 66, holding Code Ala., 1896, § 27, providing for actions for personal injuries, having been construed by Supreme Court of Alabama as awarding exemplary damages, that construction is binding on Federal court; Williams v. Gold Hill Min. Co., 96 Fed. 465, holding under Const. Cal., art. XII, § 15, relating to foreign corporation doing business in the State, and Stats. 1880, p. 131, relating to mortgaging or selling land by said corporation, a mortgage of a corporation of another State not conforming thereto is void; Commonwealth v. International Harvester Co., 131 Ky. 560, 133 Am. St. Rep. 256, 115 S. W. 706, holding that an indictment for violation of anti-trust statute was demurrable; State v. Davis, 9 Okl. Cr. 102, 44 L. R. A. (N. S.) 1083, 130 Pac. 965, holding that while disobedience by officer of order of court was contempt of court, punishment might be

suspended; dissenting opinion in Kessler v. Armstrong Cork Co., 158 Fed. 753, 85 C. C. A. 642, majority holding finding of French law with reference to conclusiveness of American judgments is not binding on different parties to another action involving same question; Alaska Commercial Co. v. Debney, 2 Alaska, 325, arguendo; Green v. Neal, 6 Pet. 297, 8 L. Ed. 405, where Supreme Court conformed to the more recent decision of Tennessee court of a State statute; Luther v. Borden, 7 How. 58, 12 L. Ed. 606, following State courts in holding question of what was legal government in Rhode Island in 1842, to be a political one; dissenting opinion in Gelpcke v. Dubuque, 1 Wall. 210, 17 L. Ed. 527, arguing that latest decision of State court as to constitutionality of State law was binding on Federal courts; Fairfield v. Gallatin Co., 100 U. S. 52, 25 L. Ed. 546, overruling former decision construing section of State Constitution, and deciding case according to construction by State Supreme Court; McArthur v. Scott, 113 U. S. 391, 28 L. Ed. 1031, 5 Sup. Ct. 667, recognizing as authority Ohio cases construing State law relating to proceedings to set aside probate of wills; Merrill v. Portland, 4 Cliff. 144, Fed. Cas. 9470, where State construction of State statute relating to recovery from town for injuries from defective highway held obligatory on Federal court; Wick v. Schooner Strong, 6 McLean, 593, Newb. 192, Fed. Cas. 17,607, holding court bound by decision of State Supreme Court, construing Ohio statute as not creating lien on domestic vessel in favor of materialmen; Thompson v. Phillips, 1 Bald. 284, Fed. Cas. 13,974, accepting construction of State act by State Supreme Court; Goodrich v. Chicago, 4 Biss. 20, Fed. Cas. 5542, holding decisions of State Supreme Court construing city charter, bound Federal court; Boyle v. Arledge, Hempst. 623, Fed. Cas. 1758, adopting construction by State Supreme Court of State statute repealing exception in statute of limitations in favor of nonresidents; Barker v. Jackson, 1 Paine, 564, Fed. Cas. 989, following decision of State court, construing State statute as a statute of limitations, and holding same not repugnant to State Constitution; Griffing v. Gibb, McAll. 222, Fed. Cas. 5819, holding court bound by decisions of State Supreme Court construing State laws; Mitchell v. Lippincott, 2 Wood, 472, Fed. Cas. 9665, following latest decisions of State court construing "married woman's law" of Alabama; In re Wyllie, 2 Hughes, 459, Fed. Cas. 18,112, where court followed local construction in construing State exemption laws; Waterworks Co. v. Brewing Co., 36 Fed. 834, following decisions of State Supreme Court rather than one decision of Federal Supreme Court construing State laws, holding city council could grant privilege of laying water-pipes to river; Bate v. Gillett, 20 Fed. 193, following construction placed on Canadian patent law by Canadian court; Railroad Co. v. Houston, 44 Fed. 450, holding where case removed to Federal court after State Supreme Court had passed upon a demurrer decision of such court thereon bound Federal court; Perry Co. v. Brown, 2 Wood. & M. 455, Fed. Cas. 11,015, following decisions of State courts as to effect of proceedings in State courts under State insolvent

law; Prentice v. Zane, 19 Fed. Cas. 1272, where decision of Pennsylvania courts construing Pennsylvania statute making certain instruments negotiable is recognized as authority; Udell v. The Ohio, 24 Fed. Cas. 498, recognizing authority of State court decisions construing State statutes relating to materialmen's liens on domestic vessels; Bloodgood v. Grasey, 31 Ala. 589, following Maryland decisions in construing Maryland statute, relating to deeds of manumission; Broadnax v. Bradford, 50 Ala. 275, following construction by Federal court of United States bankrupt act of 1867; Johnson v. State, 91 Ala. 73, 9 South. 72, following Tennessee decisions construing powers granted by charter to railroad company where Alabama charter to same company granted all rights, powers and privileges conferred by Tennessee charter; Moore v. Clopton, 22 Ark. 129, holding note for purchase of slaves void where made to be void in Arkansas; McClure v. Owen, 26 Iowa, 254, arguing that decision of State court declaring a State law unconstitutional and contracts made thereunder void should bind the Federal tribunals; United States v. Hawkins, 4 Mart. (La.) (N. S.) 328, recognizing authority of decisions of Federal court construing Federal statute; Cucullu v. Insurance Co., 5 Mart. (La.) (N. S.) 472, **16 Am. Dec. 203**, holding conclusive construction given to Mexican Constitution in Mexico sustaining competency of prize courts established before adoption of Constitution; Saul v. His Creditors, 5 Mart. (N. S.) 587, **16 Am. Dec. 221**, denying authority of other foreign decisions upon question sufficiently determined by Spanish law which formed part of the law of Louisiana; Conrad v. Prieur, 5 Rob. (La.) 57, recognizing authority of decision of District Court, so construing Federal bankrupt law that mortgagees in Louisiana were entitled to the same privileges as mortgagees under other State systems; Hill v. Boston, 122 Mass. 380, **23 Am. Rep. 366**, explaining certain Federal cases where points decided by them otherwise than as contended for in case at bar were so decided pursuant to this rule; McIntyre v. Ingraham, 35 Miss. 58, sustaining power of State court to declare State law constitutional as applied in case at bar and denying application of Federal decisions holding such statute unconstitutional except under similar circumstances; Laird v. Railroad Co., 62 N. H. 262, **13 Am. St. Rep. 566**, where court held that liability for destruction of building in Vermont by fire from railroad locomotive determined by Vermont statute and endeavored to ascertain the construction placed upon such statute in Vermont; dissenting opinion in Hale v. Lawrence, 21 N. J. L. 745, recognizing as authority decisions of New York courts construing New York statute relating to destruction of buildings to prevent spread of fire; Works v. Lawrence, 23 N. J. L. 597, **57 Am. Dec. 422**, in argument to effect that where construction of New York statute had been adopted by courts of that State it should be final; Jessup v. Carnegie, 80 N. Y. 446, **36 Am. Rep. 646**, adopting construction placed upon Iowa statute by Iowa courts; dissenting opinion in Matheny v. Golden, 5 Ohio St. 430, in argument against authority of decisions of United States Supreme Court construing law

otherwise than as previously construed by State Supreme Court; dissenting opinion in Bank v. Knoup, 6 Ohio St. 437, arguing against authority of United States Supreme Court to reverse decision of State Supreme Court construing State law; Skelly v. Bank, 9 Ohio St. 616, recognizing authority of National Supreme Court decisions upon questions within their jurisdiction; Powell v. De Blane, 23 Tex. 76, following construction placed upon Mississippi statute by courts of that State in determining whether upon marriage in Mississippi with a woman owning slaves the husband acquired such a right therein as would become absolute upon death of wife in another State; Brownsville v. Basse, 36 Tex. 503, denying jurisdiction of court to hold a divestiture of title to lands by former Mexican authorities invalid; Ninick v. Iron Works, 25 W. Va. 192, following Ohio decisions determining character of the individual liability of stockholders created by an Ohio statute; Newcomb v. Smith, 2 Pinn. 138, construing law copied from another State by the construction upon it in such State; Spaulding v. Railway Co., 30 Wis. 120, 11 Am. Rep. 554, holding that if English statute passed shortly before Revolution, became part of common law of this country, the construction subsequently placed upon it by English courts applied to it here as well; Idler v. Borgmeyer, 65 Fed. 924, 28 U. S. App. 332, arguendo; Hilton v. Guyot, 159 U. S. 194, 40 L. Ed. 119, 16 Sup. Ct. 155, considering French judgment; United States v. New Bedford Bridge, 1 Wood. & M. 448, Fed. Cas. 15,867, arguendo; Kessler v. Armstrong Cork Co., 158 Fed. 750, 85 C. C. A. 642, finding of French law with reference to conclusiveness of judgment of American courts is not binding on different parties to another action involving same question; Beals v. Hale, 4 How. 54, 11 L. Ed. 873, where decision of State court not treated as precedent because not one of last resort; Foxcroft v. Mallett, 4 How. 379, 11 L. Ed. 1020, holding that adjudications of State court in respect to demandant's title not conclusive upon Federal court, because particular question not determined, and question one of common law, not of State statute; modified in Burgess v. Seligman, 107 U. S. 34, 27 L. Ed. 365, 2 Sup. Ct. 22, holding decision of State Supreme Court contrary and subsequent to decision on same point by United States Circuit Court, not authority for Supreme Court where course of State court decisions on subject not settled; Loring v. Marsh, 2 Cliff. 319, Fed. Cas. 8514, denying motion to continue cause until decision of case pending in State court between same parties involving undecided question of State law common to both suits; Hart v. Burnett, 15 Cal. 603, quoting Foxcroft v. Mallett, supra, in argument to support decision limiting application of last decision on same general subject; Faulkner v. Hart, 82 N. Y. 421, 37 Am. Rep. 580, denying authority of Massachusetts decisions which held that common carrier ceased to be liable as such upon unloading goods and storing in warehouse, because the question was one of commercial law, not of a State statute; Vaughan v. Phebe, Mart. & Y. 24, 17 Am. Dec. 779, holding Virginia decisions upon admissibility of evidence in suit for freedom not binding on Tennessee court, though entitled to respect.

Questions of State law as to which State court decisions must be followed in actions originating in, or removed to, Federal courts. Note, **40 L. R. A. (N. S.) 388, 394.**

Modification of rule requiring all persons in interest before court.

Approved in Bogart v. Southern Pacific Co., 228 U. S. 147, **58 L. Ed. 773**, 33 Sup. Ct. 497, holding that as a company was an indispensable party and could not be brought in, appeal should be dismissed; Jackson v. Jackson, 175 Fed. 716, 99 C. C. A. 286, holding that jurisdiction of Federal court will not be defeated by either joinder or nonjoinder of formal parties; United States Telephone Co. v. Central Union Tel. Co., 171 Fed. 135, holding that indispensable parties not being brought in, plaintiff not entitled to injunction; McConnell v. Dennis, 153 Fed. 550, 82 C. C. A. 501, holding that in suit in equity, it appearing that an indispensable party had not been brought in, decree should be reversed; North Carolina Mining Co. v. Westfeldt, 151 Fed. 297, holding that bill could be dismissed as to indispensable party and retained as to other defendants; Williams v. Crabb, 117 Fed. 205, holding in suit by one of two heirs to set aside a will and deed, the other heir is not an indispensable party; Arnold v. Keil, 252 Ill. 342, 96 N. E. 870, holding that in election contest, independent candidate not necessary party, as he could not be affected by result; Suburban R. R. v. Chicago, 204 Ill. 319, 68 N. E. 426, holding in action by city against railroad to compel removal of tracks in street, a mortgagee of the leasehold not in possession is not necessary party; Demarest v. Holdeman, 157 Ind. 474, 62 N. E. 20, holding where treasurer received from auditor certain money belonging to school fund and deposited a part thereof in bank and defaulted with the remainder, and filed canceled orders for the full sum with auditor, in suit brought by succeeding treasurer, the defaulting treasurer, his bondsman, the auditor, board of commissioners, and bank were proper defendants; dissenting opinion in Gamble v. Silver Peak Mines, 35 Nev. 366, 133 Pac. 953, majority holding that where parties have treated judgment as final, they will not afterward be heard to contrary and claim want of jurisdiction when judgment is against them; West v. Smith, 8 How. 410, **12 L. Ed. 1134**, holding not necessary to join devisee of property situated in another jurisdiction and residing there himself, and whose rights could not be affected by the decision; Goldsmith v. Gilliland, 10 Sawy. 619, 24 Fed. 157, holding where several persons claimed undivided interests in real estate adversely to one in possession, latter need not join all in suit to quiet title; Society v. Town, 2 Paine, 542, Fed. Cas. 13,155, holding joinder of one interested in subject matter of suit but whose rights not affected thereby, not necessary; Trecothick v. Austin, 4 Mason, 37, Fed. Cas. 14,164, holding persons who had ceased to have interests which could be affected by the decree, not necessary parties; Harrison v. Urann, 1 Story, 66, Fed. Cas. 6146, holding court could dispense with joinder of one who, if party, would oust jurisdiction, where decree would not affect his rights; Suydam v. Truesdale, 6 McLean, 463, Fed. Cas. 13,656, holding

where mortgages sold pending bill for their foreclosure, vendees need not be made parties, as their rights would not be affected by so doing; Barney v. Baltimore, 1 Hughes, 121, Fed. Cas. 1029, to point that court could not take jurisdiction where necessary parties resided beyond territorial jurisdiction of court; Gregory v. Swift, 39 Fed. 711, holding certain parties indispensable in suit for proceeds of note deposited; Cook v. Lasher, 73 Fed. 704, 42 U. S. App. 42, where grantee of commissioner of school lands conveyed portion of such land, such subsequent grantee was not indispensable party to suit to set aside deeds from commissioner to his grantor and others; Mining Co. v. Dangberg, 81 Fed. 87, 90, held persons who used waters of stream, but claimed no rights adverse to plaintiff, not necessary parties to suit to determine plaintiff's rights as against parties claiming adversely; Davis v. Davis, 89 Fed. 538, holding suit maintainable to enforce claim against defendant's share of an estate without joining other distributees; Bryan v. Stevens, 4 Fed. Cas. 511, holding trustees of license to use patent within certain territory need not join their cestuis que trust in suit to enjoin infringement; Lucas v. Bank, 2 Stew. (Ala.) 291, to effect that principal bank not indispensable party where its branch was made party and had notice of all proceedings; Marr v. Southwick, 2 Port. 370, holding insolvent partner of defendant's testator, who is beyond jurisdiction of the court not indispensable party to suit brought to subject estate of deceased partner to partnership debt; Walker v. Miller, 11 Ala. 1086, where held that beneficiaries under assignment for benefit of creditors not necessary parties defendant to bill to subject a steamboat to lien of mortgage previously executed by assignor to plaintiffs; Holman v. Bank, 12 Ala. 423, holding minor heir beyond jurisdiction of court not necessary party to suit to which her coheir is defendant, involving title of such coheir to real estate, as decree will not affect title of such absent minor heir; Bank v. Lee, 11 Conn. 120, 27 Am. Dec. 716, where certain defendants having made various promissory notes, indorsed by another defendant, to whom they executed mortgage to secure him, held that, in suit by holders of some of such notes to subject such mortgaged property to payment of them, holders of others not indispensable parties; Lawrence v. Rokes, 53 Me. 117, holding parties in interest beyond jurisdiction of court, not indispensable parties where decree can be made without affecting such absentees; Machine Co. v. Grover etc. Co., 110 Mass. 8, holding bill not demurrable for failure to join foreign corporation beyond jurisdiction of court; Pavement Co. v. Seminary, 43 Minn. 453, 45 N. W. 870, to effect that though original contractor necessary party to suit by subcontractor to foreclose mechanic's lien, where he was named as party but not brought in, court should give an opportunity to bring him in; McPike v. Wells, 54 Miss. 145, holding that decree in suit to which plaintiff's intestate was not party, though interested in subject matter, was binding on the parties, but not on the intestate; Erickson v. Nesmith, 46 N. H. 375, where court held in suit against stockholders for corporation debts some of whom were outside State and refused to submit to jurisdiction, whole amount could be

made out of defendants within State; Colt v. Lasnier, 9 Cow. 330, holding question to be one of discretion for court and ordering cause to stand over in order to give opportunity to bring in necessary parties; Spivey v. Jenkins, 1 Ired. Eq. 128, where held that in suit against surety on guardian's bond principal having died insolvent, cosurety residing out of State not necessary party defendant; Stimson v. Lewis, 36 Vt. 93, granting relief as between parties litigant, though some of the parties in interest not made defendants, where they were very numerous and decree would not materially affect absentees' interests; Smith v. Ford, 48 Wis. 141, 145, 2 N. W. 147, 150, holding that mere naked trustee not within jurisdiction of the court not necessary party to suit to subject trust estate.

Distinguished in Camp v. Bonsal, 203 Fed. 918, 919, 122 C. C. A. 207, holding that as action could be determined without affecting interest of absent party, it could be maintained; Mallow v. Hinde, 12 Wheat. 197, **6 L. Ed. 600**, directing dismissal of bill without prejudice, because final decision could not be made without affecting rights of absent parties in interest; Shields v. Barrow, 17 How. 142, **15 L. Ed. 161**, reversing decree and directing dismissal where parties in interest not properly joined; California v. S. P. Co., 157 U. S. 251, **39 L. Ed. 691**, 15 Sup. Ct. 600, dismissing bill for want of joinder of necessary parties who could not be joined without ousting jurisdiction; Alexander v. Horner, 1 McCrary, 645, Fed. Cas. 169, dismissing bill brought by payee of promissory note to compel second payment thereof, for failure to join indorsee and holder to whom note had been paid; Machine Co. v. Singer Co., 8 Blatchf. 127, Fed. Cas. 4884, holding failure to join parties whose rights are affected by decree held fatal; Conolly v. Wells, 33 Fed. 208, dismissing bill for want of joinder of one who was coexecutor with defendants, alleged to be outside the jurisdiction of the court, and who if made party would oust jurisdiction of court; Rateau v. Bernard, 3 Blatchf. 248, Fed. Cas. 11,579, Cookingham v. Ferguson, 8 Blatchf. 495, 4 Bank, Reg. 642, Fed. Cas. 3182, arguendo; Hamilton v. Railway Co., 49 Fed. 418, 421, holding corporation which contracted with plaintiffs to build railroad, but sold out road to defendant, who had notice of plaintiffs' interest, in violation of contract, not indispensable parties in suit to have defendants declared trustees for plaintiffs; Chadbourn v. Coe, 45 Fed. 826, dismissing bill in equity against trustee of complainant's debtor to subject property alleged to have been fraudulently conveyed to him because debtor not a party and complainant had no judgment against him; Ross v. Crockett, 9 La. Ann. 338, holding an interested corporation an interested party, but not expressly noting distinction; Hallett v. Hallett, 2 Paige Ch. 19, holding certain persons whose interests inseparably connected with claims of parties, to be necessary parties.

Adverse possession for a period of time sufficient to bar ejectment at law, constitutes a bar in equity.

Approved in Cropley v. Eyster, 9 App. D. C. 378, holding that where remedy for enforcement of equitable right is not kept alive, action barred; Peters v. Suter, 2 McAr. (D. C.) 518, Maryland act prescribing limitations upon bonds and other specialties does not apply to equitable liens on realty; dissenting opinion in Rogers v. Schlotterback, 167 Cal. 58, 138 Pac. 738, majority holding, although conveyance was prior to running of statute of limitations, act not barred; Glezen v. Haskins, 23 R. I. 604, 51 Atl. 220, holding defendant in ejectment claiming adverse possession against plaintiff and his mortgagor cannot show payment by lapse of time between execution and foreclosure of mortgage; Peyton v. Stith, 5 Pet. 494, 8 L. Ed. 203, holding the possession of respondent by his tenants for more than twenty years barred complainant's equity; Miller v. McIntyre, 6 Pet. 66, 8 L. Ed. 322, holding complainant's rights barred by adverse possession of twenty years; Boone v. Chiles, 10 Pet. 221, 9 L. Ed. 404, where equitable right of complainant to have conveyance of legal title held to have been barred as to several defendants by adverse possession; Taylor v. Benham, 5 How. 263, 12 L. Ed. 145, where court refused to go behind executor's final account after lapse of twenty years; Landsdale v. Smith, 106 U. S. 392, 27 L. Ed. 219, 1 Sup. Ct. 350, holding bill offering to pay sums due and praying permission to redeem real estate bad on demurrer because barred by lapse of time; Phillipi v. Phillipe, 115 U. S. 159, 29 L. Ed. 340, 5 Sup. Ct. 1185, holding lapse of more than twenty years after repudiation of trust by trustee and notice thereof to cestui que trust, barred proceedings against trustee for settlement; Speidel v. Henrici, 120 U. S. 387, 30 L. Ed. 720, 7 Sup. Ct. 612, where plaintiff had been member of socialistic community, lapse of fifty years barred proceedings on his part for recovery of his share of the property; Amory v. Lawrence, 3 Cliff. 533, Fed. Cas. 336, holding right to redeem a mortgage not barred because twenty years not expired; United States v. Beebe, 4 McCrary, 17, 17 Fed. 40, holding lapse of time constituted good defense against government, not by analogy to any statute of limitations, but on general principles of equity; Hall v. Russell, 3 Sawy. 515, Fed. Cas. 5943, holding statute barred recovery by heirs of settler under donation act of Oregon against government patentees; Manning v. Hayden, 5 Sawy. 377, Fed. Cas. 9043, applying test of statute of limitations to suit for real estate against constructive trustee, and holding same not barred because time of statute had not expired; Rice v. Martin, 7 Sawy. 343, 8 Fed. 480, dismissing bill for partnership interest in band of cattle and ranch on account of complainant's laches in neglecting to assert his rights during lifetime of owner and for four years after repudiation of partnership by him; Lakin v. Min. Co., 11 Sawy. 243, 25 Fed. 344, holding court would apply four years' statute of limitations, and complaint being within that time was not barred; Norris v. Haggin, 12 Sawy. 51, 28 Fed. 278, holding California statute of limitations made expressly applicable to suits in equity, must be so construed in Federal courts; Robinson v. Hook, 4 Mason, 151, note, Fed. Cas. 11,956, holding bill for account of money received for use of plaintiff barred by statute of limitations; s. c., p. 153,

holding even if case be considered one of implied trust, the statute applied; Scott v. Evans, 1 McLean, 489, Fed. Cas. 12,529, where held that though statute of limitations not applicable because not pleaded, plaintiff's claim barred by lapse of time; Dexter v. Arnold, 3 Sumn. 155, 159, Fed. Cas. 3859, holding redemption barred under Rhode Island statute limiting redemption period of mortgages made before 1798 to twenty years; Baker v. Whiting, 3 Sumn. 486, Fed. Cas. 787, holding statute of limitations applicable to trust estate, and plaintiff not barred because time not expired; Baker v. Biddle, 1 Bald. 419, Fed. Cas. 764, holding period of limitation for action at law having run, bill for an accounting was barred; Fisher v. Boody, 1 Curt. 219, Fed. Cas. 4814, dismissing bill to rescind deed where plaintiff guilty of laches; Almy v. Wilbur, 2 Wood. & M. 403, Fed. Cas. 256, holding statute did not begin to run against mortgagor of machinery so as to bar redemption until demand and refusal; Fussell v. Hughes, 8 Fed. 396, where State statute of limitations applied by analogy to bar bill in equity, based on equitable title, to recover lands; Taylor v. Holmes, 14 Fed. 511, holding bill to perform contract to convey land barred by statute of limitations; Merrill v. Town, 66 Fed. 167, holding statute of limitations barred suit to charge town as trustee of proceeds from sale of bonds which had been adjudged invalid; Dugan v. O'Donnell, 68 Fed. 989, where held that suit to have respondent declared trustee for complainants barred by lapse of seventeen years from time of notice of repudiation of trust; Merrill v. Town, 72 Fed. 464, 34 U. S. App. 615, holding statute of limitations barred suit to charge town as trustee of proceeds from sale of bonds which had been adjudged invalid; Bartlett v. Ambrose, 78 Fed. 844, 42 U. S. App. 381, holding adverse possession under void tax deed during period of statute of limitations barred recovery, even though complainant not guilty of laches; In re O'Neale, 6 N. B. R. 428, 18 Fed. Cas. 694, holding that the statute of limitations ran in favor of a residuary legatee who took realty subject to charge of a certain sum to be paid three years after testator's death, he not being a direct trustee; Hemmick v. Standard Oil Co., 91 Fed. 334, refusing to order accounting on State claim though not barred by the statute; Jones v. Watkins, 1 Stew. (Ala.) 103, to effect that plaintiff's acting under mistake of law, having permitted remedy at law to be barred by statute, equity would not interfere; Tillotson v. Kennedy, 5 Ala. 412, 39 Am. Dec. 333, holding that public disavowal by tenant of landlord's title, followed by possession during necessary period, bars action of ejectment; Danley v. Danley, 22 Ark. 272, holding a claim of dower was barred by lapse of more than ten years from husband's death; Haskell v. Bailey, 22 Conn. 572, holding foreclosure of mortgage barred by lapse of time equal to period by which right of entry barred; Rice v. Pennypacker, 5 Houst. 378, holding claims of complainant for partnership balance due his intestate, being barred at law by statute of limitations, were barred in equity; Fillyau v. Laverty, 3 Fla. 108, where statute limiting time within which to present demands against a decedent's estate applied by analogy to creditor of partnership to which deceased belonged, filing bill to recover debt from

decedent's estate; Morgan v. Morgan, 10 Ga. 303, to point that possession of mortgaged property by mortgagee for twenty years necessary to bar equity of redemption; Moore v. Moore, 103 Ga. 526, 30 S. E. 539, refusing to relieve from bar of statute attached because of parties' mutual mistake at law; Manning v. Warren, 17 Ill. 268, holding possession by mortgagor's grantees, and payment of taxes during period of statute of limitations barred suit by mortgagee's assignees; Doe v. Hearick, 14 Ind. 246, holding possession under claim of title during period of statute barred recovery; Wright v. Leclaire, 3 Iowa, 232 holding statute of limitations governing real actions, applicable to suit for specific performance of contract for sale of lands; Johnson v. Hopkins, 19 Iowa, 53, holding suit for specific performance of contract for conveyance of real estate barred, either by statute of limitations or for staleness; Gebhard v. Sattler, 40 Iowa, 157, holding statute of limitations applied to bar recovery where property sold under deed of trust given by plaintiff's ancestor to secure a debt, but sale made otherwise than as provided in deed; Fenwick v. Macey, 1 Dana (Ky.), 291, 292, holding statute of limitations barred equity of redemption of slaves which had been in adverse possession of original mortgagee more than five years; Ralls v. Hughes, 1 Dana, 408, holding right of dower barred in equity by lapse of twenty years; Dugan v. Gittings, 3 Gill, 161, 43 Am. Dec. 316, holding time not having expired within which right of entry would be barred, bill for recovery of real estate, therefore, not barred; Chew v. Bank, 2 Md. Ch. 253, holding claim to an annuity claimed to be charge on realty, barred by adverse possession and lapse of more than twenty years; Campau v. Chene, 1 Mich. 407, holding when land deeded on conditions which were not performed, grantor's equity barred by possession of grantee and those claiming under him, for forty-seven years; Iler v. Routh, 3 How. (Miss.) 296, where held that possession under deed from one heir of original deceased owner for period of more than twenty years after majority of coheir, barred recovery by latter; McNair v. Lot, 34 Mo. 302, 84 Am. Dec. 80, holding petition in nature of bill to redeem mortgage, barred by adverse possession by strangers to mortgage, holding under sheriff's deed during period of statute of limitations; Hill v. Bailey, 8 Mo. App. 89, where held that adverse possession by one originally a mortgagee, during period of statute of limitations, conferred title on him; Chapin v. Wright, 41 N. J. Eq. 442, 5 Atl. 575, holding statute of limitations barring right of entry applicable by analogy to bar equity of redemption; Coles v. Vanneman, 51 N. J. Eq. 329, 18 Atl. 471, holding lapse of eight years barred redress in equity for fraud in obtaining mortgage; Jackson v. Waldron, 13 Wend. 204, holding more than twenty years' possession by one originally equitable mortgagee, and his devisee, gave complete legal title; Humbert v. Trinity Church, 24 Wend. 615, holding bill to determine boundaries and for an accounting barred by twenty years' occupancy of land in dispute; Humbert v. Trinity Church, 7 Paige, 197, holding bill to recover rents and profits barred by more than twenty years' adverse possession; Sarrowe v. Beam, 10 Ohio, 503, where a widow was within the exception

of the statute of limitations, her dower was not barred for staleness, since the statute as a whole was applicable; Clark v. Potter, 32 Ohio St. 61, where possession under claim of title during period of statute of limitations by one originally a mortgagee, barred redemption; Strimpfler v. Roberts, 18 Pa. St. 302, 57 Am. Dec. 617, holding action of ejectment and to declare a trust based on alleged equitable title, barred by adverse possession during period of statute of limitations; York's Appeal, 110 Pa. St. 83, 2 Atl. 69, where creditor of decedent's estate presented claim in Orphans' Court, it was held to be barred by statute of limitations because it would have been in law court; Mowry v. Providence, 10 R. I. 56, holding title could be acquired by adverse possession to property previously dedicated to the use of a limited portion of the population; Patton v. McClure, Mart. & Y. 345, in argument, applying reason of rule by analogy, holding statute of frauds as binding on court of equity as on court of law; Hickman v. Gaither, 2 Yerg. 207, holding seven years' adverse possession under claim of title barred claim by entry in equity; Hughes v. Brown, 88 Tenn. 587, 590, 592, 8 L. R. A. 483, 13 S. W. 288, discussing rule and exceptions, holding suit to subject trust estate to payment of judgment against former trustee for debt incurred by him for benefit of trust estate, barred in equity by statute of limitations; Kennedy v. Baker, 59 Tex. 157, holding the two-year statute of limitations barred recovery in court of equity of money held by defendant as constructive trustee for plaintiff; Cresap v. McLean, 5 Leigh (Va.), 390, where defendant having had actual possession under elder patent longer than period which would bar entry, plaintiff's alleged equity was barred; dissenting opinion in Baker v. Morris, 10 Leigh, 316, arguing, recovery in equity on personal bond where liability has been denied by obligor for more than twenty years, barred by lapse of time; Swann v. Thayer, 36 W. Va. 53, 54, 14 S. E. 425, holding laches barred recovery of real estate purchased by creditor at void sale, under deed of trust, where he and his alienees held same, claiming title for more than seventeen years; Fawcett v. Fawcett, 85 Wis. 338, 39 Am. St. Rep. 847, 55 N. W. 406, holding the statute not to bar equity as between trustee and cestui que trust.

Modified in Doe v. McLoskey, 1 Ala. 746, holding statute prescribing time within which claims could be presented against deceased's estate, did not bar foreclosure of mortgage on part of real estate belonging to such estate.

Distinguished in Sis v. Boarman, 11 App. D. C. 121, holding that where trust creditor has delayed nineteen years to enforce trust not to be considered where statute bars only after twenty years; Johnson v. Elkins, 1 App. D. C. 443, holding that statute of limitations did not apply in case of trust where transaction under first deed made by trustee was not consummated; Rhode Island v. Massachusetts, 15 Pet. 273, 10 L. Ed. 736, holding rule not applicable to political communities, especially as special circumstances were alleged which prevented complainant from asserting

her rights; Gray v. Jones, 4 McCrary, 521, 14 Fed. 87, holding owner of equitable title to unoccupied lands not barred by statute of limitations in absence of any adverse possession; Trecothick v. Austin, 4 Mason, 32, Fed. Cas. 14,164, holding statute did not run against cestui que trust where trustee having died the trust property was distinct and separable from his own estate; Phalen v. Clark, 19 Conn. 435, **50 Am. Dec. 258**, holding statute of limitations inapplicable to bar bill for recovery by owner of lottery, from ticket agent and a confederate, of sum of money procured by them from him, through fraud; Perkins v. Cantwell, 4 Harr. 274, 275, **42 Am. Dec. 755, 756**, where held since legacies were not within statute of limitations respecting actions and entries concerning lands, the exceptions thereto were not applicable in equity to demand for payment of legacy, but same was held barred for staleness; Drummond v. Green, 35 Md. 151, admitting rule but holding it inapplicable under facts of case; Varick v. Edwards, 1 Hoff. Ch. 417, holding rule not applicable because possession not adverse; Sullivan v. Latimer, 35 S. C. 430, 14 S. E. 935, where possession of defendants, claiming under trustee, with notice of the trust, held not to be adverse so as to bar recovery by cestui que trust; Williams v. Lewis, 5 Leigh (Va.), 691, holding bill for specific performance not barred by statute of limitations where defendant's decedent, for valuable consideration, put plaintiff in possession of and agreed to convey to him land, to which he had not then, but defendant afterward acquired, the legal title; Straughan and Others v. Wright, 4 Rand. 497, where court announced the doctrine but refused to apply it until such time as it should be determined by action at law whether defendant was barred there.

Limitations in equity. Note, **12 Am. Dec. 372.**

Necessity of color of title for adverse possession. Note, **14 Am. Dec. 765.**

Effect of statute of limitations between trustees and cestui que trust. Note, **34 Am. Dec. 725.**

Refusal of relief in equity because of laches. Note, **54 Am. Dec. 130.**

Statute of limitations as between trustor and trustee. Note, **99 Am. Dec. 390.**

Necessity for color of title, not expressly made a condition by statute, in adverse possession. Note, **15 L. R. A. (N. S.) 1195.**

Miscellaneous. Cited in Perkins v. Rogers, 35 Ind. 141, **9 Am. Rep. 652**; McNairy v. Bell, 1 Yerg. 503, to point that demand not necessary when note made payable at specified time and place.

10 Wheat. 181–192, 6 L. Ed. 297, CARNEAL v. BANKS.

Jurisdiction of Federal court in equity as between parties over whom Federal court has jurisdiction will not be ousted by joinder of those over whom it has not, if unnecessary.

Approved in Regis v. United Drug Co., 180 Fed. 206, holding that as bill showed no controversy wholly between residents of different States, motion to remand to State court should be granted; North Carolina Mining Co. v. Westfeldt, 151 Fed. 296, holding that where one of defendants was not indispensable, suit as to him could be dismissed; Grove v. Grove, 93 Fed. 867, holding court has power to retain jurisdiction of suit by dismissing parties not indispensable, but whose presence would deprive court of jurisdiction; Hatch v. Railroad Co., 6 Blatchf. 116, Fed. Cas. 6204, holding plaintiff could not deprive defendant of right of removal to Federal court by joining merely formal parties; Heriot v. Davis, 2 Wood. & M. 232, Fed. Cas. 6404, where court took jurisdiction as between plaintiff and defendant whose interest was distinct from that of certain nominal defendants, citizens of same State with plaintiff; Bowman v. Wathen, 2 McLean, 379, Fed. Cas. 1740, if certain plaintiffs were improperly joined court could proceed as between parties properly before it; Harrison v. Urann, 1 Story, 66, Fed. Cas. 6146, overruling plea by two defendants that third defendant who did not appear was citizen of same State with plaintiff; Pond v. Sibley, 19 Blatchf. 197, 7 Fed. 135, holding citizenship of officers of defendant corporations could not affect right of removal to Federal court, such officers being merely formal parties; Insurance Co. v. Svendsen, 74 Fed. 348, holding complainant could amend by omitting a merely nominal party defendant over whom court had no jurisdiction; Tug R. Co. v. Brige, 86 Fed. 820, holding complainant could amend by dropping citizen defendants where decree could be rendered as between the parties remaining; Gordon v. Simonton, 10 Fla. 196, where court held its jurisdiction was not affected as to parties properly before it, by joinder of a foreign executor who could not defend under State law; Howard v. Cannon, 11 Rich. Eq. 26, **75 Am. Dec. 739**, to effect that Circuit Court could not have taken jurisdiction where some of the necessary parties defendant were citizens of the same State with plaintiff; Shields v. Barrows, 17 How. 140, **15 L. Ed. 161**, directing dismissal where parties to a compromise, residing in same State with plaintiff, were indispensable parties to bill to rescind; Florida v. Georgia, 17 How. 508, **15 L. Ed. 200**, to point that where party necessary for a decree not joined, court should refuse to act; Smith v. Rines, 2 Sumn. 350, Fed. Cas. 13,100, remanding to State court suit for damages arising out of tort, because defendants, some of whom were citizens of same State with plaintiff, were jointly liable; Conolly v. Wells, 33 Fed. 208, holding nonresident coexecutor to be such indispensable party to bill against executors for accounting, that court could not proceed without him.

Decree must be sustained by the allegations of the parties and proofs in the cause.

Approved in Columbia Digger Co. v. Rector, 215 Fed. 624, holding that where complaint did not sufficiently allege citizenship of certain parties, complainant could dismiss as to them; Edison Electric Light Co. v. Peninsular Light, Power & Heat Co., 95 Fed. 676, holding license to use electric

invention showing it to be more restricted than shown by allegations of bill did not enlarge issue made by the pleadings or change their construction; dissenting opinion in Harrison v. Nixon, 9 Pet. 512, 9 L. Ed. 212, holding failure to prove allegations in the bill a proper subject for inquiry in appellate court; Tilghman v. Tilghman, Bald. 491, Fed. Cas. 14,045, holding plaintiff alleging written contract could not recover on proof of verbal one; Phelps v. Elliot, 35 Fed. 461, dismissing bill because, though facts proved establishing complainant's title, such facts were not alleged in the bill; Morgan v. Crabb, 3 Port. (Ala.) 473, holding defendant entitled to no benefit from proof of fact not alleged in his answer; Clements v. Kellogg, 1 Ala. 333, reversing decree for variance between allegations and proof; Graham v. Tankersley, 15 Ala. 647, holding chancellor properly refused decree upon proof not responsive to any of the allegations of the pleadings; Ansley v. Robinson, 16 Ala. 798, holding that decree could not embrace matters not alleged in the bill even though admitted by defendant; Nolley v. Rogers, 22 Ark. 229, reversing decree, because facts upon which rendered not distinctly alleged in the bill; West v. McCarty, 4 Blackf. 246, where decree reversed because not sustained by the allegations or the proof; Buck v. McCaughtry, 5 T. B. Mon. 221, holding evidence of facts not alleged in the bill inadmissible; dissenting opinion in Bayne v. State, 62 Md. 115, arguing that it was necessary for plaintiff to allege and prove fraud in grantee in order to support decree setting aside deed claimed to be in fraud of creditors; Warren Glass Works Co. v. Coal Co., 65 Md. 549, 5 Atl. 254, affirming judgment for defendant for failure of evidence to support averments of declaration; Bedford v. Williams, 5 Cold. 207, holding matters appearing in the proof alone and not otherwise in the record could not constitute ground for reversal; Keene v. Wheatley, 14 Fed. Cas. 188, holding matters not alleged in bill could not constitute basis for decree in favor of complainant.

Treaty of 1778 with France secures to citizens or subjects of either power privilege of holding lands in territory of other.

Cited in Pollard v. Kibbe, 14 Pet. 413, 10 L. Ed. 519, sustaining Spanish grant in formerly disputed territory, under a provision of treaty of cession thereof to United States; Hauenstein v. Lynham, 100 U. S. 489, 25 L. Ed. 630, holding that Swiss devisee of Virginia realty is entitled, under the treaty of 1850, to sell same and export the proceeds; dissenting opinion in Baldwin v. Frank, 120 U. S. 703, 30 L. Ed. 772, 7 Sup. Ct. 765, arguing that provisions of the treaty with China, conferring certain rights and privileges upon resident Chinese was self-operating; Parrott's Chinese Case, 6 Sawy. 371, 1 Fed. 503, holding void provisions of California Constitution and code, depriving resident Chinese of rights and privileges secured to them by treaty of 1868; People v. Gerke, 5 Cal. 382, 386, sustaining power of Federal government to confer upon aliens right to inherit lands and sell same and withdraw proceeds by treaty with Prussia; Opel v. Shoup, 100 Iowa, 424, 37 L. R. A. 587, 69 N. W. 563, provisions of treaty securing

to subjects of king of Bavaria qualified right to inherit realty, prevail over State law conflicting therewith.

Effect of treaties on alien's right to inherit. Note, 32 L. R. A. 183.

Miscellaneous. Cited in Durant v. Essex Co., 7 Wall. 110, 19 L. Ed. 156, as instance of Supreme Court directing dismissal without prejudice in a proper case.

10 Wheat. 192-204, 6 L. Ed. 300, McCORMICK v. SULLIVANT.

United States inferior courts being limited, their judgments are reversible on error or appeal for failure of record to show jurisdiction, but they are not void.

Approved in Riverdale Cotton Mills v. Alabama etc. Mfg. Co., 198 U. S. 197, 49 L. Ed. 1016, 25 Sup. Ct. 629, Federal court, which has decreed foreclosure in suit in which diverse citizenship was admitted and property described as lying in State, may by ancillary suit restrain attack on purchaser's title under decree, by State suit brought by party to original suit, which proceeds on theory that by reason of own untruthful admission of citizenship, Federal court assumed jurisdiction; United States v. Ness, 230 Fed. 953, holding that decision of State court upon question as to whether certificate of citizenship was legally or illegally procured was just and right; California-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 11, 124 C. C. A. 139, holding that where it is not alleged in libel that damages occurred while goods were on high seas, judgment was erroneous, and may be reversed; Illinois Cent. R. Co. v. Sheegog, 177 Fed. 758, holding judgment valid despite insufficiency of averment of jurisdictional facts in petition for removal; Loeser v. Savings Deposit Bank & Trust Co., 163 Fed. 215, 89 C. C. A. 642, applying rule where Circuit Court of Appeals erroneously reviewed judgment of bankruptcy court on appeal instead of by petition to revise; In re First Nat. Bank, 152 Fed. 70, 11 Ann. Cas. 355, 81 C. C. A. 260, applying rule to adjudication of bankruptcy of corporation; Edelstein v. United States, 149 Fed. 638, 9 L. R. A. (N. S.) 239, 79 C. C. A. 328, holding that though petition in bankruptcy failed to allege that bankrupts were wage-earners or farmers, decree rendered thereon imports absolute verity; Edelstein v. United States, 149 Fed. 638, judgments of bankruptcy court import absolute verity unless reversed; Ridge v. Manker, 132 Fed. 602, 67 C. C. A. 596, decree against receiver of another court is not nullity which may be collaterally attacked merely because record does not affirmatively show leave to sue; Johnson v. Hunter, 127 Fed. 227, holding under Ark. Acts of 1895, p. 88, No. 71, providing for sale of land for nonpayment of levee taxes, by means of proceedings in Superior Court of record to foreclose lien, decree of such court foreclosing lien not collaterally attackable on ground that record did not disclose jurisdictional facts; In re Ives, 111 Fed. 497, holding rule in Federal courts that judgments, decrees, and order cannot be set aside after the term is applicable to bankruptcy proceedings, except of an application for

revocation of discharge; Tube City Min. etc. Co. v. Otterson, 16 Ariz. 312, 146 Pac. 206, holding that judgment of State court foreclosing lien on property of person declared bankrupt during proceedings not subject to collateral attack; Whitford v. Whitford, 100 Ark. 70, 139 S. W. 655, holding decree of divorce conclusive against collateral attack; Hull v. Burr, 64 Fla. 88, 59 South. 788, holding that collateral attack cannot be made in suit in State court upon proceedings of bankruptcy court; Ross-Lewin v. Goold, 211 Ill. 387, 71 N. E. 1029, where bankruptcy petition attempted to charge proper residence of petitioner in district, and court adjudged him bankrupt, it is presumed on collateral attack that court heard evidence as to residence; Cobe v. Ricketts, 111 Mo. App. 113, 85 S. W. 133, where after suit to dissolve loan association in Federal court, State court attempted to transfer jurisdiction in previous similar suit to Federal court, which rendered decree of sale of assets, which was never reversed, decree not collaterally assailable by association's debtor in suit by purchaser of assets; Liscum v. Henderson-Sturgis etc. Piano Co., 44 Okl. 551, 145 Pac. 773, where transcript of justice's docket shows jurisdiction over persons and subject matter, judgment not appealed is conclusive on parties; Wattles v. Foster, 126 Tenn. 452, Ann. Cas. 1913E, 69, 150 S. W. 419, judgment of Supreme Court in case in which, through inadvertence, it assumed jurisdiction on appeal which should have been taken to Court of Civil Appeals, is not void; Bank v. Moss, 6 How. 40, 12 L. Ed. 334, holding final judgment by Circuit Court could only be disturbed for want of jurisdiction by Supreme Court; Erwin v. Lowry, 7 How. 180, 12 L. Ed. 658, holding that final judgment of Federal court could not be attacked collaterally in State court, for want of jurisdiction; Kennedy v. Bank, 8 How. 611, 12 L. Ed. 1219, holding that though proceedings were erroneous for want of allegation of citizenship of parties they were not for that reason void; Des Moines Co. v. Homestead Co., 123 U. S. 557, 31 L. Ed. 204, 8 Sup. Ct. 220, holding not void an unreversed judgment of Federal court where jurisdiction did not appear; Cuddy, Petitioner, 131 U. S. 284, 33 L. Ed. 156, 9 Sup. Ct. 704, holding that jurisdiction of court in contempt proceedings could not be assailed collaterally on application for writ of habeas corpus; In re Cooper, 143 U. S. 506, 36 L. Ed. 243, 12 Sup. Ct. 462, holding decree of District Court in admiralty could not be attacked collaterally on application for writ of prohibition; Evers v. Watson, 156 U. S. 533, 39 L. Ed. 523, 15 Sup. Ct. 432, where held decree of Circuit Court could not be attacked in collateral proceedings in same court for want of jurisdiction; Dowell v. Applegate, 152 U. S. 339, 38 L. Ed. 467, 14 Sup. Ct. 616, holding unreversed decree of Circuit Court binding upon parties, and could not be treated as a nullity by State court because jurisdiction had not appeared; Cutler v. Huston, 158 U. S. 430, 39 L. Ed. 1042, 15 Sup. Ct. 871, holding judgment of Circuit Court could not be treated as void in collateral proceeding on ground that diverse citizenship of parties had not appeared; In re Lennon, 166 U. S. 553, 41 L. Ed. 1112, 17 Sup. Ct. 660, where diverse citizenship of plaintiff and defendants appeared on the record

in Circuit Court, contrary not permitted to be shown and judgment assailed therefor on petition for habeas corpus; Brown v. Noyes, 2 Wood. & M. 80, Fed. Cas. 2023, holding Federal court could not treat its own final judgment as nullity, nor vacate same on motion, for failure of record to show jurisdiction; Speigel v. Meredith, 4 Biss. 127, Fed. Cas. 13,227, holding allegation in a bill to quiet title of ignorance of citizenship of certain defendants, such defect as would defeat jurisdiction and render any decree thereon liable to reversal; Fideliter v. United States, 1 Sawy. 156, 1 Abb. (U. S.) 579, Fed. Cas. 4755, holding allegation of seizure, in libel to condemn vessel, necessary to jurisdiction, and failure to allege same ground for reversal on appeal; Farmers' etc. Co. v. McKinney, 6 McLean, 10, Fed. Cas. 4667, when Circuit Court refused to regard its decree in former case nullity because jurisdiction did not appear therein; Holmes v. Railroad Co., 7 Sawy. 392, 9 Fed. 237, denying Federal jurisdiction of cause of action already finally determined in proceeding in State court, deciding the question of inhabitancy of parties; In re Eaton, 51 Fed. 805, holding in collateral proceeding on application for habeas corpus order of injunction not void for failure of record to show jurisdictional facts; Skirving v. Insurance Co., 59 Fed. 745, 19 U. S. App. 442, refusing to enjoin execution of judgment obtained in Circuit Court for failure of record to show jurisdiction; Foltz v. Railway Co., 60 Fed. 318, 19 U. S. App. 576, holding jurisdiction of Federal court to condemn land in a suit in which final judgment rendered, not subject to collateral attack in proceeding between same parties to enjoin ejectment; Ex parte Lennon, 64 Fed. 322, 22 U. S. App. 561, holding jurisdiction of court to grant injunction in former proceeding, unassailable for lack of diverse citizenship of parties on petition for habeas corpus by one committed for contempt for violating injunction; Pullman Co. v. Washburn, 66 Fed. 794, holding defendant in suit to collect judgment rendered by Circuit Court could not assail jurisdiction of former suit for inadequacy of amount in controversy; Board v. Platt, 79 Fed. 571, 49 U. S. App. 216, 222, holding judgment of State court having jurisdiction of parties and subject matter not liable to collateral attack, in Federal court, for fraud or error; Dexter Co. v. Sayward, 84 Fed. 303, denying right of court in a collateral proceeding to pronounce void a judgment of Circuit Court and mandate of Supreme Court in cause removed from State court, though record fails to show ground for removal; Ludington v. The Nucleus, 15 Fed. Cas. 1095, holding District Court being of limited jurisdiction had no jurisdiction of contract for furnishing materials at home port on lake in building vessel, in absence of statute conferring same; In re McDonald, 16 Fed. Cas. 28, to point that jurisdiction of Federal court after judgment had been rendered could not be questioned for failure of record to show jurisdictional facts, in collateral proceeding on habeas corpus; Wyman v. Campbell, 6 Port. 244, 31 Am. Dec. 691, to effect that judgment of Orphans' Court of Alabama void unless jurisdictional facts appeared of record, it being a court of special jurisdiction; Nugent v. State, 18 Ala. 524, defining

"inferior courts" according to Alabama Constitution; Pearce v. Iron Works, 32 Ala. 72, holding Federal court judgment not subject to collateral attack on ground of want of diverse citizenship of parties; Busteed v. Parsons, 54 Ala. 401, 25 Am. Rep. 693, holding District Court though of limited is not of inferior jurisdiction, and judge thereof not liable personally for erroneously issuing warrant for arrest upon affidavit; Goodman v. Winter, 64 Ala. 426, where court held sentence of probate court to be conclusive except in a direct proceeding for its vacation or reversal; Borden v. State, 11 Ark. 541, 54 Am. Dec. 232, holding that Arkansas Probate Court being court of superior jurisdiction its decree could not be pronounced a nullity; La Croix v. Commissioners, 49 Conn. 596, defining "inferior courts" in State Constitution; Kenny v. Greer, 13 Ill. 452, arguing in favor of validity of State court judgment in collateral action, though jurisdictional facts did not appear; dissenting opinion in Haywood v. Collins, 60 Ill. 342, arguing against liability of judgment of State court of superior jurisdiction to collateral attack for want of jurisdiction; Hays v. Ford, 55 Ind. 56, holding complaint to enjoin collection of judgment because of plaintiff's discharge in bankruptcy, not demurrable for failure to show jurisdiction to grant discharge; Wright v. Marsh, 2 G. Greene, 103, holding judgment of a territorial court not void for failure of the record to show all jurisdictional facts; Ward v. Cozzens, 3 Mich. 258, in suit for false imprisonment, holding order of Federal court directing issue of capias not void, though facts did not authorize it; Grand etc. Co. v. Gray, 38 Mich. 468, defining jurisdiction of municipal courts, holding their judgments binding until reversed, though no jurisdiction be shown of record; Jim v. State, 3 Mo. 163, discussing effect in appellate court of omission of jurisdictional facts from record in murder trial; Reed v. Vaughn, 10 Mo. 448, where held bill to enjoin judgment included in bankrupt's schedule need not show jurisdiction of District Court to grant the discharge; Johnson v. Beazley, 65 Mo. 260, 27 Am. Rep. 282, holding record of appointment of administrator could not be regarded as a nullity in a collateral proceeding because record failed to show jurisdictional facts; State v. Rainey, 74 Mo. 234, to point that judgment of Federal court not subject to collateral attack in State court; Kittredge v. Emerson, 15 N. H. 263, to point that Federal court could not, in collateral proceeding, regard judgment of State court as void, though same might be reversible for error in Federal Supreme Court; Sherman v. Hanno, 66 N. H. 166, 28 Atl. 21, holding reference in mortgage to a deed for description of premises not ground for collateral attack on judgment of foreclosure; Russel v. Works, 35 N. J. L. 320, holding judgment of Justices' Court in New Jersey not to be liable to attack collaterally; Ruckman v. Cowell, 1 N. Y. 507, and Chemung v. Judson, 8 N. Y. 261, holding discharge in bankruptcy where offered in evidence, cannot be regarded as nullity for failure to show jurisdictional facts; Lessee v. Jeffries, 12 Ohio, 271, 40 Am. Dec. 478, to point, that mere failure to show jurisdiction on record in a collateral proceeding does not invalidate judgment of court of general jurisdiction; Sheldon v. Newton,

3 Ohio St. 500, to effect that proceedings of Court of Common Pleas not to be regarded as invalid in collateral proceeding for mere failure to show all jurisdictional facts; Thompson v. Lyle, 3 Watts & S. 168, holding it error for State court in collateral proceeding to regard proceedings of District Court as void; Supervisors v. Le Clerc, 3 Pinn. 327, holding that as County Courts were limited in their jurisdiction, the record must show that they acted within their powers; Williamson's Case, 26 Pa. St. 23, 67 Am. Dec. 386, holding State Supreme Court could not review judgment of District Court on application for habeas corpus; Vincent v. Davidson, 1 Kan. App. 612, 42 Pac. 392, holding judgment of an inferior court could not be questioned or set aside in a collateral proceeding where record showed jurisdiction; dissenting opinion in McNutt v. Bland, 2 How. 22, 25, 11 L. Ed. 164, 165, arguing as to Federal jurisdiction for diverse citizenship.

Modified in Kingsbury v. Buckner, 134 U. S. 675, 33 L. Ed. 1057, 10 Sup. Ct. 646, holding that judgment is void and may be collaterally attacked where party against whom rendered was never before the court; Werz v. Werz, 11 Mo. App. 35, holding that the presumption in favor of judgments of superior courts is confined to proceedings according to course of common law; Morse v. Presby, 25 N. H. 301, to effect that decree of District Court in bankruptcy was liable to collateral attack, its powers in such cases being special; In re Booth, 3 Wis. 180, holding judgment of District Court void where record affirmatively showed it to have acted without jurisdiction.

Effect of inadvertent assumption of jurisdiction by appellate court. Note, Ann. Cas. 1913E, 70.

The inferior courts of the United States are courts of limited jurisdiction.

Approved in In re Columbia Real Estate Co., 101 Fed. 970, holding in bankruptcy proceedings in District Court, all facts necessary to give court jurisdiction need not appear on face of record; United States v. Ta-wanga-ca, Hempst. 305, Fed. Cas. 16,435, applying the rule in holding District Court for Arkansas could not take cognizance of crime committed outside of the district; United States v. New Bedford Bridge, 1 Wood. & M. 438, Fed. Cas. 15,867, denying Circuit Court's power to punish a nuisance in maintaining bridge over navigable waters, in absence of authority from Congress.

Law of place where land is situated governs as to the title and disposition of real property.

Approved in Coney Island v. McIntyre-Paxton Co., 200 Fed. 906, 119 C. C. A. 197, holding that although contract was not deed, mortgage or lease under laws of Ohio, it was contract and valid; Southern Pac. Co. v. Western Pac. Ry. Co., 144 Fed. 179, construing Oakland waterfront grant; Kane v. Luckman, 131 Fed. 618, applying rule in suit for specific performance of contract to exchange cows for land; Postal Tel. Cable Co. v. South-

ern Ry. Co., 122 Fed. 160, holding as under State law, action of eminent domain is not triable before a jury, on removal to Federal court jury will be denied; Deck v. Whitman, 96 Fed. 884, holding in suit to foreclose mortgage in Federal court the State statutes for enforcement of mortgage contract will be followed; Crossett Lumber Co. v. Files, 104 Ark. 602, 149 S. W. 909, holding in case of one omitting mention of child in will, descent of his realty governed by laws of State where situated; Pritchard v. Henderson, 2 Penne. (Del.) 558, 47 Atl. 377, holding probate proceedings in one State with respect to will devising land in another State, are not conclusive in latter State; Keane v. Chamberlain, 14 App. D. C. 106, holding that operation of deed of assignment as conveyance of land depends upon law of State where land is situated; Richmond etc. R. Co. v. Gorman, 7 App. D. C. 107, holding that grant of letters in probate matter not subject to collateral attack; Chidsey v. Brookes, 130 Ga. 220, **14 Ann. Cas. 975**, 60 S. E. 530, holding devisee of land in Georgia cannot maintain action in regard to such land until will is probated in that State; Peet v. Peet, 229 Ill. 350, **11 Ann. Cas. 492, 13 L. R. A. (N. S.) 785**, 82 N. E. 378, and Readman v. Ferguson, 13 App. D. C. 71, both holding that validity of will disposing of real estate is to be determined by law of State where land is situate; Catholic University v. Boyd, 227 Ill. 293, 81 N. E. 366, holding that deed from heirs, recorded before authenticated copy of will and its probate in sister State passes title to land in Illinois; Harrison v. Weatherby, 180 Ill. 435, 437, 54 N. E. 240, holding under Ill. 3 Starr. & C. Ann. Stats. (2d ed.), 4040, § 9, providing that authenticated copy of probate of will proven under the laws of any State shall pass title in Illinois, a will certified by Governor instead of judge will not pass title; Donaldson v. State, 182 Ind. 627, 101 N. E. 490, nonresident alien could not transmit by descent title to land owned by him in Indiana; Thompson v. Parnell, 81 Kan. 133, **33 L. R. A. (N. S.) 658**, 105 Pac. 507, holding that will executed abroad but executed and attested in accordance with law of Kansas where land was situated, was entitled to probate in that State; Succession of Hasling, 114 La. 296, 38 South. 174, validity of will made in Louisiana by citizen thereof bequeathing realty situated in Mississippi is governed by laws of latter; Barnes v. Gunter, 111 Minn. 395, 127 N. W. 400, holding that where foreign will was never probated in State where land was situated, deed of land by heirs conveyed title, notwithstanding probate of will in sister State; Fenderson v. Missouri Tie etc. Co., 104 Mo. App. 295, 78 S. W. 820, duly authenticated record of foreign will affords no presumption that it was duly proved, so as to dispense with proof of such facts in support of title to land depending thereon; Higgins v. Vandeveer, 85 Neb. 96, 122 N. W. 846, holding that probate courts of Nebraska have no authority over questions of succession to title of realty situated in sister State; Muck v. Hitchcock, 212 N. Y. 289, **Ann. Cas. 1915D, 566**, 106 N. E. 77, holding that where foreign corporation acquired land in New York, it was not required to obtain permission to sell as required by New York corporations; Taylor v. Benham, 5 How. 273, **12 L. Ed. 149**, holding that

necessity for recording will, directing lands to be sold by executor, depends upon law of State where lands lie; United States v. Fox, 94 U. S. 320, 24 L. Ed. 193, holding that devise to United States of lands in New York was void under New York law, limiting devises of lands to natural persons and domestic corporations; Brine v. Insurance Co., 96 U. S. 635, 24 L. Ed. 861, holding State law giving mortgagor twelve months to redeem after sale under foreclosure, and his judgment creditor further time, governed the Federal courts; Robertson v. Pickrell, 109 U. S. 611, 27 L. Ed. 1050, 3 Sup. Ct. 409, to effect that probate of will of real estate in Virginia did not pass title to realty in the District of Columbia where not so provided by law of district; Schley v. Car Co., 120 U. S. 580, 30 L. Ed. 791, 7 Sup. Ct. 732, holding that transfer of realty to be legal must be according to the lex rei sitae; Langdon v. Sherwood, 124 U. S. 82, 31 L. Ed. 346, 8 Sup. Ct. 431, holding that State statute providing that judgment or decree of court therein for conveyance of land, after certain time operated as conveyance, applied to Federal court decree; Arndt v. Griggs, 134 U. S. 321, 33 L. Ed. 920, 10 Sup. Ct. 559, where held that under Nebraska statutes court could acquire jurisdiction to quiet title to realty by constructive service against nonresident defendants; Magoun v. Bank, 170 U. S. 289, 42 L. Ed. 1041, 18 Sup. Ct. 596, sustaining Illinois inheritance tax law and right of State to make such taxes lien on realty; United States v. Bain, 3 Hughes, 606, Fed. Cas. 14,496, sustaining power of State legislature to authorize lease of space on river for dock, notwithstanding United States was thereby impeded in use of portion of its wharf; McClaskey v. Barr, 47 Fed. 169, holding that in order for will probated in another State to pass realty in Ohio, law relative to recording of same in county where land situated must be complied with; Billings v. Min. Co., 51 Fed. 344, 10 U. S. App. 1, holding laws of State in which mining property was situated determinative of right of aliens to inherit same from an alien, subject only to direct proceedings on part of United States under its laws to defeat their title; Magill v. Brown, 16 Fed. Cas. 447, in argument upon legality of certain devises and bequests for pious and charitable uses, to point that disposition of realty is subject to laws of State in which it is situated; In re Zug, 30 Fed. Cas. 948, 16 Bank. Reg. 280, 281, conforming to rule of State decisions, holding realty held in common by members of partnership not partnership assets; Leavens v. Butler, 8 Port. 401, holding decree of State court distributing real estate of decedent inoperative upon lands in other States; Goodman v. Winter, 64 Ala. 428, declaring necessity for conformity to law of State in which land is situated, improving devise of such land by one domiciled in another State; Apperson v. Bolton, 29 Ark. 427, to effect that widow's dower right determined by law of State in which land is situated; s. c., pp. 435, 437, declaring necessity for conformity to Arkansas law, requiring probate of foreign will before lands could be sold thereunder; Chappell v. Jardine, 51 Conn. 66, construing mortgage on real estate in New York according to New York law; Key v. Harlan, 52 Ga. 477, holding will executed and probated in

Tennessee, according to law there, but which did not conform to Georgia laws, did not affect real estate in Georgia; Seaman v. Cook, 14 Ill. 506, determining nature and extent of interest in lands in New York according to New York law; Stoltz v. Doering, 112 Ill. 239, where right of illegitimate child to inherit real estate determined by lex rei sitae not by law of child's domicile; Lucas v. Tucker, 17 Ind. 45, declaring necessity for conformity to local law relating to foreign wills before executor could sell same, or come within scope of statute curing defective executor's sales; Evansville Co. v. Winsor, 148 Ind. 688, 48 N. E. 594, holding right to contest foreign will devising realty in Indiana accrued as to such realty, upon presenting will for record under Indiana law; Doyle v. McGuire, 38 Iowa, 413, where a husband and wife in Pennsylvania had certain transactions involving title in realty in Iowa, law of Iowa determined their interests with reference to husband's attachment creditor; Acker v. Priest, 92 Iowa, 616, 61 N. W. 237, to effect that law of State where land, subject of an alleged trust, lies, determines question whether such trust was in fact created; Sneed v. Ewing, 5 J. J. Marsh. 465, 22 Am. Dec. 47, holding probate of foreign will in Indiana not effectual as to realty in Kentucky; dissenting opinion in Scott v. Key, 11 La. Ann. 239, arguing against right of one to inherit realty in Louisiana, who, born out of wedlock in Arkansas, was legitimated by act of legislature of that State; Osborn v. Adams, 18 Pick. 247, where citizen of Connecticut, under statute of that State, assigned for benefit of his creditors, land in Massachusetts did not pass thereby; Crusoe v. Butler, 36 Miss. 167, holding record of probate in another State of will devising lands in Mississippi not sufficient evidence to establish the will; s. c., p. 172, to effect that probate in Mississippi of foreign will established right of executor to sell lands there under power conferred by the will; Cabanne v. Skinker, 56 Mo. 367, to effect that probate of will not being effectual as to real estate in another State, neither executor thereunder nor his sureties were liable as such for such estate; Keith v. Keith, 97 Mo. 228, 10 S. W. 599, holding a foreign will executed according to laws of Missouri, but not recorded there, not notice to one who loaned money on land in Missouri, which was devised thereby; Emmons v. Gordon, 140 Mo. 499, 500, 62 Am. St. Rep. 740, 741, 41 S. W. 1001, where held that executor and sureties not liable on his bond for sale of realty in another State not in compliance with the laws thereof; Eyre v. Stover, 37 N. H. 121, holding testator domiciled in another State could not deprive his posthumous child of the right to inherit his realty in New Hampshire by omitting to provide for him in his will; Nelson v. Potter, 50 N. J. L. 326, 15 Atl. 376, holding will executed and probated in California and recorded in New Jersey not effectual to devise lands in latter State if not executed according to law thereof; Bullock v. Bullock, 51 N. J. Eq. 446, 27 Atl. 436, where court refused to compel defendant to execute mortgage on lands in New Jersey in obedience to decree of a court of another State; Wills v. Cowper, 2 Ohio, 129, holding law of Virginia, under which administrator, with will annexed, possessed power of sale conferred upon execu-

tor by will, did not so extend his powers with reference to Ohio lands; In re Clayson's Will, 24 Or. 545, 34 Pac. 359, where held execution and probate of foreign will of lands to be effective in Oregon must have been according to Oregon law; La Selle v. Woolery, 14 Wash. 71, **53 Am. St. Rep. 857, 32 L. R. A. 75,** 44 Pac. 115, restricting length to which court would go in enforcing rights acquired in another State.

Reconciled in Oakey v. Corry, 10 La. Ann. 503, where Federal assignee in bankruptcy in Mississippi, under order of court, sold land in Louisiana.

Distinguished in White v. Keller, 68 Fed. 801, 30 U. S. App. 275, which holds that devise of realty takes effect upon death of testator, though subsequent probate of unrecorded will does not affect title of innocent purchaser from the heir; Ross v. Ross, 129 Mass. 246, **37 Am. Rep. 322,** in argument, to effect that child domiciled in and adopted according to law of another State is entitled to inherit; Vaughan v. Phebe, 1 Mart. & Y. 24, **17 Am. Dec. 779,** to point that right to freedom of one until recently domiciled in another State not determined by law of that State.

Probate of foreign wills. Note, **113 Am. St. Rep. 213.**

Conclusiveness in domestic courts of foreign will duly probated abroad. Note, **9 Ann. Cas. 423.**

Conclusiveness of foreign probate as affecting realty. Note, **6 L. R. A. (N. S.) 618.**

Effect of probate of will in other State. Note, **48 L. R. A. 133, 137, 138, 142.**

Conclusiveness of judgment of foreign country. Note, **20 L. R. A. 673.**

Law governing construction of will of realty. Note, **11 Ann. Cas. 498.**

Conflict of laws as to contracts relating to realty. Note, **L. R. A. 1916A, 1012.**

Conflict of laws as to wills. Note, **2 L. R. A. (N. S.) 424.**

Miscellaneous. Cited in The Paquete Habana, 189 U. S. 465, 47 L. Ed. 904, 23 Sup. Ct. 594, holding decree may be entered against United States by prize court, for damages resulting from capture of vessel by navy; Kelly v. Moore, 22 App. D. C. 25, to point that when any of witnesses to will has died, proof of his signature is sufficient prima facie proof of attestation of will by him; Warner v. Brinton, 29 Fed. Cas. 234, to point that probate of a will is not evidence of a devise at common law, and holding will could be contested after probate; p. 235, to point that minutes of evidence taken on probate probably open to objection in action of ejectment; Crapster v. Griffith, 2 Bland Ch. 24. Cited erroneously in Wilson v. Pierce, 30 Fed. Cas. 153.

10 Wheat. 204–245, 6 L. Ed. 303, WRIGHT v. DENN.

Devisee takes an estate for life only, where there are no words of limitation to the devise, and no contrary intention plainly appears.

Approved in McCaffrey v. Manogue, 196 U. S. 569, 49 L. Ed. 602, 25 Sup. Ct. 319, where testator disposes of whole estate to heirs as devisees equally, they take fee in lands; Atkins v. Best, 27 App. D. C. 153, where testator devised certain land without words of limitation to person, and then another piece of land "for life" to same person, construction was that first devise passed fee; McCaffrey v. Manogue, 22 App. D. C. 390, devise of land without words of limitation coupled with personal charge thereon passed it in fee simple; Ferguson v. Zepp, 4 Wash. C. C. 648, Fed. Cas. 4742, to point that introductory clause cannot per se enlarge the estate devised, to a fee; s. c., p. 649, Fed. Cas. 4742, holding that words "residue and remainder" in devising clause could not of themselves so enlarge estate; s. c., pp. 649, 650, Fed. Cas. 4742, to effect that where there is charge upon devisee personally in respect to devise, he takes fee; Warner v. Brinton, 29 Fed. Cas. 242, where court refused to construe introductory clause as enlarging the estate devised to a fee; dissenting opinion in Hitch v. Patten, 8 Houst. (Del.) 370, 371, 2 L. R. A. 734, 16 Atl. 577, to point that introductory clause cannot operate to enlarge the estate devised; McLean v. Turner, 15 Me. 438, holding a devise could not be construed to carry the fee because of a charge upon the realty for payment of debts; Lummus v. Mitchell, 34 N. H. 46, collecting cases, reaffirming general rule, but holding context plainly established intention to devise the fee; s. c., p. 47, holding charge of a legacy upon devisee with respect to land devised was a manifestation of intent to devise the fee; Steele v. Thompson, 14 Serg. & R. 94, holding in a case where the arrangement and connection indicated such an intention, the introductory clause had the effect of enlarging the estate devised to a fee.

Distinguished in Kellogg v. Blair, 6 Met. 326, holding that the word "estate" carried the fee.

Introductory clause of will as aid to construction. Note, Ann. Cas. 1912B, 344.

What word is necessary to carry estate in fee by will. Note, 10 E. R. C. 689.

Legacy is not charge upon real estate devised unless intention to charge is manifested by express words or by fair implication.

Approved in Lacey v. Collins, 134 Iowa, 585, 112 N. W. 102, holding that land was chargeable with payment of legacy; Morey v. Morey, 113 Iowa, 156, 84 N. W. 1040, holding where testator's will provided that all personal property should go to his wife and she was given a life estate in his realty but a remainder was devised to his nephews and he died intestate as to remainder, a specific cash legacy became a charge on remainder and not on specific devise to nephews; Taylor v. Harwell, 65 Ala. 10, holding legacy payable upon legatee's coming of age, out of profits upon realty devised in trust, not charge upon the realty if profits insufficient; In re Will of Newcomb, 98 Iowa, 179, 67 N. W. 588, holding legacy payable out of per-

sonalty only unless expressly or by necessary implication charged on realty; Owens v. Claytor, 56 Md. 133, where an annuity held not to be chargeable on real estate; Knotts v. Bailey, 54 Miss. 239, **28 Am. Rep. 351**, where testator blended realty and personalty in residuary clause, held manifestation of intent to charge legacies on realty; Judge v. Kimball, 12 N. H. 170, holding legatee not entitled to proceed against land where legacy not charged thereon, except under New Hampshire statute, after personalty is exhausted; Leigh v. Savidge, 14 N. J. Eq. 129, to point that an express grant of power to executors to execute their trust does not charge realty with legacies; Larkin v. Larkin, 17 R. I. 463, 23 Atl. 20, holding annuities personally charged upon devisees of realty not chargeable upon the land; Kirkpatrick v. Chestnut, 5 S. C. 219, holding a charge to testator's sons to pay, as they become entitled to the estates devised to them, each an equal proportion of a sum to their sisters, not a charge on the land; Moore v. Davidson, 22 S. C. 101, where intention to charge realty appeared by clear implication from the terms of the will; Cairns v. Smith, 49 S. W. 732 (Tex. Civ.), holding general legacies not charged on realty.

Denied in Clyde v. Simpson, 4 Ohio St. 461, holding where legacy charged upon devisee in respect of the property devised, it is equitable charge upon land.

Devise or bequest by implication. Note, **15 L. R. A. (N. S.) 76.**

Court should give effect to all words of will interpreted according to their plain and ordinary sense, unless manifestly otherwise applied.

Approved in Travers v. Reinhardt, 205 U. S. 431, **51 L. Ed. 869**, 27 Sup. Ct. 563, holding that relationship established by proof showed that parties were husband and wife in State of their residence and will must be so construed that wife took under it; Estate of Wood, 36 Cal. 81, construing word "intestate" as used in the will; Welsch v. Bank, 94 Ill. 200, where court held the plain intention of testator to be the paramount object in construing wills, which would be effectuated by adding words, if plainly necessary; Matter of Tompkins, 154 N. Y. 645, 49 N. E. 138, applying rule construing will so as to give effect to all parts thereof; Steele v. Thompson, 14 Serg. & R. 101, where court considered all the circumstances apparent in the will in determining the intent of testator to devise the fee; Warner v. Brinton, 29 Fed. Cas. 237, upon value of settled rules of interpretation.

Meaning of term "provided." Note, **Ann. Cas. 1912C, 1089.**

Requisites of disherison of heir. Note, **9 E. R. C. 295.**

Miscellaneous. Cited in Green v. Byrne, 46 Ark. 467, holding where a legacy was charged upon lands, legatee need not wait for personal assets to be exhausted before proceeding against lands in rem. Cited erroneously in Andrews v. Jones, 10 Ala. 422, to point that marriage is a valuable consideration.

10 Wheat. 246–305, 6 L. Ed. 314, UNITED STATES v. MORRIS.

Remission of forfeiture by Secretary of Treasury.

Approved in Marvin v. Trout, 199 U. S. 225, 50 L. Ed. 162, 26 Sup. Ct. 31, upholding Ohio Rev. Stats., § 4275, authorizing action to subject building knowingly permitted to be used for gambling purposes to payment of judgment obtained by informer for recovery of money lost by play; United States v. One Hundred Fifty and Seven-twelfths Dozen Long Gloves, 168 Fed. 1012, holding that, although claimant did not appear in the forfeiture proceeding, he was not barred from applying for remission; Walker v. Globe Newspaper Co., 140 Fed. 309, Rev. Stats., §§ 4965, 4970, do not take away right of owner of copyrighted map to recover damages for infringement; Peacock v. United States, 125 Fed. 588, holding under Rev. Stats., § 5292, relating to remission of duties, the Secretary of Treasury has power to remit penalty before or after judgment; McLane v. United States, 6 Pet. 426, 8 L. Ed. 451, holding that where payment of an amount equal to certain duties, required as condition of remission, collector was entitled to his proportion of such sum; Maryland v. Railroad Co., 3 How. 552, 11 L. Ed. 722, sustaining right of State legislature to remit a forfeiture which, if not remitted, would have been payable under a previous act to a particular county; dissenting opinion in State Bank v. Knoop, 16 How. 408, 14 L. Ed. 993, arguing in favor of right of legislature to change the method of taxing the State bank from that provided in the act incorporating it; Dorsheimer v. United States, 7 Wall. 174, 19 L. Ed. 189, sustaining authority of Secretary of Treasury to remit forfeiture accruing under the revenue laws; Confiscation Cases, 7 Wall. 461, 462, 19 L. Ed. 199, sustaining authority of attorney general to move to dismiss prosecutions under act subjecting to forfeiture, property used to aid rebellion, notwithstanding the interest of the informant; The Laura, 114 U. S. 415, 29 L. Ed. 148, 5 Sup. Ct. 883, holding remission of penalties by Secretary of Treasury, under Revised Statutes, section 5294, where applied for before determination by competent court, of informer's interest, destroys all liability; The Laura, 19 Blatchf. 566, 569, 8 Fed. 615, 617, sustaining power of Secretary of Treasury to remit penalty under Revised Statutes, section 5294, thereby extinguishing all liability; United States v. Three Parcels, 3 Ware, 76, Fed. Cas. 16,512, holding collector improperly joined as coplaintiff in information in rem for forfeiture, his interest being conditional and liable to extinction by remission; About Twenty-five Thousand Gallons, 1 Ben. 372, Fed. Cas. 14,282, sustaining right of United States to consent to reopening of case after decree, and thereby to affect reformer's rights in forfeited goods; Princess of Orange, Jewels of, 19 Fed. Cas. 1337, in argument upon right of collector to show cause against remission of forfeiture; The Palo Alto, 2 Ware (Dav.), 354, 355, Fed. Cas. 10,700, to point that the remission is not irrevocable until delivery of the rem, where unconditional; Matter of Flournoy, 1 Ga. 609, holding remission of a fine by the Governor, extinguished liability on a note which had been given for the payment thereof; Thompson v. Bas-

sett, 5 Ind. 536, holding no recovery could be had on penal bond after repeal of the act giving the penalty; Lapham v. Almy, 13 Allen, 305, holding informer had no recovery against collector of port for share of sum paid by way of compromise of legal proceedings for smuggling; Rice v. Thayer, 105 Mass. 261, 7 Am. Rep. 519, holding informer entitled to nothing paid by way of compromise before final judgment; University v. Rowse, 42 Mo. 323, sustaining authority of legislature to repeal clause of charter exempting university from taxation; Burroughs v. Peyton, Abrahams v. Same, 16 Gratt. 492, sustaining power of Confederate Congress, to deprive citizens of exemption from military service formerly granted in consideration of their furnishing substitutes; Brown v. Walker, 161 U. S. 601, 40 L. Ed. 822, 16 Sup. Ct. 648, discussing President's pardoning power.

Distinguished in United States v. Griswold, 11 Sawy. 72, 24 Fed. 365, denying right of government to compromise a qui tam action without the consent, and to the detriment of the prosecutor; United States v. Harris, 1 Abb. (U. S.) 117, Fed. Cas. 15,312, holding President could not, by pardon after judgment, divest informer of his vested right in the forfeited property; Cook v. Freeholders, 26 N. J. L. 335, holding that a pardon after payment of a fine does not entitle person pardoned to restitution of the fine already paid.

A defective plea may, in some cases, be aided by the replication.

Approved in Vickery v. New London Northern R. Co., 87 Conn. 642, 89 Atl. 280, Nashville etc. Ry. v. Anderson, 134 Tenn. 678, 185 S. W. 680, and Texas etc. R. Co. v. Miller, 221 U. S. 416, 55 L. Ed. 796, 31 Sup. Ct. 534, all holding that defect in pleading was cured by answer; Childress v. Foster, 3 Ark. 258, where certain defects held waived by pleading over; Railway Co. v. Hessions, 150 Ill. 558, 37 N. E. 908, where allegation necessary to state a cause of action was stated only in last count, upon defendant's pleading over, it was held applicable to each count; Ellis v. Appleby, 4 R. I. 468, holding omission of essential allegation from a plea was cured by admission of the necessary fact in the replication; McMahon v. Polk, 10 S. D. 300, 73 N. W. 78, collecting cases, holding omission of essential fact from complaint cured by its averment in the answer.

Distinguished in Frazer v. Roberts, 32 Mo. 461, holding defect in petition not cured by admission of omitted fact in answer of one only of two defendants answering separately.

Custom-house officers have inchoate interest upon seizure of goods subject to forfeiture vested by distribution of proceeds.

Cited in United States v. Collier, 3 Blatchf. 346, Fed. Cas. 14,833, where held that after formal distribution under decree, the collector could not be divested of his distributive share by remission of forfeiture; United States v. Sixty-four Barrels, 3 Cliff. 317, Fed. Cas. 16,306, to effect that in proceedings to condemn spirits for payment of tax out of proceeds, condemnation relates back no further than date of seizure; In re Jayne,

28 Fed. 422, to effect that under law existing before 1874, informer had a vested right in penalty after payment into treasury; Cushman v. Hale, 68 Vt. 449, 458, 35 Atl. 384, 387, holding prosecuting attorney had acquired, by conviction, only inchoate conditional expectancy, which was extinguished pending appeal, by repeal of law giving him share of fine.

The term "prosecution" embraces everything up to and including the execution.

Approved in United States v. Carlisle, 5 App. D. C. 146, holding that repeal of act relating to bounty for sugar producers, took away all claims existing under original act.

Fines, penalties and disabilities are not incurred, and do not accrue, until judgment.

Approved in United States v. Heinszen, 206 U. S. 388, 11 Ann. Cas. 688, 51 L. Ed. 1104, 27 Sup. Ct. 742, holding that ratification by Congress of collections made, after suit brought, is not in violation of fifth amendment; Princess of Orange, Jewels of, 19 Fed. Cas. 1340, holding case not to be one for remission unless forfeiture has been decreed, or confessed in petition for remission; United States v. One Hundred Barrels, 1 Low. 247, Fed. Cas. 15,946, to point that fines, etc., do not accrue until judgment; Mitchell v. Cunningham, 29 Me. 383, to point that confession of forfeiture pending proceedings therefor, on application for remission, is not conclusive against owner so as to render invalid mortgage of the property executed by him.

10 Wheat. 306–311, 6 L. Ed. 328, THE DOS HERMANOS.

Captures made jure belli by noncommissioned captors are made for government, and such captor has no claim, except for salvage.

Cited in dissenting opinion in The Siren, 7 Wall. 163, 19 L. Ed. 134, arguing that vessel captured by United States man-of-war, being property of the government, was not liable for maritime tort, since its owner, the government, was not liable; The Siren, 13 Wall. 393, 20 L. Ed. 506, in general discussion upon rights of captors, to point that no rights exist except those expressly granted by the government; Carrington v. Insurance Co., 8 Pet. 522, 8 L. Ed. 1031, holding seizure legal and for benefit of government though made by a noncommissioned cruiser; The Ella Warley, Blatchf. Pr. 207, Fed. Cas. 4371, to point that prize taken in time of war became government property; Eight Hundred and Fifty-eight Bales of Cotton, Blatchf. Pr. 326, Fed. Cas. 4318, holding captured cotton was government property and government liable to pay freight therein contracted for by its competent agent; The Siren, 1 Low. 282, Fed. Cas. 12,911, holding ship falling into hands of government forces, upon surrender of enemy's port became government property without any particular persons being captors; The Deer, 1 Low. 95, Fed. Cas. 3739, where

persons not in the navy who rendered services in connection with capture were given salvage; Seventy-eight Bales, 1 Low. 18, Fed. Cas. 12,679, where goods, property of enemy, abandoned and picked up at sea by government cruiser, held prize of war, and therefore government property, out of which captors were entitled to salvage only; The Rita, 89 Fed. 768, holding officers and men of auxiliary cruiser not regularly enlisted in navy entitled to prize money.

Mode of taking and perfecting security on appeal are matters of discretion for lower court, and Supreme Court will not interfere with its exercise.

Approved in Blaffer v. New Orleans Water Supply Co., 160 Fed. 390, 393, 87 C. C. A. 341, holding that appeal, not being taken within six months allowed by law, court had no jurisdiction to hear it; Walker v. Houghtaling, 104 Fed. 514, holding where plaintiff in error has failed to file bond on writ of error, but the writ has been issued and served, and cause transferred to Circuit Court of Appeals, that court has power after time has expired to retain cause and permit filing of bond in amount prescribed, but not to act as supersedeas; Noonan v. Chester Park Athletic Club Co., 93 Fed. 577, holding allowance of appeal by trial court within six months from entry of decree is sufficient to save case from bar of statute; Anson v. Railroad Co., 23 How. 2, **16 L. Ed. 518**, where court permitted appellant to give bond for costs after regular time expired; United States v. Adams, 6 Wall. 107, **18 L. Ed. 793**, where held that by taking initiatory steps in time, appellant had conformed to law and rules of court, and subsequent delay in perfecting appeal did not invalidate it; Edmonson v. Bloomshire, 7 Wall. 311, **19 L. Ed. 92**, holding filing bond not necessary for existence of appeal so as to start time running within which transcript must be filed; Bigler v. Waller, 12 Wall. 149, **20 L. Ed. 262**, denying motion to dismiss appeal because bond defective, and granting leave to file new bond; Peugh v. Davis, 110 U. S. 228, **28 L. Ed. 128**, 3 Sup. Ct. 18, holding where appeal allowed by court in session, acting judicially, without taking bond, judge of appellate court could nevertheless, after expiration of sixty days, grant a supersedeas; Wickelman v. Dick Co., 85 Fed. 851, 57 U. S. App. 199, allowing appellant time to give security on appeal notwithstanding expiration of six months from date of decree; Barnum's Appeal, 33 Conn. 127, where appeal held valid when applied for and granted within statutory time, though bond not given till later. See also Green v. Lynn, 87 Fed. 840, holding merely filing petition without obtaining order allowing appeal within time, insufficient.

Distinguished in Adams v. Law, 16 How. 148, **14 L. Ed. 882**, holding that where an appeal operated as a supersedeas, the law must have been strictly complied with and bond given within ten days after decree.

Practice and procedure governing transfer of causes to Federal Supreme Court for review. Note, 66 L. R. A. 849, 858.

Amount of salvage is within sound discretion of the District Court, and will not ordinarily be disturbed on appeal.

Cited in The Schooner Emulous, 1 Sumn. 215, Fed. Cas. 4480, where appellate court, with great reluctance, reduced salvage allowed by District Court, because exorbitant.

Review of salvage award. Note, 20 Ann. Cas. 564.

10 Wheat. 312–332, 6 L. Ed. 329, THE JOSEFA SEGUNDA.

District Court in admiralty may determine who was captor of vessel violating slave trade and entitled to share in proceeds of vessel and cargo.

Cited in United States v. George, 6 Blatchf. 46, Fed. Cas. 15,197, sustaining jurisdiction of court to decree distribution of penalties after condemnation; Robinson v. Hook, 4 Mason, 144, Fed. Cas. 11,956, in argument, sustaining jurisdiction of court to decree distribution of proceeds after condemnation therein; s. c., p. 148, Fed. Cas. 11,956, to point that such court had exclusive jurisdiction to decide who was the informer entitled to share such proceeds; Price v. Forrest, 173 U. S. 425, discussing rights of heir of a claimant to funds in court's possession.

Distinguished in dissenting opinion in Waring v. Clarke, 5 How. 486, 12 L. Ed. 248, arguing against jurisdiction of admiralty court in case of collision on navigable river within a county.

To constitute capture so as to entitle captor to proceeds of forfeiture, there must be open, visible possession claimed and authority exercised.

Cited in Fideliter v. United States, 1 Sawy. 155, 1 Abb. (U. S.) 578, Fed. Cas. 4755, denying jurisdiction and dismissing libel because no seizure alleged.

Seizure voluntarily abandoned or not followed by prosecution or claim insisting upon captor's rights becomes void.

Cited in The Tug May, 6 Biss. 249, Fed. Cas. 9330, following rule; United States v. Ninety-two Barrels, 8 Blatchf. 482, Fed. Cas. 15,892, where jurisdiction defeated by bonding and releasing of property seized before filing information; Tracey v. Corse, 58 N. Y. 151, holding District Court had no jurisdiction to condemn barge which had passed from its custody by unauthorized sale by collector.

Under slave trade act of 1807, anyone may seize vessel violating act, and proceeds are forfeited to government.

Approved in United States v. Two Barrels of Desiccated Eggs, 185 Fed. 305, holding that proceedings under food and drug act are not within admiralty or maritime jurisdiction of Federal courts; United States v. George Spraul & Co., 185 Fed. 407, 107 C. C. A. 569, holding that in cases of seizures under pure food and drug act, courts proceed as court of common-law jurisdiction on trial by jury; Charge to Grand Jury, 30 Fed. Cas. 1027, holding seizure under slave trade act could be made by anyone.

Miscellaneous. Cited in Richards v. Sanderson, 39 Colo. 274, 121 Am. St. Rep. 167, 89 Pac. 770, apparently miscited; Emerson v. Hall, 13 Pet.

411, 10 L. Ed. 224, 14 La. 3, reviewing decision in deciding against liability of captors' heirs to pay their ancestor's debts out of sum granted by Congress in consideration of ancestor's services in the prosecution; Blagge v. Balch, 162 U. S. 458, 40 L. Ed. 1036, 16 Sup. Ct. 856, Wheaton v. United States, 8 Blatchf. 475, Fed. Cas. 17,487, as instance of Supreme Court reviewing decree of the District Court, distributing captor's share of forfeited property on appeal brought by such captors.

10 Wheat. 333-358, 6 L. Ed. 334, BANK OF UNITED STATES v. BANK OF GEORGIA.

When payment is received on forged paper or base coin, such party may, if without negligence, recover consideration paid.

Approved in Neal v. Coburn, 92 Me. 147, 69 Am. St. Rep. 498, 42 Atl. 350, holding when bank pays check purporting to have been drawn by one of its depositors to innocent holder, bank cannot recover; Kenneth Inv. Co. v. Bank, 96 Mo. App. 145, 70 S. W. 179, holding retention of balanced bank-book by depositor for a long time, together with canceled checks, will not preclude him from recovering on payment of forged check; State Bank v. Cumberland Savings & Trust Co., 168 N. C. 606, L. R. A. 1915D, 1138, 85 S. E. 6, holding when bank pays check purporting to be drawn by one of its own depositors, it cannot recover; First Nat. Bank v. Bank of Wyndmere, 15 N. D. 303, 304, 125 Am. St. Rep. 588, 10 L. R. A. (N. S.) 49, 108 N. W. 548, holding that upon bank, which had paid forged check, discovering forgery, it could recover from bank which received the money; B. B. Ford & Co. v. People's Bank, 74 S. C. 183, 114 Am. St. Rep. 986, 7 Ann. Cas. 744, 10 L. R. A. (N. S.) 63, 54 S. E. 205, holding that upon payment by plaintiff of forged draft drawn on him, bearing indorsement of defendant bank, recovery could be had from bank; Semmes v. Wilson, 5 Cr. C. C. 289, 290, Fed. Cas. 12,658, holding innocent holder who gives forged note which he knows has been dishonored, in payment of debt, is liable for amount of credit received therefor; Foreman v. Hardwick, 10 Ala. 326, to point that maker winning his promissory note on wager did not constitute payment; State v. Abramson, 57 Ark. 150, 20 S. W. 1086, holding county precluded from recovery of debt paid in forged warrants by negligence in omitting to return and give notice of forgery; Redington v. Woods, 45 Cal. 425, 426, 13 Am. Rep. 201, 202, where bank held liable for amount paid on raised check, on ground of negligence in not returning check; Pope v. Nance, Minor, 315, where defendant, who had paid debt with note of third persons, one of whose names therein was a forgery, held released by negligence of payee; Collier v. Budd, 7 Mo. 487, where purchaser of bill of exchange from innocent parties, to which indorsement of payee had been forged, failed to recover because of negligence in giving notice; Bank v. Allen, 59 Mo. 314, 315, where plaintiff recovered amount paid to innocent holder for value on raised and altered check, where notice given as soon as forgery discovered; Thomas v. Todd, 6 Hill, 341, allowing recovery of sum paid in counterfeit bank notes lost

through negligence of plaintiff; Curcier v. Pennock, 14 Serg. & R. 63, holding plaintiff entitled to recover sum paid in spurious foreign coin; Rick v. Kelly, 30 Pa. St. 530, holding recovery could be had of sum paid on promissory notes to which indorsements were forgeries, upon giving notice and making return within a reasonable time; Gilman v. Peck, 11 Vt. 519, **34 Am. Dec. 703**, permitting recovery of sum paid in bank bill of insolvent bank, defendant being cognizant of such insolvency when he made such payment; Thrall v. Newell, 19 Vt. 207, **47 Am. Dec. 684**, where amount of promissory note, void for insanity of maker, executed in favor of defendant and by him assigned to plaintiff, was recovered from defendant; De Voss v. Richmond, 18 Gratt. 359, **98 Am. Dec. 661**, holding city liable for negligent omission of its agent dealing with innocent third person; Corbit v. Bank, 2 Harr. (Del.) 270, **30 Am. Dec. 651**, arguendo.

Modified in Pope v. Nance, 1 Stew. (Ala.) 371, **18 Am. Dec. 64**, to point that offer to return forged note of third person, which had been received from defendant, not necessary where defendant not injured by the omission; Canal Bank v. Bank, 1 Hill, 293, where mere delay in giving notice of forgery did not preclude recovery in absence of neglect.

Distinguished in Farmers' Nat. Bank v. Farmers & Traders' Bank, 159 Ky. 145, **L. R. A. 1915A, 77**, 166 S. W. 988, holding that bank was entitled to recover from defendant bank money paid on check under mistake; Jones v. Miners' etc. Bank, 144 Mo. App. 435, 128 S. W. 830, holding that in case of payment of forged negotiable instrument, rule does not apply; Bank of Williamson v. McDowell County Bank, 66 W. Va. 548, 562, **36 L. R. A. (N. S.) 605**, 66 S. E. 762, 768, holding that where both parties were negligent, plaintiff could not recover money paid on forged check.

Right of bank to recover money paid by mistake. Note, **Ann. Cas. 632.**

How rights of bankers are affected by forgery. Note, **3 E. R. C. 746.**

Drawee's right to recover money paid on forged paper. Note, **10 L. R. A. (N. S.) 58, 68.**

Liability for loss occasioned by forgery as between two innocent parties.

Approved in Kenneth Inv. Co. v. National Bank, 103 Mo. App. 619, 77 S. W. 1003, applying principle; United States v. National Exchange Bank, 214 U. S. 312, **53 L. Ed. 1009**, 29 Sup. Ct. 665, holding United States can recover from bank receiving money on forged pension checks; Postal Telegraph-Cable Co. v. Citizens' Nat. Bk., 228 Fed. 605, holding bank could retain moneys repaid to it on forged drafts by corporation in whose employ was person who drew drafts; United States v. Bank of New York Nat. Banking Assn., 219 Fed. 651, **L. R. A. 1915D, 797**, 134 C. C. A. 579, holding that Secretary of Treasury could not recover for payment of forged draft of American consul; Scott v. Abbott, 160 Fed. 582, 87 C. C. A. 475, holding that where stockholders were defrauded by corporation, although entitled to rescind and recover from it, they could not exercise that right after it became bankrupt; National Exchange Bank v.

United States, 151 Fed. 404, 80 C. C. A. 632, applying rule in action by United States to recover from one to whom pension check paid on forged indorsement; Bacon v. Bacon, 150 Cal. 493, 89 Pac. 323, where by mistake in copying will probated legacy written as for two thousand instead of ten thousand dollars, and legacy so distributed, remaining eight thousand going to residuary legatees, legatee could enforce trust against residuaries therefor, where limitations had not run from discovery of mistake; Boatsman v. Stockmen's Nat. Bank, 56 Colo. 502, **50 L. R. A. (N. S.)** 107, 138 Pac. 767, holding bank not liable as negligence of plaintiff increased risk and money had been paid to person plaintiff intended; Woods v. Colony Bank, 114 Ga. 685, 40 S. E. 721, holding when holder of forged draft, by his negligence, contributed to success of fraud, drawee may recover from holder; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 395, 59 N. E. 63, holding where forged checks, payable to cash, and unindorsed, were paid by bank through clearing-house to another bank which had credited a depositor therefor, the bank paying could not recover the amount of the check; Brown v. People's Nat. Bank, 170 Mich. 425, **40 L. R. A. (N. S.)** 657, 136 N. W. 509, holding that where payee of forged draft failed for two years to notify bank, he was estopped from recovery from it; Troll v. Sauerburn, 114 Mo. App. 327, 89 S. W. 366, where there were many deeds of trust with same trustee on certain property and holder of one, after purchasing property on foreclosure, released his deed, believing junior lienholder had no lien, release canceled for mistake; Ford v. People's Bank, 74 S. C. 183, 54 S. E. 205, determining right of holder of forged draft to retain money obtained; Hoffman v. Bank, 12 Wall. 193, **20 L. Ed. 369**, and Young v. Lehman, 63 Ala. 523, holding payer of drafts accompanied by forged bills of lading cannot recover sum paid thereon to innocent holder; Bank v. Morgan, 117 U. S. 109, **29 L. Ed. 816**, 6 Sup. Ct. 661, to effect that depositor could not recover from bank amounts paid on raised checks to his confidential agent when he had for some time had opportunity to discover fraud by inspecting his pass-book; United States v. Bank, 45 Fed. 167, holding government could not recover from bank money paid by latter on former's check to person to whom check delivered by government agent; Deposit Bank v. Fayette Bank, 90 Ky. 21, **7 L. R. A. 850**, 851, 13 S. W. 339, bank cannot recover payments on forged checks to innocent holder for value; Louisiana Bank v. Citizens' Bank, 28 La. Ann. 191, **26 Am. Rep. 95**, holding, a bank which had certified raised check must bear loss; Commercial Bank v. Bank, 30 Md. 20, **96 Am. Dec. 559**, holding defendant not liable for amount paid on deposit of forged check on plaintiff which they had transmitted to, and been credited with by, plaintiff before such payment; Bank v. Swift, 70 Md. 518, **14 Am. St. Rep. 383**, 17 Atl. 337, holding payment of check to innocent holder did not entitle bank to recovery where drawer had no funds in bank; Bank v. Boutell, 60 Minn. 191, **51 Am. St. Rep. 521, 27 L. R. A. 640**, 62 N. W. 328, sustaining demurrer to complaint for money paid on forged check to innocent holder; Stout v. Benoist, 39 Mo. 281, **90 Am. Dec. 468**, to effect that acceptor of forged bill could not recover sum paid thereon

to bona fide holder for value; Crippen v. Bank, 51 Mo. App. 516, holding plaintiff bank, which sent draft on defendant bank to forger of mortgage, intending same to be paid to him, could not recover sum paid on the draft; Bank v. Bank, 46 N. Y. 81, 7 **Am. Rep. 313**, where held plaintiff could not recover sum paid on forged draft to bona fide holder for value; Bank v. Farmers' etc. Bank, 10 Vt. 146, **33 Am. Dec. 191**, holding drawee of forged check, amount of which was credited to defendants' account, who were innocent holders, could not recover; De Voss v. Richmond, 18 Gratt. 359, **98 Am. Dec. 661**, holding city liable for amount of bond issued by its agent in form not authorized, and which misled innocent holder for value; Johnston v. Bank, 27 W. Va. 352, 359, **55 Am. Rep. 320**, 326, holding supposed maker of forged note could not recover money paid by himself thereon to innocent holder for value; Gilman v. Peck, 11 Vt. 519, **34 Am. Dec. 703**.

Modified in **Cooke v. United States, 12 Blatchf. 55, Fed. Cas. 3178**, holding government not concluded by purchase of counterfeit treasury notes by assistant treasurer, from recovering purchase price from former holder; State v. Abramson, 57 Ark. 145, 146, 20 S. W. 1085, holding county entitled to opportunity to investigate and determine validity of its own warrants paid in discharge of debt due it before being precluded from recovery, when they turn out to be forgeries; Bank v. Ricker, 71 Ill. 440, **22 Am. Rep. 105**, holding drawee of forged check entitled to recover where, at time of presentment, holder withheld from him knowledge which furnished ground for belief that same was forgery; Bank v. Bank, 4 Ind. App. 360, **51 Am. St. Rep. 225**, 30 N. E. 809, where drawee recovered sum paid defendant on forged instrument, which had been discounted and indorsed by defendant "for collection"; Bank v. Tappan, 6 Kan. 467, 469, **7 Am. Rep. 573, 574**, holding bank not entitled to credit for paying bill to which plaintiff's acceptance was forged, where plaintiff gave notice and returned bill where forgery discovered and before bank prejudiced by delay.

Distinguished in Offutt v. Bank, 1 Bush (Ky.), 168, where bank held entitled to recover original debt which had been paid with forged note of third parties; Canal Bank v. Bank, 1 Hill, 290, 291, where forgery was not payee's indorsement on draft, and recovery was allowed; Bank v. Banking Assn., 55 N. Y. 214, **14 Am. Rep. 235**, holding plaintiff could recover sum paid on check which it had certified, body of which was subsequently altered; Wilson v. Alexander, 3 Scam. 393, where administrator recovered amount paid by him on forged note purporting to have been made by his deceased; Ellis v. Ohio etc. Co., 4 Ohio St. 656, **64 Am. Dec. 620**, holding plaintiff drawee of check could recover amount paid thereon to defendant bank whose negligence had misled plaintiff; People's Bank v. Bank, 88 Tenn. 306, **17 Am. St. Rep. 888, 6 L. R. A. 726**, 12 S. W. 717, plaintiff bank, drawee of check, could recover sum paid thereon to defendant bank whose negligence at time of cashing same had misled plaintiff; City Bank v. Bank, 45 Tex. 218, to effect that where plaintiff paid to defendant the amount of a raised check, drawn on former's corre-

spondent, and which plaintiff had pronounced good before payment, plaintiff not precluded from recovery; Bank v. Fletcher, 68 Vt. 86, 34 Atl. 39, holding surety liable on note, notwithstanding a renewal of same by maker to which surety's name was forged, and representation by maker to him that note was paid; dissenting opinion in National Exchange Bank v. United States, 151 Fed. 410, 80 C. C. A. 632, majority applying rule in action by limited states to recover from one to whom pension check paid on forged indorsement.

Rights and remedies of the several parties when a forged check has been paid. Note, 17 Am. St. Rep. 891.

Implied powers of bank cashiers. Note, 77 Am. Dec. 759.

Avoidance of contracts for mutual mistake of fact. Note, 45 Am. Dec. 633.

Liability on forged commercial paper. Note, 36 L. R. A. 539.

Drawee's duty to know drawer's signature. Note, 27 L. R. A. 637.

Bank notes ordinarily pass as money, and are good tender, unless specially objected to.

Approved in dissenting opinion in Legal Tender Cases, 12 Wall. 625, 20 L. Ed. 336, in argument upon constitutionality of legal tender acts, as applied to contracts antedating their passage; Legal Tender Case, 110 U. S. 445, 28 L. Ed. 213, 4 Sup. Ct. 128, holding act making treasury notes legal tender constitutional; Woodruff v. Mississippi, 162 U. S. 300, 40 L. Ed. 976, 16 Sup. Ct. 823, defining "money" as including bank notes; Corbit v. Bank, 2 Harr. (Del.) 252, 30 Am. Dec. 636, following rule; People v. Mayhew, 26 Cal. 663, holding valid payment in treasury notes by redemptioner to sheriff for purchaser in absence of objection by sheriff; Bank v. Rushmore, 28 Ill. 471, where bank collected and deposited to their credit debt due plaintiffs in currency, which subsequently depreciated, held the deposit was general and bank liable therefor; Ridenour v. McClurkin, 6 Blackf. 414, upholding payment made in depreciated currency where neither party knew of the depreciation; Boyd v. Olvey, 82 Ind. 300, upholding redemption where national bank notes paid to and accepted by clerk of court for use of purchaser, and clerk thereafter held himself ready to pay amount in lawful money; Jones v. Overstreet, 4 T. B. Mon. 550, where bank notes of the Bank of Kentucky regarded as money for purposes of satisfaction of execution and recovery for face value thereof had against sheriff; Doyle v. Commissioners, 12 Gill & J. 494, where bank notes, deposited as a wager, held to be money within meaning of law forfeiting all money so deposited to the county; Duffy v. O'Donovan, 46 N. Y. 228, holding tender of certified check good, where not objected to, because not legal tender; Shallenberger v. Brinton, 52 Pa. St. 85, sustaining constitutionality of act making treasury notes legal tender; State v. Moseley, 10 S. C. 4, holding judgment satisfied by sheriff collecting amount thereof in Confederate treasury notes at a time when such notes passed as currency; Rodgers v. Bass, 46 Tex. 516, holding debt discharged by

payment in Confederate notes, during the war, to creditor's agent in Texas; Klauber v. Biggerstaff, 47 Wis. 559, 32 Am. Rep. 778, 3 N. W. 361, where word "currency," in certificate of deposit, was held to include bank notes in circulation at par with coin.

Distinguished in Corbit v. Bank, 2 Harr. (Del.) 270, 30 Am. Dec. 651, holding deposit by bank to plaintiff's credit, of notes of insolvent bank, did not render it liable for face value thereof.

Explained in Bank v. Lightbody, 13 Wend. 107, 27 Am. Dec. 183, holding payment in notes of insolvent bank, though parties ignorant of the insolvency, was not a satisfaction of the debt; dissenting opinion in Currie v. White, 45 N. Y. 842, holding offer of payment in checks not tender.

Law of bank bills. Note, 52 Am. Dec. 449, 450, 451, 452.

Bank notes as money. Note, 4 Ann. Cas. 631.

Miscellaneous. Cited incidentally in Flanagin v. Humbleton, 54 Md. 227; Smith v. Association, 119 N. C. 260, 26 S. E. 41; erroneously in Territory v. Golding, 3 Utah, 48.

10 Wheat. 358–367, 6 L. Ed. 341, KEPLINGER v. DE YOUNG.

One who contracts with manufacturer to purchase articles made by patented machine is not liable for infringement.

Approved in Motion Picture Patents Co. v. Laemmle, 186 Fed. 642, where defendants had been enjoined from use of patented machine, and applicant for employment by them used machine to show efficiency, he was their agent and they chargeable as contributory infringers; Hogg v. Emerson, 11 How. 607, 13 L. Ed. 833, to point that damages not recoverable for mere selling or buying; Boyd v. M'Alpin, 3 McLean, 430, Fed. Cas. 1748, to point that selling of product of patented machine did not constitute infringement.

It is for jury to determine whether contract to purchase product of patented machine was colorable hiring of machinery with view to infringe patent.

Cited in Byam v. Bullard, 1 Curt. 102, Fed. Cas. 2262, to point that jury might infer infringement from purchase of article by plaintiff's agent from defendant, if connected with other circumstances.

Miscellaneous. Cited incidentally in Putnam v. Sudhoff, 20 Fed. Cas. 90.

10 Wheat. 367–395, 6 L. Ed. 343, DE WOLF v. JOHNSON.

Contract of loan is governed by law of place where made and to be repaid.

Approved in Ringer v. Virgin Timber Co., 213 Fed. 1004, holding that where notes were executed in Arkansas, but payable in Chicago, notes were governed, as to question of usury, by law of Illinois; Laws v. Fleming, 177 Fed. 455, holding that in construing usurious contract, rule of public policy of State will be followed by Federal court; Scott v. Fabacher,

176 Fed. 235, 100 C. C. A. 147, holding that, being part of original transaction, though executed later and in another State, was governed by usury laws of State where original contract was made and subject to its usury laws; In re Worth, 130 Fed. 930, under Iowa Code, 1897, § 3041, making usurious contract voidable only to extent of usurious interest, creditors of bankrupt cannot set up defense of usury against claim of another creditor; United States Sav. & Loan Co. v. Harris, 113 Fed. 31, holding where building and loan association incorporated in Minnesota makes loan to member in Kentucky, secured by land in that State, and all payments are to be made at home office in Minnesota, the contract is governed by laws of Minnesota; Brown v. Grundy, 111 Fed. 17, holding in construing usury laws, Federal courts follow State decisions; United States Sav. etc. L. Co. v. Bukley, 137 Ala. 124, 33 South. 935, holding where resident of Alabama became stockholder of Minnesota building company and obtained loan secured by land in Alabama, which note stated it was made in reference to Minnesota, it was not Alabama note; United States v. Morse, 31 App. D. C. 438, where association was located in District of Columbia, and usurious, contract was to be performed there, although security for performance of contract was situated in West Virginia, contract would be controlled by law of District of Columbia; Hollis v. Covenant Bldg. & Loan Assn., 104 Ga. 322, 31 S. E. 215, holding where lender resides in one State and borrower in another, and the evidence of debt and all papers are executed in State of residence of borrower, the contract is to be construed by the laws of residence of borrower; Walker v. Lovitt, 250 Ill. 546, 550, 95 N. E. 632, 633, where interest on note was not usurious under law of State where made, notwithstanding it was usurious under law of State where land mortgaged for its payment was located, note was not illegal; Midland etc. Co. v. Solomon, 71 Kan. 189, 79 Pac. 1079, bond and mortgage on land here governed by its terms by laws of Colorado is enforceable here though interest would be higher than allowed by local laws; American Malting Co. v. Souther Brewing Co., 194 Mass. 95, 80 N. E. 526, where contract of sale was made and to be performed in Massachusetts, and certain notes in payment were subsequently given also payable there, that State was place of performance; Trower Bros. Co. v. Hamilton, 179 Mo. 225, 77 S. W. 1087, where Missourian goes to lender in Kansas and executes note payable there and secured by mortgage on cattle in Missouri, which is recorded in latter State, both note and mortgage are Kansas contracts; Bank v. Cooper, 85 Mo. App. 387, holding note payable in Kansas but executed in Missouri is Kansas contract; Weyland v. Park Terrace Co., 202 N. Y. 236, 237, **Ann. Cas. 1912D, 1010, 36 L. R. A. (N. S.) 308, 95 N. E. 725**, where contract contains no provision as to where borrower shall repay, place of payment is where contract is made; Manhattan Life Ins. Co. v. Johnson, 188 N. Y. 114, **11 Ann. Cas. 223, 9 L. R. A. (N. S.) 1142, 80 N. E. 660**, where deed for land in New York was given to secure payment of notes made payable in Massachusetts, deed was not invalid because loan was usurious under law of New York; P. Ballantine & Sons v. Fenn, 88 Vt. 170, 92 Atl. 4, where order for goods

was sent outside State, in accordance with agreement made outside State, place of contract was held to be where agreement was entered into, although mortgage on property inside State was executed to secure indebtedness; Benjamin Bank v. Doherty, 42 Wash. 328, 84 Pac. 875, where note valid in State where executed, fact that its payment was secured by mortgage on property in Washington did not render it subject to usury laws of Washington; Andrews v. Pond, 13 Pet. 78, **10 L. Ed. 67**, holding usurious contract governed by laws of State where made; Scudder v. Bank, 91 U. S. 411, **23 L. Ed. 248**, holding law of Illinois determined formalities necessary for sufficiency of acceptance of foreign bill of exchange; Call v. Palmer, 116 U. S. 100, **29 L. Ed. 560**, 6 Sup. Ct. 302, holding question whether note is usurious depends on laws of State where made; Coghlan v. South Carolina R. R. Co., 142 U. S. 110, **35 L. Ed. 954**, 12 Sup. Ct. 153, holding law of State where contract payable determined question of usury; Missouri etc. Trust Co. v. Krumseig, 172 U. S. 355, **43 L. Ed. 475**, following law of State where transaction had, holding usurious contract void; Fitch v. Remer, 1 Biss. 339, 340, 341, 1 Flipp. 18, 19, 23, Fed. Cas. 4836, holding question of usury determined by law of place where loan made; Burrows v. Hannegan, 1 McLean, 316, Fed. Cas. 2206, holding law of State where note made, indorsed and payable, determines diligence necessary to fix indorser's liability; Cadman v. Vermont etc. R. R. Co., 16 Blatchf. 175, Fed. Cas. 2935, holding contract usurious under law of State where and with reference to which made; Hickox v. Elliott, 10 Sawy. 430, 22 Fed. 23, holding maintenance no defense against California contract, though security taken in Oregon; Hickox v. Elliott, 11 Sawy. 637, 27 Fed. 839, holding champerty did not vitiate California contract, though security taken in Oregon; Black v. Reno, 59 Fed. 923, holding law of State where loan made and repayable governed, though secured elsewhere; Kuhn v. Morrison, 75 Fed. 82, holding law of State where note made payable and security situated governed, though mortgage executed elsewhere; Trust Co. v. Rathburn, 18 Fed. Cas. 763, holding usury law of State where security situated not applicable to loan payable in Scotland; Broughton v. Bradley, 36 Ala. 691, holding usury law of State where original bond given and payable governed; Cubbedge v. Napier, 62 Ala. 522, holding usury law of place where mortgage executed and parties resided governed; Falls v. United States Sav. etc. Co., 97 Ala. 433, **38 Am. St. Rep. 211**, 13 South. 32, holding usury law of place where all transactions had and security situated governed, though otherwise stipulated; Thomson v. Kyle, 39 Fla. 597, **63 Am. St. Rep. 198**, 23 South. 17, holding loan governed by usury law of State where made and parties resided, though secured elsewhere; Goodrich v. Williams, 50 Ga. 434, holding law of State where loan executed and payable governed, though security situated elsewhere; Allen v. Allen, 95 Cal. 196, **16 L. R. A. 652**, 30 Pac. 215, where loan barred by statute where made, equity of redemption in security barred; Arnold v. Potter, 22 Iowa, 198, holding usury law of State where note partially executed, payable, and security situated, governed; Eastwood v. Kennedy, 44 Md. 572, holding usury laws

of District of Columbia, where note executed, governed contract; Chase v. Dow, 47 N. H. 406, holding interest allowable according to law of State where note made, though security situated elsewhere; Dolman v. Cook, 14 N. J. Eq. 61, holding law of State where loan and mortgage executed governed, though mortgaged land elsewhere situated; Campion v. Kille, 14 N. J. Eq. 231, holding question whether contract usurious determined by law of State where made; Andrews v. Torrey, 14 N. J. Eq. 357, holding law of place where contract made determines whether usurious, though security taken elsewhere; Flagg v. Baldwin, 38 N. J. Eq. 222, 48 Am. Rep. 310, holding contract governed by law of State where all transactions anterior to mortgage took place; Curtis v. Leavitt, 15 N. Y. 88, 227, 228, holding loan negotiated and payable in England governed by English usury laws; s. c., p. 91, holding loan partly negotiated and payable in Pennsylvania subject to Pennsylvania law; Dickinson v. Edwards, 77 N. Y. 578, 33 Am. Rep. 675, where legality of interest determined by law of State where note made and payable; Arrington v. Gee, 5 Ired. 594, holding law of State where original contract made applied, no matter where security taken; Overton v. Bolton, 9 Heisk. 773, 24 Am. Rep. 374, holding interest law of place where transactions really occurred governed, though note dated elsewhere; Shipman v. Bailey, 20 W. Va. 144, holding law of State where contract made governed as to interest, though secured elsewhere; Newman v. Kershaw, 10 Wis. 343, holding laws of State where contract made govern as to validity and effect, though elsewhere secured; Turpin v. Povall, 8 Leigh, 109, discussing what law governs bond given in one State for debt contracted elsewhere; dissenting opinion in Sherman v. Gassett, 4 Gilm. (Ill.) 535, majority holding usury laws remedial, and, therefore, inapplicable in another State.

Distinguished in Arnold v. Potter, 22 Iowa, 203, statute providing for forfeiture of portion of usurious contract is not penal and will be enforced in court of forum; Kavanaugh v. Day, 10 R. I. 400, 14 Am. Rep. 693, holding where interest payable as damages, rate determined by law of place where breach occurred.

Law governing interest. Note, 50 Am. Dec. 292.

Usury law governing validity of mortgage on land in one jurisdiction given to secure debt contracted or obligation executed in another jurisdiction. Note, 11 Ann. Cas. 225.

Place of payment under contract not specifying place, where parties are residents of different States or countries. Note, Ann. Cas. 1912D, 1015.

Enforcement of mortgage on realty valid where made and payable, but usurious by lex fori et rei sitae. Note, 4 L. R. A. (N. S.) 1192.

Lex rei sitae as to interest and usury as controlling in foreclosing mortgage on realty. Note, 55 L. R. A. 945, 949.

Testimony of party to record is inadmissible, though he be certified bankrupt against whom no relief can be had.

Cited in Bridges v. Armour, 5 How. 94, 12 L. Ed. 65, holding party to the record, though divested of interest, incompetent to testify; The Neptune, Olc. 489, Fed. Cas. 10,120, excluding testimony of colibelants to circumstances of collision; Robinson v. Mandell, 3 Cliff. 176, Fed. Cas. 11,959, discussing effect of acts of Congress on subject, and excluding complainant's testimony; Lane v. The Buck, 14 Fed. Cas. 1077, excluding co-claimant's testimony, though interest discharged, in absence of order striking name from record; Bank v. McDonnell, 87 Ala. 750, 6 South. 708, holding entry of decree pro confesso against party does not make him competent witness; Wise v. Patterson, 3 G. Greene, 472, holding sale of interest in plaintiff firm from pending suit did not constitute vendor competent witness; Pino v. Beckwith, 1 N. M. 27, refusing to admit defendant's testimony.

Modified in Snyder v. Fiedler, 139 U. S. 480, 35 L. Ed. 219, 11 Sup. Ct. 584, holding plaintiff, an administratrix, competent witness after appointment of her successor; Lizardi v. Cohen, 3 Gill, 436, holding defendant of record who had no interest a competent witness.

Distinguished in Pryor v. Ryburn, 16 Ark. 692, holding objection to testimony of party without interest, waived by stipulation of counsel filed.

A contract invalid for usury by the laws of one State may be a good basis for new contract elsewhere.

Approved in Pacific Building Co. v. Hill, 40 Or. 293, 91 Am. St. Rep. 482, 67 Pac. 106, holding where citizen of California and foreign corporation doing business in Oregon made contract in Oregon, and payments were to be made in California, such contract being usurious by laws of Oregon but not by laws of California, the contract will not be enforced by Oregon courts; Floyd v. Nat. Loan & Investment Co., 49 W. Va. 344, 38 S. E. 661, holding a domestic building and loan association may fix minimum premium to be deducted in advance or paid in installments, but such sum must be fixed and definite, and a foreign corporation making a contract with citizen must conform to this requirement.

Usury in a contract is a mortal taint, and no subterfuge can conceal it from the eye of the law.

Approved in Ringer v. Virgin Timber Co., 213 Fed. 1008, where notes were given for amount largely in excess of purchase price, transaction was usurious; Sherwood v. Roundtree, 32 Fed. 123, holding loan usurious where part of principal withheld under name of "commission"; Phelps v. Pierson, 1 G. Greene, 128, reversing decree foreclosing usurious mortgage; Knickerbocker etc. Ins. Co. v. Nelson, 78 N. Y. 149, holding loan usurious, notwithstanding elaborate subterfuges to conceal usury; Smith v. Cross, 90 N. Y. 554, holding court would look behind transactions had to conceal usury.

Though contract be usurious in its inception, subsequent legal contract, entered into for purpose of freeing it from usury, makes it valid.

Approved in Peters Shoe Co. v. Arnold, 82 Mo. App. 6, holding debt secured by usurious mortgage may repudiate usury and correct mistake by proper contract; Building Co. v. Jones, 94 Tex. 502, 62 S. W. 743, holding where, under original contract, plaintiff was only liable for balance after deducting certain payments, because contract was usurious, a second contract, purging the first of usury, was not void as to interest for want of consideration; Masterson v. Grubbs, 70 Ala. 408, holding reformation of contract by removal and remitting excessive interest cured the usury; Mitchell v. Lyman, 77 Ill. 530, holding interest payable on note substituted for old usurious note, less excess paid on old note; Lillard v. Field, 1 J. J. Marsh. 276, 280, holding good, a note for principal, and legal interest given in consideration of original usurious loan; Hoyt v. Bridgewater etc. Mining Co., 6 N. J. Eq. 274, when subsequent agreement of parties held to have purged contract of usury; Morris v. Taylor, 22 N. J. Eq. 443, and Taylor v. Morris, 22 N. J. Eq. 610, holding usury cured by settlement between parties and giving new mortgage; Palmer v. Smith, 10 N. Y. 307, holding mortgagor estopped from setting up invalidity of assignment by agreement recognizing assignee's title; Sheldon v. Haxtun, 91 N. Y. 134, holding valid new note, complying with law of State where made, given in consideration of old usurious debt; Gerlaugh v. Bassett, 20 Wis. 678, holding contract purged of usury, by giving new note for original debt; Edgell v. Stanford, 6 Vt. 559, holding recovery allowable of original debt, though subsequent usurious contract substituted therefor.

Distinguished in Jackson v. Jones, 13 Ala. 126, holding contract tainted with old usury, where usurious interest on old notes carried into new contract; Lee v. Peckham, 17 Wis. 390, holding usurious, a new contract for sum due, including unpaid usurious interest; dissenting opinion in Sheldon v. Haxtun, 91 N. Y. 135, 136, majority holding valid new note complying with law of State where made, given in consideration of usurious debt.

Usury affecting new note. Note, **11 Am. Dec. 540.**

What transactions are usurious. Note, **46 Am. St. Rep. 201.**

Court will not treat usurious contract as absolutely void, when not so declared, but merely prohibited by statute.

Approved in First Nat. Bank of McEntire, 112 Ga. 235, 37 S. E. 382, holding where surety signs promissory note waiving homestead which is secretly tainted with usury unknown to him, he is not discharged from liability when note is made payable to national bank under Rev. Stats. U. S., § 5198; Oates v. National Bank, 100 U. S. 250, 25 **L. Ed. 584**, holding reservation of usurious interest by national bank did not make loan void; McBroom v. Scottish etc. Co., 153 U. S. 326, **38 L. Ed. 732**, 14 Sup. Ct. 855 (affirming s. c., 6 N. M. 588, 30 Pac. 863), holding contract made under New Mexican law not void for usury; Wiley v. Starbuck, 44 Ind. 313, holding reservation of usurious interest by national bank did not make contract void; Haggard v. Atlee, 1 G. Greene, 46, 47, holding usurious contract not void under law of Iowa; Commercial Bank etc. v.

Nolan, 7 How. (Miss.) 527, holding principal due on usurious contract recoverable; Montany v. Rock, 10 Mo. 508, holding usurious contract not void; Farmers' Bank v. Burchard, 33 Vt. 371, holding usurious contract valid, except as to the usury; dissenting opinion in Fowler v. Throckmorton, 6 Blackf. (Ind.) 334, majority holding no recovery could be had on usurious contract; Scottish etc. Co. v. McBroom, 6 N. M. 588, 30 Pac. 863, holding contract made under New Mexican law not void for usury.

Distinguished in Saltmarsh v. Tuthill, 13 Ala. 409, holding bill of exchange void for prior indorsement on Sunday, in hands of indorsee in a usurious transaction.

Plea of usury is generally personal and peculiar, and not available to third persons.

Approved in Phillips v. Ogle, 21 D. C. 207, following rule; Lefmann v. Brill, 142 Fed. 49, where wife in maintenance suit made mortgagee of husband a party, but court in awarding her husband's interest in mortgaged property refused to pass on validity of mortgage but dismissed mortgagee's cross-petition, his mortgage not having matured, decree not bar to subsequent foreclosure; In re Worth, 130 Fed. 931, under Iowa Code 1897, § 3041, making usurious contract voidable only to extent of usurious interest, creditors of bankrupt cannot set up defense of usury against claim of another creditor; Edgell v. Ham, 93 Fed. 764, holding where mortgage not usurious on its face by lex loci rei sitae is foreclosed, conveyance to purchaser cannot be attacked for usury in mortgage; Matthews v. Ormerd, 140 Cal. 581, 74 Pac. 138, holding where mortgage is foreclosed for amount of principal and interest which, under Cal. Const., art. XIII, § 4, mortgagee must pay, purchaser from mortgagor cannot recover the interest from mortgagee; Barney v. Fontine Surety Co., 131 Mich. 196, 91 N. W. 142, assignee of contract cannot avail himself of defense of usury; Higbee v. Aetna Bldg. etc. Assn., 26 Okl. 330, Ann. Cas. 1912B, 223, 109 Pac. 237, purchaser of land at sale in bankruptcy proceedings cannot question mortgagor on ground of usury; Irwin v. Washington Loan Assn., 42 Or. 107, 71 Pac. 143, holding where building association mortgage is usurious on account of interest, premium and installments on stock, the whole amount is not usurious, but only the excess; Black v. Reno, 59 Fed. 923, holding usury not available defense for mortgagor in usurious transaction against holder of mortgage as collateral security; American Water-Works Co. v. Farmers' etc. Trust Co., 73 Fed. 962, 36 U. S. App. 563, holding want of authority in grantor company to execute mortgages, no defense for grantee with notice; Gatewood v. Bank, 49 Ga. 50, holding usury in first mortgage no ground for bill by later mortgagee to enjoin sale; Henderson v. Bellew, 45 Ill. 325, holding usury no defense on foreclosure, for purchaser subject to mortgage; Carmichael v. Bodfish, 32 Iowa, 420, holding stranger to contract could not plead usury; Pritchett v. Mitchell, 17 Kan. 358, 22 Am. Rep. 289, holding subsequent mortgagee could not plead usury in prior mortgage; Farmers' etc. Bank v. Kimmel, 1 Mich. 85, holding plea of usury not available to

subsequent mortgagee; Ladd v. Wiggin, 35 N. H. 429, **69 Am. Dec. 558**, holding usury a personal defense; Post v. Bank of Utica, 7 Hill, 406, holding purchaser at sheriff's sale, with notice, not entitled to decree setting aside mortgage for usury; Sands v. Church, 6 N. Y. 352, 353, 354, 356, holding usury not available defense for purchaser of equity of redemption; Oneida Bank v. Ontario Bank, 21 N. Y. 501, holding usurious discount by indorsee for payee, no defense for drawer of bill of exchange; Chamberlain v. Dempsey, 36 N. Y. 149, holding grantee of equity of redemption could not set up usury in mortgage; Williams v. Tilt, 36 N. Y. 326, holding claimant of property by paramount title could not set up usury; Merchants' etc. Bank v. Commercial etc. Co., 49 N. Y. 643, note, holding grantee from borrower subject to lien could not set up usury; Knickerbocker etc. Ins. Co. v. Nelson, 78 N. Y. 150, holding mortgagor's grantees of equity of redemption could not set up usury; Cahn v. Farmers' etc. Bank, 1 S. D. 242, 46 N. W. 186, holding borrower's creditor could not set aside lender's judgment against him for usury; Hill v. Alliance Building Co., 6 S. D. 179, **55 Am. St. Rep. 832**, 60 N. W. 757, holding purchaser of equity of redemption could not set up usury; Spengler v. Snapp, 5 Leigh, 491, 502, 510, holding purchaser of equity of redemption could not set up usury; Michie v. Jeffries, 21 Gratt. 345, holding purchaser of land subject to mortgage could not set up usury; Christian v. Warsham, 78 Va. 109, holding strangers to mortgage could not set up usury; Lee v. Feamster, 21 W. Va. 113, **45 Am. Rep. 553**, holding borrower's creditor could not plead usury to defeat another creditor. See also Turner v. Association, 47 S. C. 408, 25 S. E. 283, dissenting opinion, majority holding purchaser who paid mortgage as part of price, entitled to recover usury exacted; Clark v. Spencer, 14 Kan. 407, arguendo, approving general proposition; Hope v. Smith, 10 Gratt. 224, refusing to decide question.

Overruled in Lloyd v. Scott, 4 Pet. 229, **7 L. Ed. 841**, holding usury available defense for loanee's alienee.

Denied in Yardley v. The New York Guaranty etc. Co., 1 Flipp. 555, 556, Fed. Cas. 18,125, holding usury available to purchasers of bonds from borrower corporation; Trumbo v. Blizzard, 6 Gill & J. 23, holding plea of usury available to mortgagor's alienee; Doub v. Barnes, 1 Md. Ch. 142, holding usury available defense for mortgagor's alienee against mortgagee's assignee; Freeman v. Brittin, 17 N. J. L. 213, holding usury available defense for maker, to suit by indorsee, who obtained note by usury; Cummins v. Wire, 6 N. J. Eq. 87, holding purchaser of equity of redemption entitled to plead usury; Brolasky v. Miller, 9 N. J. Eq. 809, holding subsequent mortgagees entitled to plead usury.

Modified in Hackensack Water Co. v. De Kay, 36 N. J. Eq. 553, 554, holding purchaser at sheriff's sale entitled to plead usury in mortgage as defense; Dix v. Van Wyck, 2 Hill, 525, holding purchaser under judgment and execution entitled to set up usury.

Distinguished in Middle States Loan etc. Co. v. Baker, 19 App. D. C. 10, grantee of usurious mortgage entitled to credit for usurious payments

made by his grantor; Scull v. Idler, 79 N. J. Eq. 469, 81 Atl. 747, defense of usurious character of mortgage is available to third party where bill does not directly aver that third party purchased equity subject to mortgage.

Who may plead usury as defense. Note, **22 Am. Rep. 291.**

Personal liability of grantee of land to pay off prior mortgage. Note, **78 Am. Dec. 87.**

Availability of defense of usury to purchaser of property charged with usurious debt. Note, **2 Ann. Cas. 46.**

Parol evidence to contradict written instrument. Note, **11 E. R. C. 227.**

Miscellaneous. Cited in Ornstine v. Cary, 204 U. S. 669, **51 L. Ed.** 672, 27 Sup. Ct. 788; Bank v. Tuthill, 4 Dak. 301, 30 N. W. 155.

10 Wheat. 395–405, 6 L. Ed. 350, BRENT v. DAVIS.

Legality of a drawing is not affected by irregularities which did not vary the chances of complainant.

Cited in M'Gimpsey v. Booker, 5 Yerg. 142, holding correction of mistakes made in drawing did not vitiate it.

Miscellaneous. Cited incidentally in Washington v. Young, 10 Wheat. 407, **6 L. Ed. 353,** another lottery case.

10 Wheat. 406–410, 6 L. Ed. 352, CORPORATION OF WASHINGTON v. YOUNG.

One not the proprietor of an obligation cannot put it in suit, unless authorized by the legislature.

Approved in Howard v. United States, 184 U. S. 690, **46 L. Ed. 761,** 22 Sup. Ct. 549, affirming 102 Fed. 84, which affirmed 93 Fed. 721, and holding private suitor has right without statutory authority to sue in the name of United States for his benefit on bond of clerk of Circuit Court, given under United States Rev. Stats., § 795, for faithful performance; City of Eaton Rapids v. Stump, 127 Mich. 5, **89 Am. St. Rep. 454,** 86 N. W. 439, holding where bond of city marshal runs to city and not the people, an action cannot be maintained for use and benefit of third person; Penn Iron Co. v. William R. Trigg Co., 106 Va. 559, 56 S. E. 330, holding materialman cannot maintain suit on bond executed to United States in his own name, unless authorized by Federal statute; McCue v. Washington, 3 Cr. C. C. 642, Fed. Cas. 8735, holding owner of prize lottery ticket not entitled to sue manager on bond to corporation.

Distinguished in Stephenson v. Monmouth Min. etc. Co., 84 Fed. 119, where consent presumed from corporation taking bond running to itself instead of to State as required.

Denied in State v. Norwood, 12 Md. 193, holding any person interested could sue on official bond of State officer.

Modified in Spencer v. Watkinson, 11 Conn. 15, holding persons damaged by ferry owner's negligence could recover nominal damages on owner's bond to State treasurer.

Right of citizen to enforce public contract. Note, 49 L. R. A. (N. S.) 1175.

In suit on bond in name of obligee corporation, for use of another, the corporation is the real plaintiff.

Approved in Peake v. United States, 16 App. D. C. 418, holding suit on government contractor's bond was properly brought in name of United States; East St. Louis v. Renshaw, 153 Ill. 498, 38 N. E. 1049, holding, in suit on official bond of city treasurer, city was real plaintiff.

Warrant of attorney need not be spread on the record to enable counsel to appear for a corporation.

Cited in State Bank v. Bell, 5 Blackf. 128, holding signing and filing of declaration by attorney sufficient evidence that corporation so appeared.

Miscellaneous. Cited in Bledsoe v. Erwin, 32 La. Ann. 619, 620, upon effect of dismissal without reserve for renewal of action.

Erroneously cited in Ross v. The Neversink, 20 Fed. Cas. 1244, as The St. Jago de Cuba.

10 Wheat. 411–420, 6 L. Ed. 354, JANNEY v. COLUMBIAN INS. CO.

Generally, in foreign countries, right to condemn unseaworthy vessels is incidental to admiralty power.

Cited in Potter v. Ocean Ins. Co., 3 Sumn. 42, 43, Fed. Cas. 11,335, holding Federal admiralty courts have jurisdiction, though not exclusive, to order survey in case of distress; The Schooner Tilton, 5 Mass. 474, Fed. Cas. 14,054, holding survey and condemnation of vessel on application of master within admiralty jurisdiction; The Dawn, 1 Ware, 487, Fed. Cas. 3665, holding survey and condemnation of vessel, in case of distress, on application of master, within admiralty jurisdiction; The Steamboat James Morrison, Newb. 244, Fed. Cas. 15,465, to point that power to condemn for unseaworthiness within admiralty jurisdiction.

Miscellaneous. Cited in Insurance Co. etc. of Virginia v. Mordecai, 22 How. 117, 16 L. Ed. 332, where not shown that condemnation proceeded from causes mentioned in policy, it did not discharge underwriters; United States v. New Bedford Bridge Co., 1 Wood. & M. 473, Fed. Cas. 15,867, and Packard v. The Sloop Louisa, 2 Wood. & M. 53, Fed. Cas. 10,652, discussing admiralty jurisdiction.

10 Wheat. 421–427, 6 L. Ed. 256, SIXTY PIPES OF BRANDY.

All circumstances required by statute must concur to constitute offense under revenue law as to import of liquors.

Cited in The Cargo ex Lady Essex, 39 Fed. 767, holding cargo of vessel driven on shore by stress of weather, not liable to condemnation; United States v. Halberstadt, 26 Fed. Cas. 73, holding law imposing penalty for selling casks from which marks not removed not applicable to purchaser; United States v. Pounds of Celluloid, 82 Fed. 632, holding goods unlawfully imported by mere trespasser not liable to forfeiture.

Purpose of revenue laws is security of revenue, not prevention of devices of merchants for private profit without defrauding government.

Cited in United States v. Twenty-eight Packages, Gilp. 326, Fed. Cas. 16,561, holding, making up false invoice, not used to make false entry, does not subject goods to condemnation.

Miscellaneous. Cited in Stacey v. Emery, 97 U. S. 646, 24 L. Ed. 1036, as instance of use of "probable cause" and "reasonable cause" to mean same thing.

10 Wheat. 428–430, 6 L. Ed. 358, THE THOMAS JEFFERSON.

The admiralty jurisdiction of Federal District Courts, where dependent on locality, is limited to sea and tide water.

Approved in The Robert v. Parsons, 191 U. S. 25, 48 L. Ed. 77, holding Erie canal is within scope of admiralty jurisdiction of United States; Ex parte Lair, 177 Fed. 794, holding void act providing for criminal prosecution in re keeping of alien woman for prostitution, such offense being within police power of State; State v. Akers, 92 Kan. 197, Ann. Cas. 1916B, 543, 140 Pac. 648, holding void act of Kansas regulating sale and taking of sand from navigable stream; Hobart v. Drogan, 10 Pet. 120, 9 L. Ed. 367, holding District Court jurisdiction included suits for pilotage, though State law fixed compensation; Orleans v. Phoebus, 11 Pet. 184, 9 L. Ed. 680, holding claims for services performed on inland waters not within admiralty jurisdiction; Waring v. Clarke, 5 How. 463, 475, 498, 12 L. Ed. 237, 242, 253, holding jurisdiction over collisions extended to tide water, though infra corpus comitatus; New Jersey etc. Co. v. Merchants' Bank, 6 How. 390, 392, 421, 12 L. Ed. 485, 486, 498, holding libel for specie lost by vessel burning in tide water, within admiralty jurisdiction; McLelland v. The Robert Morris, 1 Wall. Jr. 38, Fed. Cas. 8896, holding repair of vessel used to navigate tide water, a maritime contract; The Schooner Mary, 1 Sprague, 204, Fed. Cas. 9190, holding services performed on vessel making trips within tide water gave lien; McCormick v. Ives, Abb. Adm. 420, Fed. Cas. 8720, holding services on canal boat not within admiralty jurisdiction; The Wave, Blatchf. & H. 240, 241, Fed. Cas. 17,297, holding admiralty jurisdiction extends to claims for salvage on tide water; Martin v. Acker, Blatchf. & H. 281, Fed. Cas. 9155, holding within admiralty jurisdiction, contract for service on vessel navigating tide water; The D. C. Salisbury, Olc. 74, Fed. Cas. 3694, holding jurisdiction extends to any services performed on vessel navigating tide water; Davis v. The Enterprise, 7 Fed. Cas. 120, dis-

missing libel for services not performed substantially on tide water; Ludington v. The Nucleus, 15 Fed. Cas. 1096, holding extension of jurisdiction by act of 1845 did not include contracts for materials furnished at home port; Van Santwood v. The John B. Cole, 28 Fed. Cas. 1077, holding contract of affreightment performed on tide water, within admiralty jurisdiction; Case v. Woolley, 6 Dana, 21, 22, **32 Am. Dec. 58, 59**, holding admiralty jurisdiction extended only to services performed on tide water; Baker v. Hoag, 7 N. Y. 562, **59 Am. Dec. 436**, applying tide water test, holding lien for salvage by maritime law attached where vessel sunk in tide water; Hubbard v. Hubbard, 8 N. Y. 199, sustaining nuncupative will of master of ship at anchor in tide water; Smith v. United States, 1 Wash. Ter. 266, 268, holding crime committed on tide water within Federal jurisdiction; Peyroux v. Howard, 7 Pet. 342, **8 L. Ed. 707**, holding court could take judicial notice of presence of tide where contract performed; Jackson v. Steamboat Magnolia, 20 How. 322, 342, **15 L. Ed. 927, 929**, dissenting opinion, majority holding admiralty jurisdiction included cause of collision in navigable stream above tide water; dissenting opinion in United States v. Rodgers, 150 U. S. 270, 271, **37 L. Ed. 1079**, 14 Sup. Ct. 117, majority holding great lakes are high seas; United States v. New Bedford Bridge Co., 1 Wood. & M. 473, Fed. Cas. 15,867, restricting admiralty jurisdiction to the sea; Lands v. Cargo of Coal, 4 Fed. 480, where court took judicial notice of navigability of waters; Bulloch v. The Lamar, 4 Fed. Cas. 658, holding collision in tide water within admiralty jurisdiction; The Belfast v. Boone, 41 Ala. 63, holding constitutional a State law creating shipper's lien on vessel navigating interior waters of State; People v. Tyler, 7 Mich. 275, 276, 281, 287, denying Federal jurisdiction over crime committed on river connecting great lakes; Cole v. White, 26 Wend. 517, construing mortgage of vessel on lakes; dissenting opinion in The Lottawanna, 21 Wall. 584, **22 L. Ed. 665**, majority holding claim for materials furnished for repairs in home port not maritime lien; Gill v. The Continental, 10 Fed. Cas. 372, holding admiralty has jurisdiction of lien for materials furnished in home port; Haslett v. The Enterprise, 11 Fed. Cas. 787, holding barge in New York harbor in admiralty jurisdiction; Merrick v. Avery, 14 Ark. 378, holding lien acquired under Ohio water craft law did not follow craft to another State; Williamson v. Hogan, 46 Ill. 511, 512, accepting doctrine that District Court's jurisdiction in admiralty is exclusive; Stinton v. The R. R. Roberts, 46 Ind. 481, holding lien on steamboat for building materials at home port not cognizable in admiralty; dissenting opinion in Berry v. Snyder, 3 Bush, 289, **96 Am. Dec. 234**, majority holding riparian owner on navigable stream above tide water held ad medium filum aquae; People v. Canal Appraisers, 33 N. Y. 497, holding riparian owners on navigable stream not entitled to damages for diversion of water for canal; Dunlap v. Commonwealth, 108 Pa. St. 613, sustaining jurisdiction of State court over offenses against State game laws on lake.

Overruled in Genesee Chief v. Fitzhugh, 12 How. 455, 456, **13 L. Ed. 1064**, holding admiralty jurisdiction extended to navigable inland waters;

Jackson v. Steamboat Magnolia, 20 How. 299, 302, 313, 15 L. Ed. 916, 917, 921, holding admiralty jurisdiction includes cause of collision on navigable river above tide water, within a State; The Hine v. Trevor, 4 Wall. 562, 563, 565, 18 L. Ed. 452, 453 (reversing s. c., 17 Iowa, 353), holding admiralty had exclusive jurisdiction of collision on Mississippi above tide water; The Belfast, 7 Wall. 637, 19 L. Ed. 270 (reversing s. c., 41 Ala. 63), holding contracts of affreightment to be performed on navigable inland waters subjects of admiralty jurisdiction exclusively.

Denied in The Oler, 2 Hughes, 15, 16, Fed. Cas. 10,485, holding collision on ship canal connecting navigable waters, is within admiralty jurisdiction; Stewart v. Potomac Ferry Co., 5 Hughes, 381, 12 Fed. 303, holding unconstitutional a State law giving lien on vessel for cause of action arising on navigable river; The Flora, 1 Biss. 30, 32, Fed. Cas. 4878; Revenue Cutter No. 1, Brown Adm. 92, 95, Fed. Cas. 11,713, holding great lakes within admiralty jurisdiction independently of act of 1845; Scott's Case, 1 Abb. (U. S.) 339, Fed. Cas. 12,517, holding admiralty jurisdiction on great lakes exclusive; Parmlee v. The Charles Mears, Newb. 204, Fed. Cas. 10,766, holding maritime law applies to cases on lakes as to jurisdiction, procedure and practice, independently of act of 1845; Eads v. Steamboat H. D. Bacon, Newb. 276, Fed. Cas. 4232, holding salvage on navigable river, above tide water, recoverable in admiralty; United States v. Burlington etc. Ferry Co., 21 Fed. 334, 335, holding admiralty jurisdiction embraced libel for marine tort of river steamboat; Western Transp. Co. v. The Great Western, 29 Fed. Cas. 782, holding admiralty jurisdiction extended to case of salvage on great lakes; Wolverton v. Lacy, 30 Fed. Cas. 419, holding act of 1790, concerning shipping articles, applicable to great lakes; Trevor v. The Hine, 17 Iowa, 353, reviewing cases, holding Federal and State courts had concurrent jurisdiction on navigable rivers; Keating v. Spink, 3 Ohio St. 108, 110, 62 Am. Dec. 217, 219, holding admiralty jurisdiction extends to navigable inland waters, but is not exclusive there.

Distinguished in Thackery v. The Farmer, Gilp. 528, Fed. Cas. 13,852, holding, where contract not maritime, it is not within jurisdiction, though performed on tide water; United States v. Wilson, 3 Blatchf. 437, Fed. Cas. 16,731, holding crime of destroying vessel not within Federal jurisdiction, unless committed on high seas.

Disapproved in State v. Lewis, 69 Ohio St. 208, 209, 69 N. E. 134, refusing to follow rule of stare decisis; dissenting opinion in Scown v. Czarnecki, 264 Ill. 331, Ann. Cas. 1915A, 772, L. R. A. 1915B, 247, 106 N. E. 286, as to effect of prior decision.

What waters are navigable. Note, 42 L. R. A. 312.

It is essential, in order for admiralty jurisdiction to attach, that contract should be maritime in its nature.

Approved in California-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 10, 124 C. C. A. 139, denying sufficiency of libel for tort which

did not show tort committed on high seas; Packard v. Sloop Louisa, 2 Wood. & M. 52, 53, Fed. Cas. 10,652, holding vessel employed in carrying and laying stone in Massachusetts bay not subject to maritime lien for wages; People v. Steamer America, 34 Cal. 679, holding suit for wharfage cognizable in State court; Thackery v. The Farmer, Gilp. 528, Fed. Cas. 13,852, holding contract not maritime in its nature is not within jurisdiction, though performed on sea.

Admiralty jurisdiction of contracts. Note, **66 L. R. A. 213, 227.**

Miscellaneous. Cited in Pollock v. Farmers' L. & T. Co., 157 U. S. 575, **39 L. Ed. 817**, 15 Sup. Ct. 687, as instance where rule laid down had not been followed in later cases; St. Paul etc. R. R. Co. v. Schurmeir, 7 Wall. 288, **19 L. Ed. 78**, discussing title to sand-bar in navigable river; The War Eagle, 6 Biss. 366, Fed. Cas. 17,173, holding vessel plying on river within proviso to act limiting liability of shipowners; dissenting opinion in Western etc. Tel. Co. v. Williams, 86 Va. 719, **8 L. R. A. 437**, 11 S. E. 113, majority holding unconstitutional a statute permitting construction of telegraph line on highway without compensating owners.

10 Wheat. 431–449, 6 L. Ed. 359, THE SANTA MARIA.

In proceedings to carry decree into effect, original proceedings are before court when necessary to determine new points in controversy.

Approved in Mutual Reserve Fund Life Assn. v. Beatty, 93 Fed. 754, following rule; Illinois v. Illinois Cent. R. R. Co., 184 U. S. 91, **46 L. Ed. 446**, 22 Sup. Ct. 305, holding when decree of Circuit Court is affirmed, except as to one matter, as to which it is reversed, the decree is conclusive as to the matters affirmed; Stoll v. Loving, 120 Fed. 807, holding on second appeal questions determined on first appeal will not be considered; Butler v. Thompson, 52 W. Va. 315, 43 S. E. 176, holding when decree is reversed upon the merits for further proceedings, in accordance with written opinion, the lower court has no power to allow amendments and further testimony; Mitchel v. United States, 15 Pet. 84, **10 L. Ed. 670**, considering proceedings in original suit in construing mandate issued therein; Metcalf v. Watertown, 68 Fed. 861, 34 U. S. App. 107, sustaining second appeal to correct error in carrying mandate into effect; Brucker v. State, 19 Wis. 540, holding record on former appeal before the court to determine whether cause had been remitted. See also Poole v. Nixon, 19 Fed. Cas. 1000, holding court has jurisdiction of bill of review based on newly discovered facts.

Conclusiveness of prior decisions on subsequent appeals. Note, **34 L. R. A. 341.**

Claims for charges existing at time of, and not set up at hearing on merits, cannot be set up after decree of restitution on application to enforce mandate of Supreme Court.

Approved in The Newaygo, 205 Fed. 181, holding interest on claim for wrecking services allowed only from date of filing commissioner's report; Dent v. Pickens, 59 W. Va. 277, 53 S. E. 155, arguendo; Boyce v. Grundy, 9 Pet. 290, 9 L. Ed. 132, reversing Circuit Court decree allowing interest on original decree, not allowed on first appeal; Ex parte Sibbald, 12 Pet. 492, 9 L. Ed. 1169, holding matters determined on original appeal not subject to review after mandate issued; Washington Bridge Co. v. Stewart, 3 How. 424, 426, 11 L. Ed. 663, 664, holding conclusive, affirmance of decree, though by divided court; Bank of United States v. Moss, 6 How. 40, 12 L. Ed. 335, denying court's authority at subsequent term to strike out judgment rendered for want of jurisdiction; Corning v. Troy Iron etc. Factory, 15 How. 466, 14 L. Ed. 775, dismissing appeal from decree disposed of on former appeal; Roberts v. Cooper, 20 How. 481, 15 L. Ed. 974, holding on second writ of error previous decision in same case, not subject to review; Carter v. American etc. Ins. Co., 3 Pet. 318, 7 L. Ed. 692, holding decree of restitution silent as to damages, a virtual denial thereof, and not subject to review on subsequent appeal; Noonan v. Bradley, 12 Wall. 129, 20 L. Ed. 281, holding final decree rendered at former term, not subject to review; The Lady Pike, 96 U. S. 462, 24 L. Ed. 673, refusing to consider matters decided in antecedent appeal; In re Washington etc. R. R. Co., 140 U. S. 97, 35 L. Ed. 342, 11 Sup. Ct. 674, denying power of lower court to allow interest on original judgment, after affirmance; Bissell etc. Sweeper Co. v. Goshen Sweeper Co., 72 Fed. 533, 43 U. S. App. 47, holding lower court could not modify decree, affirming interlocutory injunctional decree where merits involved; Republican Min. Co. v. Tyler Min. Co., 79 Fed. 735, 48 U. S. App. 218, holding matters decided on former appeal not subject to review; Oregon R. R. etc. Co. v. Balfour, 90 Fed. 301, holding question adjudicated on former not open for consideration on second appeal; Poole v. Nixon, 19 Fed. Cas. 1000, holding matters determined on former appeal not subject to review on bill of review; Fortenberry v. Frazier, 5 Ark. 202, 39 Am. Dec. 374, holding judgment affirmed not subject to review after mandate; Roberts v. Haggart, 4 Dak. 212, 29 N. W. 656, holding no jurisdiction in Supreme Court to grant rehearing after term at which judgment entered; Davidson v. Dallas, 15 Cal. 83, holding decision on former appeal conclusive upon matters decided; Semple v. Anderson, 4 Gilm. 562, holding Supreme Court cannot review its decision on former appeal; Ogden v. Larrabee, 70 Ill. 513, holding errors existing, though not assigned on former, not assignable on subsequent appeal; Dodge v. Gaylord, 53 Ind. 369, holding decision on first appeal determines law of case; Stationary etc. Co. v. Hentig, 31 Kan. 323, refusing to entertain motion for rehearing after term at which judgment entered; Strike v. M'Donald, 2 Har. & G. 219, 1 Bland Ch. 70, holding decree conclusive as to matters determined after time for appeal; Davenport v. Kleinschmidt, 8 Mont. 480, 20 Pac. 826, holding decision on first appeal conclusive of questions involved therein; Younkin v. Younkin, 44 Neb. 731, 63 N. W. 32, holding issue determined on first, not subject

to review on subsequent appeal; Teaff v. Hewitt, 1 Ohio St. 520, 59 Am. Dec. 637, holding decree not appealed from conclusive of matters determined therein; Overton v. Bigelow, 10 Yerg. 53, holding rehearing of chancery cause not permissible at term after term when decision rendered; Chambers v. Hodges, 3 Tex. 529, holding Supreme Court's power to revise decree concluded by entry thereof and close of term; Folger v. The Robert G. Shaw, 2 Wood. & M. 540, Fed. Cas. 4899, holding District Court could make no further order after appeal; dissenting opinion in State v. Circuit Court, 71 Wis. 610, 38 N. W. 199, majority sustaining jurisdiction of lower court to grant new trial after judgment affirmed; United States v. New York Indians, 173 U. S. 171, 172, refusing to allow a motion to reopen a cause and find further facts, and dismissing an appeal from a judgment in accord with Supreme Court's mandate.

Distinguished in City of Hastings v. Foxworthy, 45 Neb. 693, 34 L. R. A. 348, 63 N. W. 961, holding decision subject to review, when cause remanded generally on first appeal; dissenting opinion in Stewart v. Salamon, 97 U. S. 362, 24 L. Ed. 1045, majority holding appeal would not lie from decree entered in accordance with Supreme Court's mandate.

Power of appellate court after remittitur. Note, 21 Am. Dec. 119.

10 Wheat. 449–454, 6 L. Ed. 363, DAY v. CHISM.

Allegation of eviction by title paramount is necessary in declaration upon covenant of warranty.

Approved in Pabst Brewing Co. v. Thorley, 145 Fed. 122, where defendant obtained permission to construct vault in street subject to revocation when space required for public improvement, and leased premises with appurtenances and later vault permit canceled, making property leased unfit for purpose intended, defendant liable for breach of covenant for quiet enjoyment; Jennings v. Kierman, 35 Or. 352, 55 Pac. 444, holding breach of warranty is sufficiently alleged by stating title is in United States, that Secretary of Interior has withdrawn land from entry and sale, that they were occupied when deed was made, and that plaintiff has not occupied them, and has been evicted; Salle v. Light, 4 Ala. 705, 39 Am. Dec. 318, holding bad declaration on covenant of warranty omitting to allege recovery by title paramount; Dupuy v. Roebuck, 7 Ala. 488, holding where eviction by paramount title not shown, no right of action existed; Davis v. Smith, 5 Ga. 297, 48 Am. Dec. 297, holding eviction, to constitute breach of warranty, must be upon title paramount; Scott v. Kirkendall, 88 Ill. 467, 30 Am. Rep. 563, holding mere outstanding title not asserted does not constitute breach of covenant of warranty; Hannah v. Henderson, 4 Ind. 176, sustaining demurrer where no ouster or eviction alleged; Reese v. McQuilkin, 7 Ind. 451, holding declaration substantially showing eviction by title paramount sufficient; Mills v. Rice, 3 Neb. 85, holding allegation of outstanding adverse title since become perfect and ouster thereunder sufficient; Cheney v. Straube, 35 Neb. 524, 53 N. W. 480, holding sufficient, allegation of eviction by title paramount, in general terms;

Patton v. McFarlane, 3 Penr. & W. 424, holding allegation of payment of encumbrance, without eviction, would not support action on covenant of warranty; Rex v. Creel, 22 W. Va. 375, holding possession by third person under paramount title when covenant made, constitutes eviction; Watts v. Sheppard, 2 Ala. 432, holding sufficient, assignments of breaches, substantially stating intention of parties, in declaration, on bond; Bailey v. White, 3 Ala. 333, holding in declaration on covenant, assignment of breach may be accorded to intent of parties; Montgomery Mfg. Co. v. Thomas, 20 Ala. 476, holding unnecessary to use precise terms of agreement sued on in assigning breach.

Declaration in covenant, by plaintiffs claiming as heirs and devisees, without setting out will or showing how they were heirs, is not fatal on general demurrer.

Approved in Wilder v. McCormick, 2 Blatchf, 34, Fed Cas. 17,650, holding allegation of proceedings in obtaining patent unnecessary in declaration for infringement; Van Hook v. Woods, 28 Fed. Cas. 1005, holding allegation of particular acts of commissioner in extending patent unnecessary in declaration for infringement.

Where two breaches, repugnant to each other, are assigned in declaration on covenant in same count, immaterial one disregarded on general demurrer.

Cited in Mills v. Rice, 3 Neb. 86, disregarding, on general demurrer, immaterial allegation of breach, possibly inconsistent with another breach assigned.

It is in the power of Federal courts to permit amendments of pleadings.

Cited in Garland v. Davis, 4 How. 154, **11 L. Ed. 918**, holding court below could permit amendment after reversal and case remanded for further proceedings.

10 Wheat. 454–464, 6 L. Ed. 364, McDOWELL v. PEYTON.

Federal Supreme Court follows construction given to State statutes by its own courts.

Cited in State v. Grand etc. Ry. Co., 3 Fed. 889, declining jurisdiction of proceedings against alien, under State law, held criminal by State court.

Questions of State law as to which State court decisions must be followed in actions originating in, or removed to, Federal courts. Note, **40 L. R. A. (N. S.) 394.**

Kentucky law requires locations to be with certainty, sufficient to enable subsequent warrants to be located with certainty on adjacent residuum.

Cited in McNeel v. Herold, 11 Gratt. 315, holding entries must be made with certainty; Rich v. Elliot, 10 Vt. 215, holding description in deed could not be varied by oral evidence.

10 Wheat. 465–472, 6 L. Ed. 367, DARBY'S LESSEE v. MAYER.

At common law and in Maryland, probate of will is no evidence of devise of lands in suit in ejectment.

Approved in Perry v. Sweeney, 11 App. D. C. 411, holding that as Orphans' Court of District of Columbia had no jurisdiction to probate wills relating to realty, its decree is not evidence of title to land; Peet v. Peet, 229 Ill. 350, **11 Ann. Cas. 492, 13 L. R. A. (N. S.) 785**, 82 N. E. 378, where child was born to testator after making will containing no provision for such child, parol evidence as to intent was admissible, construction of will depending upon law where land was located; Succession of Hasling, 114 La. 295, 38 South. 174, validity of will made in Louisiana by citizen thereof devising land in Mississippi is governed by law of latter; Robertson v. Pickrell, 109 U. S. 611, 612, **27 L. Ed. 1050**, 3 Sup. Ct. 409, holding Virginia probate of will of lands not evidence of devise in District of Columbia; Sneed v. Ewing, 5 J. J. Marsh. 466, **22 Am. Dec. 47**, holding probate of will in another State no evidence of devise of lands; Nelson v. Potter, 50 N. J. L. 326, 15 Atl. 376, holding foreign probate of will of lands ineffectual to establish devise in absence of statute; Warner v. Brinton, 29 Fed. Cas. 234, holding matters contained in certificate of probate not conclusive evidence; s. c., p. 235, intimating minutes of testimony on probate not proper evidence; Robinson v. Townshend, 3 Gill & J. 419, and Townshend v. Duncan, 2 Bland Ch. 86, holding probate prima facie evidence under Maryland act of 1715; Randall v. Hodges, 3 Bland Ch. 481, holding probate only prima facie evidence, even under act of 1715; Olney v. Angell, 5 R. I. 204, **73 Am. Dec. 65**, holding foreign probate of will of personalty ineffectual in Rhode Island.

Conclusiveness in domestic courts of foreign will duly probated abroad. Note, **9 Ann. Cas. 422, 423.**

Conclusiveness of probate as res judicata. Note, **21 L. R. A. 681.**

Effect of probate of will in other State. Note, **48 L. R. A. 133, 136, 137, 138, 140, 142, 147.**

The lex rei sitae governs as to effect of devise in one State, of lands in another.

Approved in Pritchard v. Henderson, 2 Penne. (Del.) 557, 47 Atl. 377, holding probate proceedings under will in one State are not conclusive as to title to lands in another State; Harrison v. Weatherby, 180 Ill. 435, 54 N. E. 240, holding under Ill. 3 Starr & C. Ann. Stats. (2d ed.), p. 4040, § 9, providing that certified copy of will, proven under the laws of any State, will convey land in Illinois, a will must be authenticated by judge of probate court and not by Governor; Robertson v. Pickrell, 109 U. S. 611, 612, **27 L. Ed. 1050**, 3 Sup. Ct. 409, holding devise to be effectual in District of Columbia must be according to local law; In re Zug, 30 Fed. Cas. 948, holding rule to determine what are partnership assets is furnished by State law; Chappell v. Jardine, 51 Conn. 66, holding lex rei sitae governed mortgage; Calloway v. Doe, 1 Blackf. 372, holding will devising

realty must be executed according to lex rei sitae; Sneed v. Ewing, 5 J. J. Marsh. 466, 22 Am. Dec. 47, holding foreign probate of will ineffectual to pass title to realty in Kentucky; Eyre v. Storer, 37 N. H. 121, holding realty in New Hampshire cannot pass under foreign will to disinheritance of posthumous child; Nelson v. Potter, 50 N. J. L. 326, 15 Atl. 376, holding foreign probate of will of lands ineffectual to establish devise in absence of statute; Bullock v. Bullock, 51 N. J. Eq. 446, 27 Atl. 436, holding judgment did not affect title to realty in another State; Wills v. Cowper, 2 Ohio, 129, holding lex rei sitae determined authority of foreign administrator to sell lands.

Distinguished in Vaughan v. Phebe, Mart. & Y. 24, 17 Am. Dec. 779, holding status of person claimed as slave determined by law of forum.

Probate is not required of wills of lands at common law and in Maryland, to make them admissible in evidence.

Cited in Campbell v. Porter, 162 U. S. 484, 485, 488, 40 L. Ed. 1046, 1048, 16 Sup. Ct. 873, 875, holding Supreme Court of District of Columbia could not admit will of lands to probate.

Distinguished in Shepherd v. Nabors, 6 Ala. 637, holding will bequeathing negro slave must be probated before admissible in evidence.

Miscellaneous. Cited in Kelly v. Moore, 22 App. D. C. 25, holding that where witness to a will has died, proof of his signature is sufficient prima facie proof of his attestation of will; Thrasher v. Ingram, 32 Ala. 659, holding decree of probate court not assailable collaterally.

10 Wheat. 473–497, 6 L. Ed. 369, MANRO v. ALMEIDA.

Federal courts of admiralty have jurisdiction in cases of maritime torts and contracts as well in proceedings in personam as in rem.

Approved in Atlantic Transport Co. v. Imbrovek, 234 U. S. 60, 51 L. R. A. (N. S.) 1157, 58 L. Ed. 1212, 34 Sup. Ct. 733, holding that suit for injury to employee sustained while on navigable waters was on maritime nature and within admiralty jurisdiction of Federal court; Lewis Blind Stitch Co. v. Arbitter Felling Mach. Co., 181 Fed. 977, provision under acts holding that no civil suit shall be brought except in district whereof defendant is inhabitant does not apply to suit brought for issuance of patent; Pouppirt v. Elder Dempster Shipping, 122 Fed. 988, holding an admiralty court of United States has jurisdiction over action in personam against owner of foreign ship for injuries sustained by an American on the high seas; New Jersey etc. Navigation Co. v. Merchants' Bank, 6 How. 436, 12 L. Ed. 505, holding libel in personam lies to recover for specie lost on ship burned; The Belfast, 7 Wall. 643, 19 L. Ed. 272, holding materialmen in foreign port have remedy in personam as well as in rem; In re Louisville Underwriters, 134 U. S. 490, 33 L. Ed. 993, 10 Sup. Ct. 588, holding libel in personam maintainable against nonresident corporation by service on its legally appointed attorney; Willard v. Dorr, 3 Mason, 93,

Fed. Cas. 17,679, sustaining libel in personam for master's wages; Steele v. Thatcher, 1 Ware, 97, Fed. Cas. 13,348, holding admiralty jurisdiction not restricted to such narrow bounds as in England; Thurber v. The Fannie, 8 Ben. 435, Fed. Cas. 14,014, holding admiralty had jurisdiction of libel to recover sloop wrongfully seized and sold; United States v. Burlington etc. Ferry Co., 21 Fed. 338, holding suit in personam to recover penalty for marine tort cognizable in admiralty; In re Steamboat Josephine, 39 N. Y. 27, sustaining admiralty jurisdiction of suit in personam for supplies furnished in home port; The Lotty, Olc. 331, Fed. Cas. 2337a, holding suit for damages caused by collision of vessels in tide water within admiralty jurisdiction; dissenting opinion in Governor v. Madrazo, 1 Pet. 134, 7 **L. Ed.** 84, majority denying jurisdiction where demand had been converted into a pecuniary one against a State; The Commerce, 1 Black, 581, 17 **L. Ed.** 110, holding suit for marine tort cognizable wherever vessel found; Price v. Thornton, 10 Mo. 138, holding steamboat owner personally liable for master's negligence in permitting slave to escape.

Modified in Ramsay v. Allegre, 12 Wheat. 630, 631, 6 **L. Ed.** 752, 753, holding admiralty jurisdiction did not extend to libel for supplies where promissory note given therefor; dissenting opinion in Waring v. Clarke, 5 How. 486, 12 **L. Ed.** 248, majority holding jurisdiction extends infra corpus comitatus where tide ebbs and flows.

Admiralty jurisdiction in tort. Note, 13 **Ann. Cas.** 1223.

The process act of 1792 adopted existing admiralty practice of our own country, as grafted upon the British practice.

Approved in Ward v. Chamberlain, 2 Black, 440, 17 **L. Ed.** 325, holding process act of 1792 adopted forms and modes of proceeding then existing; Atkins v. Disintegrating Co., 18 Wall. 304, 21 **L. Ed.** 845, holding process act of 1792, adopted admiralty process then existing here; The Wanata, 95 U. S. 611, 24 **L. Ed.** 464, construing appeal bond as admiralty stipulation; United States v. Ames, 99 U. S. 36, 25 **L. Ed.** 297, holding stipulation in admiralty a substitute for the thing itself; The Delaware, Olc. 242, Fed. Cas. 3762, holding remedy against stipulators for costs, to be determined by court rules or admiralty practice; Van Hook v. Pendleton, 2 Blatchf. 88, Fed. Cas. 16,852, holding process act adopted modes of proceeding as then existing in United States; Gaines v. Travis, Abb. Adm. 429, Fed. Cas. 5180, holding process act of 1828, limiting courts' power to regulate practice, inapplicable to admiralty; The Lynchburg, Blatchf. Pr. 60, Fed. Cas. 8638, holding persons having proceeds of captured property compellable to monition to bring same into court; Lane v. Townsend, 1 Ware, 294, Fed. Cas. 8054, discussing differences between English and American practice in regard to stipulations; Stonecutter Co. v. Sears, 20 Blatchf. 26, 9 Fed. 10, construing process act as adopting existing English practice in equity, as modified in America; Gardner v. Isaacson, Abb. Adm. 148, Fed. Cas. 5230, holding process acts placed admiralty practice on substantially same footing as in England; The Wave, Blatchf.

& H. 246, Fed. Cas. 17,297, construing admiralty jurisdiction in salvage case, according to English doctrine, modified; Lamson v. Mix, 14 Fed. Cas. 1057, holding chancery practice in Federal courts derived directly from English high courts of chancery.

Admiralty court can compel appearance by process of attachment on goods of trespasser, though same goods attachable by common-law courts.

Cited in Atkins v. Disintegrating Co., 18 Wall. 303, 305, 21 L. Ed. 844, 845, reversing s. c., 7 Blatchf. 561, 569, Fed. Cas. 602, holding court could obtain jurisdiction by attaching goods of nonresident defendant in proceeding in personam; Cushing v. Laird, 107 U. S. 76, 27 L. Ed. 394, 2 Sup. Ct. 201 (affirming s. c., 4 Ben. 80, 85, 87, Fed. Cas. 3508), holding attachment auxiliary to principal cause; Mutual etc. Ins. Co. v. The George, Olc. 97, Fed. Cas. 9981, holding in case of general average, jurisdiction of foreign owner obtainable by foreign attachment; Smith v. Miln, Abb. Adm. 378, 383, Fed. Cas. 13,081, holding foreign attachment an admiralty process; Atkins v. Disintegrating Co., 1 Ben. 120, Fed. Cas. 600, holding jurisdiction obtainable in libel in personam, in admiralty by foreign attachment; Cushing v. Laird, 4 Ben. 80, 85, 87, Fed. Cas. 3508, holding process of foreign attachment lies in admiralty; Boyd v. Urquhart, 1 Sprague, 424, Fed. Cas. 1750, holding decree in suit in personam, defendants being out of district, is against attached property; Clarke v. New Jersey etc. Nav. Co., 1 Story, 537, 538, 541, Fed. Cas. 2859, holding attachment lies to obtain jurisdiction in admiralty over nonresident corporation, through its property; Lee v. Thompson, 3 Wood, 171, Fed. Cas. 8202, holding libelant could attach debt due respondent to satisfy judgment in personam; The Alpena, 7 Fed. 363, holding writ of garnishment reached ships in hands of garnishee; Card v. Hines, 36 Fed. 575, holding commencement of suit in personam by attachment gave jurisdiction; Essler v. Worth, 8 Fed. Cas. 793, holding attachment being to compel appearance, must be discharged upon such appearance; Manchester v. Hotchkiss, 16 Fed. Cas. 571, holding attachment of goods of nonresident respondent to libel in personam, sufficient service; cited also in The L. B. X., 88 Fed. 293, holding attachment against goods of nonresident defendant available in libelant, in personam; Chase v. Manhardt, 1 Bland Ch. 344, holding attachment to be auxiliary remedy for recovery of sum due; Corrie's Case, 2 Bland. Ch. 494, arguendo, holding attachment lies to satisfy debt out of property about to be exported; Hepburn's Case, 3 Bland Ch. 119, arguendo, holding alien enemy's creditor, who could have attached, could not recover confiscated property.

Modified in Atkins v. Disintegrating Co., 7 Blatchf. 561, 569, Fed. Cas. 602 (reversing s. c., 1 Ben. 120, Fed. Cas. 600), holding foreign attachment does not lie where defendant resident of another district; Louisiana Ins. Co. v. Nickerson, 2 Low, 311, Fed. Cas. 8539, holding attachment not for purpose of enforcing appearance.

Distinguished in Reed v. Hussey, The Franklin, Blatchf. & H. 534, Fed. Cas. 11,646, holding, where third person's property attached because of

respondent's lien thereon, suit was in rem; The Bremena v. Card, 38 Fed. 145, holding attachment could not be used where respondent within district, but not subject to arrest; New England Ins. Co. v. Detroit etc. Nav. Co., 18 Fed. Cas. 64, holding jurisdiction could not be obtained of suit in personam, for damages for collision, by attachment against nonresident; Wilson v. Pierce, 30 Fed. Cas. 151, holding jurisdiction of libel founded on contract could not be obtained by attachment of nonresident respondent's goods.

Attachment in admiralty may be of credits and effects in hands of third persons, by service of notice.

Applied in Miller v. United States, 11 Wall. 297, **20 L. Ed. 142**, holding valid, an attachment by notice in confiscation proceedings; Jones v. The Richmond, 13 Fed. Cas. 1013, holding monition to party holding property proceeded against in rem sufficient for jurisdiction.

Miscellaneous. Cited in New Jersey etc. Nav. Co. v. Merchants' Bank, 6 How. 432, **12 L. Ed. 503**, as example of maritime tort; Dole v. Merchants' etc. Ins. Co., 51 Me. 477, holding term "capture," includes piratical seizure, citing case as instance where term so used; New York Ins. Co. v. Roulet, 24 Wend. 509, holding international commissioners', award not conclusive as to rights of parties in indemnity for spoliation.

10 Wheat. 497–501, 6 L. Ed. 375, THE GRAN PARA.

Monition and not execution is proper process against one alleged to have custody of property released on admiralty stipulation to which he was not party.

Distinguished in The Elmira, 16 Fed. 137, holding order denying motion to quash execution not appealable.

Property released on stipulation, in admiralty, is subject to reseizure to satisfy decree.

Cited in United States v. Mackay, 2 Dill. 306, Fed. Cas. 15,696, holding property released on bond subject to reseizure; Braithwaite v. Jordan, 5 N. D. 256, **31 L. R. A. 260**, 65 N. W. 722, holding res being subject to seizure to satisfy judgment, admiralty stipulation is security suable in State court.

10 Wheat. 502–504, 6 L. Ed. 376, THE PALMYRA.

Appeal will not lie, except from final decree; in libel for tortious seizure, decree is not final which leaves damages still unadjudged.

Cited in Chase v. Vasquez, 11 Wheat. 430, **6 L. Ed. 511**, holding decree for damages on libel in personam not appealable until damages ascertained; Corning v. Troy Iron etc. Factory, 15 How. 467, **14 L. Ed. 775**, holding appeal would not lie from mandate before acted upon; Beebe v. Russell, 19 How. 284, 286, **15 L. Ed. 668, 669**, holding a decree with reference to master to take account and report not appealable, Humiston v. Stain-

throp, 2 Wall. 110, 17 L. Ed. 906, holding decree awarding patentee injunction with reference for accounting and report not appealable; Keystone Iron Co. v. Martin, 132 U. S. 93, 33 L. Ed. 276, 10 Sup. Ct. 32, 33, holding decree for perpetual injunction, with reference for accounting and order, not final; Postal Tel. etc. Co. v. Southern Ry. Co., 90 Fed. 212, holding judgment on demurrer in condemnation proceedings, where appointment of commission and assessment of damages remained, not final; Cohn v. Hamlet, 44 Ark. 345, holding order sustaining demurrer, dismissing complaint and directing writ of inquiry to assess damages, not appealable; Gray v. Palmer, 9 Cal. 635, holding decree accompanied with direction to take account, interlocutory and not appealable; Riley v. Farnsworth, 116 Mass. 225, holding judgment for plaintiff, for damages not yet assessed, not final and not appealable; McGourkey v. Toledo etc. Ry. Co., 146 U. S. 545, 36 L. Ed. 1083, 13 Sup. Ct. 172, holding decree containing reference for account and report, not final, so as to be disturbed at later term; McLean v. Clark, 23 Fed. 862, holding overruling of demurrer with leave to answer, not final hearing so as to entitle plaintiff to docket fee.

Distinguished in Grant v. East etc. R. R. Co., 50 Fed. 797, 2 U. S. App. 182, holding final decree dismissing auxiliary bill against original complainants, with reference to a master.

Final and interlocutory judgments and decrees. Note, 60 Am. Dec. 438.

Finality of decree adjudicating equities but reserving settlement of accounts for report of master. Note, 5 Ann. Cas. 177.

A cause cannot be divided so as to bring up distinct parts of it.

Cited in Canter v. American etc. Ins. Co., 3 Pet. 318, 7 L. Ed. 692, holding affirmance of decree for restitution and costs precluded recovery of damages.

Decree of foreclosure and sale of mortgage is final.

Cited in Tormey v. Gerhart, 41 Wis. 58, holding judgment of foreclosure and sale final.

Miscellaneous. Cited in Williams v. Delano, 155 Mass. 14, 28 N. E. 1123, holding pendency of libel, under local law for forfeiture, barred action against seizer for recovery of boat.

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CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1826.

BY HENRY WHEATON.

Counselor at law.

VOL. XI.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, Chief Justice.
The Hon. BUSHROD WASHINGTON, Associate Justice.
The Hon. WILLIAM JOHNSON, Associate Justice.
The Hon. GABRIEL DUVALL, Associate Justice.
The Hon. JOSEPH STORY, Associate Justice.
The Hon. SMITH THOMPSON, Associate Justice.
WILLIAM WIRT, Esq., Attorney-General.

MEMORANDUM.

The following proceedings of the court and bar took place on the occasion of the decease of the Honorable Thomas Todd, an associate justice of this court, who died at his seat near Frankfort, in Kentucky, about the commencement of the present term:

Feb. 21st.—This court being informed that our much respected brother and associate, Mr. Justice Todd, has departed this life,

Resolved, That we will, in testimony of our sense of his worth, and of our deep feeling at the afflicting loss we have sustained, wear crape for the residue of the term.

The court, on motion of the Attorney-General, directed the following proceedings of the bar, and officers of the court, to be entered on the minutes:

"At a meeting of the bar and officers of the Supreme Court of the United States, in the court room, on Monday, the 20th day of February, 1826, Mr. Attorney-General Wirt being called to the chair, the following resolves were proposed by Mr. Webster, and unanimously adopted:

"Resolved, That the members of this bar, and officers of the court, feel sensibly the loss which this court, and the country, have sustained in the death of the Honorable Thomas Todd, late a judge of this court.

"Resolved, That to testify their respect for the virtues and talents of the deceased, and their sense of the loss which the community has sustained by his death, the members of this bar, and the officers of the court, will wear the usual badge of mourning for the residue of the term.

"Resolved, That the Attorney-General, in behalf of the bar, and officers of the court, do respectfully move the court, that the foregoing resolutions may be entered on the minutes of its proceedings.

"WM. WIRT, Chairman."

REPORTS OF THE DECISIONS

OF THE

Supreme Court of the United States.

FEBRUARY TERM, 1826.

1°] [*Prize.]

THE MARIANNA FLORA.

The Vice-Consul of Portugal, Claimant.

In admiralty proceedings, amendments are made in the Appellate Court, not only as to form, but as to matter of substance, as by the filing a new count to the libel; the parties being permitted, whenever public justice and the substantial merits require it, to introduce new allegations and new proofs; non allegata allegare, et non probata probare.

If the amendment is made in the Circuit Court, the cause is heard and adjudicated by that court, and (upon appeal) by this court on the new allegation; but if the amendment is allowed by this court, the cause is remanded to the Circuit Court, with directions to permit the amendment to be made.

An attack made upon a vessel of the United States, by an armed vessel, with the avowed intention of repelling the approach of the former, or of crippling or destroying her, upon a mistaken suposition that she was a piratical cruiser, and without a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property, is not a piratical aggression under the act of the 3d of March, 1819, c. 75.

Nor is an armed vessel, captured under such circumstances, liable to confiscation as for a hostile aggression, under the general law of nations.

2°] *The act extends to foreign vessels committing a piratical aggression; and whatever responsibility the nation may incur towards foreign states, by executing its provisions, the tribunals of the United States are bound to carry them into effect.

Pirates may be lawfully captured by the public or private ships of any nation, in peace or in war; for they are hostes humani generis.

American ships offending against our own laws, may be seized upon the ocean, and foreign ships thus offending within our territorial jurisdiction, may be pursued and seized upon the ocean, and brought into our ports for adjudication.

But, in such cases, the party seizes at his peril, and is liable to costs and damages if he fails to establish the forfeiture.

Ships of war sailing under the authority of their government, in time of peace, have a right to approach other vessels at sea for the purpose of ascertaining their real characters, so far as the same can be done without the exercise of the right of visitation and search, which does not exist in time of peace.

No vessel is bound to await the approach of armed ships under such circumstances; but such vessel cannot lawfully prevent their approach by the use of force, upon the mere suspicion of danger.

Where an aggression was committed by a foreign armed merchant vessel, on a public armed ship of the United States, under these circumstances, and a combat ensued upon mutual misapprehension and mistake, the commander of the public ship was held exempt from costs and damages for subduing, seizing, and bringing into a port of this country for adjudication, the offending vessel.

APPEAL from the Circuit Court of Massachusetts.

The original libel filed in the District Court against the Portuguese ship Marianna Flora, and cargo, was for an alleged piratical aggression attempted or committed by the ship on the United States armed schooner Alligator, Lieutenant Stockton, commander, against the act of Congress of the 3d of March, 1819, c. 75, entitled, "An act to protect the commerce of the United States, and punish the crime of piracy." [1]

*Upon the hearing of the cause in the [*3 District Court, the judge pronounced an interlocutory sentence of restitution, and subsequently pronounced a further decree for damages, amounting to $19,675, for the act of sending in the ship for adjudication, and the consequent detention. An appeal was taken by the libelants from both decrees to the Circuit Court; and afterwards, before the hearing of the appeal, by request of the government of the United States, and with the consent of the libelants, the ship and cargo were restored to the claimants, and further *proceedings re- [*4 specting the same were abandoned. The only

1.—Which provides (sec. 1) that the president of the United States be authorized and requested to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States, and their crews, from piratical aggressions and depredations. (Sec. 2) The President of the United States is authorized to instruct the commanders of the public armed vessels of the United States, to subdue, seize, take and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas. (Sec. 3) Authorizes the merchant vessels of the United States to defend themselves against any piratical aggressions, etc., and to capture the assailant. (Sec. 4) Whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

question, therefore, litigated in the Circuit Court, was upon the point of damages, and, ultimately, a decree was there pronounced reversing the decree for damages; and this constituted the matter of the present appeal.

Pending the proceedings in the Circuit Court, leave was granted to the libelants to file a new count or allegation, in which the aggression was stated to be hostile, and with intent to sink and destroy the Alligator, and in violation of the law of nations.

The facts which were given in evidence, and relied on to support the allegations in the libel, were substantially as follows: On the morning of the 5th of November, 1821, the Alligator and the Marianna Flora, were mutually descried by each other on the ocean, at the distance of about nine miles, the Alligator being on a cruise against pirates and slave traders, under the instructions of the President, and the Portuguese vessel being bound on a voyage from Bahia to Lisbon, with a valuable cargo on board. The two vessels were then steering on courses nearly at right angles with each other, the Marianna Flora being under the lee bow of the Alligator. A squall soon afterwards came on, which occasioned an obscuration for some time. Upon the clearing up of the weather, it appeared that the Marianna Flora had crossed the point of intersection of the courses of the two vessels, and was about four miles distant on the weather bow of the Alligator. Soon afterwards she shortened sail 5*] and *hove to, having at this time a vane or flag on her mast, somewhat below the head, which, together with her other manœuvres, induced Lieutenant Stockton to suppose she was in distress, or wished for information. Accordingly, he deemed it his duty, upon this apparent invitation, to approach her, and immediately changed his course towards her. When the Alligator was within long shot of the Portuguese ship, the latter fired a cannon-shot ahead of the Alligator, and exhibited the appearance and equipments of an armed vessel. Lieutenant Stockton immediately hoisted the United States flag and pendant. The Marianna Flora then fired two more guns, one loaded with grape, which fell short, the other loaded with round shot, which passed over and beyond the Alligator. This conduct induced Lieutenant Stockton to believe the ship to be a piratical or a slave vessel, and he directed his own guns to be fired in return; but as they were only carronades, they did not reach her. The Alligator continued to approach, and the Marianna Flora continued firing at her at times, until she came within musket shot, and then a broadside from the Alligator produced such intimidation that the Portuguese almost immediately ceased firing. At that time, and not before, the Portuguese ship hoisted her national flag. Lieutenant Stockton ordered the ship to surrender, and send her boat on board, which was accordingly done. He demanded an explanation; and the statement made to him by the Portuguese master, and 6*] other officers, was, that they did not *know him to be an American ship of war, but took him to be a piratical cruiser. Under these circumstances, without much examination of the papers, or the voyage of the ship, Lieutenant Stockton determined to send her into the United States, on account of this, which he deemed a piratical aggression. She was accordingly manned and sent, with her officers and crew, under the orders of Lieutenant Abbot, into Boston.

Mr. J. Knapp, for the appellants, argued (1) upon the facts, to show that the visitation of the Marianna Flora, and her detention for examination and search, were unlawful and unjustifiable. He insisted that the Portuguese master was deceived by the omission of the Alligator to affirm her flag with a gun, according to the law and usage of the nations on the European continent.[1] He had a lawful right to resist the approach of the other vessel, until assured, beyond all reasonable doubt, of her true national character.[2] A remark of Lord Ellenborough, in an analogous case, recognizes such manœuvres as were used by the Marianna Flora, as coming within the legitimate acts of defensive resistance. He says, "defense might happen in various ways, as by making a show of confidence in the face of an enemy, with a view to deter him from an attack."[3] Upon the topics of the nature or *character of [*7 unblamable defense, and the time when forcible resistance may lawfully begin, and the extent to which it may be carried, particularly between persons belonging to different civil societies, or between vessels of different nations, on the ocean, authorities were cited from various text-writers, as applicable to the situation of the Portuguese master, and justifying his conduct.[4] It was asked if it be lawful for private ships to arm, in time of peace, for the purposes of self-protection, whether that liberty did not comprehend the right to do with force whatever, under existing circumstances of apparent peril, human instinct and natural prudence would dictate. Could the maxim that we must so use what belongs to us as not to infringe the rights of others, be inconsistent with this principle? Could it be the duty of the master of a merchant vessel armed for such a purpose, when his nation was at peace with all the world, and when the seas were infested with pirates, to suffer another armed vessel to approach him without first being satisfied of her pacific intentions? Still less was it his duty to submit to the exercise of the right of visitation and search (a right which has no existence in time of peace), in the unlawful manner in which it was attempted to be exercised.[5]

2. It was insisted that if the search and examination had been made in a lawful and deliberate manner, it must have resulted in a conviction *of the innocence of the Portu- [*8 guese ship, and her consequent immediate liberation. As, in this case, simple reparation only was sought, and not vindictive damages, it was considered sufficient to refer to the case of The Apollon, where it was laid down by this court, that, except in cases of captures jure belli, or on exemption expressly created

1.—2 Azuni, 203; 2 Wheat. Rep. Appendix, 10; 1 Code des Prises par Le Beau, 223.

2.—Puffend. l. 2, c. 3, sec. 8; 2 Rutherf. 493; 2 Azuni, 207.

3.—6 East's Rep. 202.

4.—1 Rutherf. 372–377, 398, 180; Puffend. l. 2, c. 5, s. 6, 8.

5.—2 Azuni, 205; 1 Mason's Rep. 24; The George.

by statute, even probable cause will not excuse from simple reparation.[1] But there must, in every case, be probable cause to justify the seizure.[2]

3. But it was further contended that the subsequent detention and sending in of the ship for adjudication was wholly unjustifiable, and subjected the seizor to damages. Even the harsh and unbending rules of prize law render the captors liable to costs and damages whenever the evidence of the neutrality of the ship and cargo exists on board, unless it is afterwards shown to be enemy's property, or to have been guilty of some unneutral conduct, rendering it liable to confiscation.[3] But yet there was a distinction between a right to seize and examine, and a right to capture. The right to detain and send in for adjudication did not necessarily follow from a seizure and examination, which might have been warranted by the circumstances, but which had not resulted in showing that there was any reason 9*] *to doubt the true character of the Portuguese vessel, and the innocence of her conduct. But, at all events, the misconduct of the master, supposing it to be ever so aggravated, could not affect the owners of the ship and cargo, whose agent he was for ordinary civil purposes, but not so as to subject their property to loss or injury by his unlawful acts. And for the losses accruing by the detention of the ship and cargo in port, after it was satisfactorily ascertained that they could not be proceeded against by the seizors, there was still less reason to doubt the right of the claimants to recover damages.[4]

4. The charge that the Portuguese ship had attempted, or committed, a piratical aggression or restraint, within the act of Congress, was considered as negatived by the restitution, with the consent of the captors, in the court below. Whatever might be the nature or degree of the offense meant to be defined by the act, it must be piratical; and all the authorities define piracy to be a robbery, or forcible depredation on the high seas; and they all concur, that a bare assault, without taking or pillaging something, does not constitute this crime.[5] If the act of Congress goes beyond this 10*] definition, it is not warranted *by the law of nations, and cannot give jurisdiction to the tribunals of this country over the persons and property of foreigners.

Mr. Blake, for the respondents, made three points:

1. The captors were justifiable, under all the circumstances of the case, in subduing and taking possession of the Portuguese ship.

2. They were justifiable in sending her in for adjudication.

3. There was probable cause of seizure and sending in for adjudication.

1. Even the sentence of the District Court admits that Captain Stockton was not liable to damages for the mere act of subduing and seizing the ship. She had committed a hostile and piratical aggression on a public vessel of the United States in time of peace. The learned counsel here entered into an able and elaborate argument upon the evidence, to show that the first aggression was committed by the Portuguese ship, and that it was not justified or excused by the conduct of the Alligator. It was a predetermined, deliberate, and wanton attack; not an accidental encounter, nor the result of any mistake. It was an act of private war, and the onus probandi is on the claimant to show that it was authorized by the law of nations. Admitting even that the Alligator pursued the Portuguese vessel, she had an unquestionable right to approach her in time of peace; and an attempt to exercise the right could not be construed into *an act [*11 of hostility, or warrant the use of force to prevent it. As the ocean is the common property of all nations, every nation has a right to its free use, and no one can claim the exclusive control of a larger portion than is sufficient for the purposes of its own movements. The regulations as to keeping out of cannon-shot, and sending a boat on board, are applicable only to a state of war, and to the exercise of the belligerent right of search, which, it is admitted, does not exist in time of peace. Indeed, these regulations are the creatures of conventional law, and bind those nations only between whom they are established by special treaty. But the Alligator was a public armed ship, belonging to the navy of the United States; and sent out to cruise against pirates and slave traders, under the different acts of Congress passed for the suppression of these offenders. Captain Stockton was authorized by these laws, and his instructions under them, to seize and subdue all vessels and persons offending against them, wherever they might be found. If every vessel on the ocean has a right to draw around her a magic circle, and to prevent by force the approach of all others, it is obvious that the acts of Congress must remain a dead letter, since they could not be executed without approaching sufficiently near to ascertain the probable character of the vessel. The act of heaving to, on the part of the Marianna Flora, indicated either a desire to speak the Alligator, or to get the weathergage for the purposes of annoyance; and, in either case, it was the duty *of Captain [*12 Stockton to change his course, and overhaul the Portuguese ship. But the circumstance of the hostile guns which were soon afterwards fired from the Marianna Flora, without hoisting any national flag, made it still more imperatively his duty to approach her; and had he avoided the recounter, he could not have justified his conduct to his government and his country. He had a right, then, to pursue and capture, founded upon the act of Congress, and his instructions. He was justified in considering the ship as having not only attempted, but as having actually committed, a piratical restraint and aggression, within the meaning of the act.

But, independent of the authority derived from this statute, he was justified in pursuing and subduing the aggressor, upon the more

1.—9 Wheat. Rep. 374.
2.—2 Cranch's Rep. 64, 170; 3 Cranch's Rep. 458.
3.—Wheat. on Capt. 312; App. Croke. Reply to Schlegal, 62; 2 Azuni, 212; 1 Dall. Rep. 183; 2 Wheat. Rep. 333, The Anna Maria.
4.—2 Bro. Civ. & Adm. Law, 210; 5 Rob. 40; The St. Juan Baptista, 4 Rob. 58; The Zee Star, 3 Dall. Rep. 333; 2 Wheat. Rep. App. 12.
5.—2 Woodes. 140; 2 Azuni, 351; Bynk. Q. J. Pub. Duponceau's transl. 127, note; 2 Bro. Civ. & Adm. Law, 462; 1 Sir L. Jenkins' Life, etc. 91; 5 Wheat. Rep. 161; 3 Wheat. Rep. 641.

general grounds of natural and public law. The right of freely navigating the ocean, and of self-defense, of repelling force by force, was common to both vessels. The Alligator was not bound to decline the combat by flight. In the expressive words of Baron Puffendorf, "in a state of nature, the aggressor hath no right, by which the other party is bound to decline his violence rather than oppose it; and the reason why a man, under his natural condition, sometimes chooses rather to fly than fight, is not out of any favor to him who sets upon him, but because he thinks it more convenient for his own affairs to fly, like hares, 13*] whose armor is in their feet."[1] *This doctrine has reference to the condition of man in a state of nature; and such was the condition of the parties now before the court, when upon the ocean, and waging war with each other. The vindices injuriarum were not there, and each party became of necessity his own avenger and judge. As to the Alligator not firing a gun in affirmance of her flag, it cannot surely be pretended that such an idle ceremony could give any additional assurance that she was what she pretended to be, or that the general law of maritime states requires any such ceremony. It may be the particular usage of Spain and Portugal, and it may have been adopted between some other nations as a part of the conventional law; but it has reference exclusively to a state of war, and is a mere regulation of the exercise of the belligerent right of visitation and search.

Still less can it be maintained that the Portuguese had reasonable grounds to suspect that the Alligator was a pirate, and had hostile designs upon his ship, and therefore he had a right to attack and destroy her. The analogies of the municipal law may assist to illustrate this branch of the inquiry. What degree, or what grounds of fear of bodily harm, will justify an act that may result in the destruction of human life is, in some cases, a question of great delicacy and difficulty. By the rules of the common law, the rights of the party assailed are confined within very narrow limits. The danger must be manifest, impending, and almost unavoidable. But the writers 14*] on natural law may, perhaps, on this *occasion, be more properly cited; and the following passage from Puffendorf affords the fullest illustration of the principles applicable to this subject: "Sometimes," says he, "a doubt has arisen whether, if one assault me, by mistake, without any evil design, but with intent to employ his force against another, I may kill him in my own defense. Grotius makes this clear in the affirmative. De J. B. ac P., lib. 11, c. 1, s. 2. Inasmuch as nature obliges us to maintain peace with others, it may, and ought to be presumed that everyone will fulfill this obligation, unless he give manifest evidence of contrary designs." "But now," (speaking of timely preparations for self-defense,) "though my providing thus far for my security can be injurious to none, yet, before I can actually assault another under color of my own defense, I must have tokens and arguments amounting to a moral certainty that he entertains a grudge against me, and has a full design of doing me a mischief, so that, unless I prevent him, I shall immediately feel his stroke. Among these tokens and signs giving me a right to make a violent assault upon another man, I must by no means reckon his bare superiority to me in strength and power. 'Tis a very gross way of philosophizing which some men have got, when they tell us, by way of advice: 'He that is able to hurt you, undoubtedly is willing, and therefore, without further warning, down with him.' This kind of doctrine is manifestly destructive of all social commerce among men, and the authors commonly cited in *defense of it, [*15 either are such whose character prevents their authority, or else, in the passages alleged from them they speak only of precaution in our dealing with those who have given us sufficient tokens of their resolution to hurt us."[2]

The application of these principles to the case now in judgment, is too plain to require illustration, and seems to leave no doubt that the respondents are fully justified as to the act of subduing and capturing the appellant's ship.

The counsel also commented upon a passage from Albericus Gentilis, which had been relied on by the learned judge of the District Court as supporting his decree, but which, it was contended, had been misunderstood; and, at all events, was but the opinion of a private individual against the solemn judgment of a court of justice in a case analogous to that now in discussion.[3]

1.—l. 2 c. 13, s. 14.

2.—Puffend. l. 2, c. 5, s. 6.

3.—Albericus Gentilis, Hispanicæ Advocationis, c. 27.

Albericus Gentilis is justly regarded as one of the founders of the modern law of nations. He was born in the March of Ancona, in the year, 1550, and left Italy with his father, an eminent physician, who was obliged to fly from that country on account of his religious opinions. The son afterwards established himself in England, where he obtained a chair of professor of the civil law at Oxford, in 1582, and died at London in 1608. His works are: De Jure Belli, in three books; De Criminæ Lesæ Majestatis; De Nuptiis; Comment. ad. L. 3; Cod. de Professoribus et Medicis; and the work above referred to, Hispanicæ Advocationis, which is a collection of opinions given by him as the counsel of Spanish claimants in the English courts of prize, and may be considered as the earliest reports of adjudged cases of maritime law. Moreri, Dict. "Albericus Gentilis," says Sir James Mackintosh, "was certainly the forerunner of Grotius. The opinion entertained, at the time, of the difference between them, will be seen in the following words of Zouch, the pupil and successor of Gentilis at Oxford: 'He chiefly followed Albericus Gentilis, and Hugo Grotius, of whom the former justifies all his positions by authorities of law, the latter tried his doctrines by the test of reason.'" Edinb. Rev. Vol. XXVII. No. 53, art. 9.

Singular mutability of human opinions! Nearly all the writers cited by Gentilis are now forgotten; he himself is hardly known except by name; even Grotius is little read, and, however extensive the effects of his great work on his own age, it is now considered as resting more on the authority of the innumerable writers of every age and nation cited by him, than on original principles, or the deduction of reason.

The editor has supposed that the following translation of the passage from Gentilis, above referred to, would not be unacceptable to the reader;

"Concerning an English vessel which fought with a Tuscan, and was taken.

"An English ship was captured by a Tuscan, after an engagement, and confiscated. The Florentine judges state, as the ground of this decree, that the English ship was the aggressor, and that the Florentine acted only in necessary defense.

16*] *2. The captors were equally justifiable in sending her in for adjudication. It was 17*] the exercise *both of a right and a duty. Taking it for granted, that there was a right to 18*] subdue, and to capture, *the right to send in for adjudication follows as a corollary. The 19*] right to seize depended upon *the fact of the offense committed by the captured vessel. The captors had no authority to apply the law to the fact, to sit in judgment upon the case, and to inflict summary justice on the offender. Still less could the commander of a public ship be expected to assume the responsibility of suffering the offender to escape. It was apparently a piratical, or, at least, a hostile aggression against the law of nations, which had been committed upon a public vessel of the United States. It is not essential to constitute the piratical restraint and depredation which is meant to be punished by the act of Congress, that there should be an intent to rob or plunder. Any wanton attack on a vessel, on the high seas, and especially an attack with an intent to sink the vessel, and destroy the lives of the officers and crew, is clearly within the letter and spirit of the act. If a homicide had been occasioned by this aggression it could not be considered as justifiable or excusable, upon the principles of the criminal code of this, or any other civilized country; and not being justifiable or excusable, it would be a *case of murder, and if a case of mur- [*20 der, of piratical murder. Now, if the act attempted to be done would have been piratical, the attempt also was piratical. It may, indeed, be said that the act of Congress is broader than the rule of international law on this subject; that, by the law of nations, an attempt to commit a piracy is not a piracy; and, therefore, the detention and sending in for adjudication was unlawful. Supposing this to be so, argumenti gratia, still the judicial tribunals of this country are bound to protect the officer who acts under it, and in obedience to it. This very question of an apparent collision between the law of nations and a municipal ordinance, was presented to the mind of that great man who presides in the British High Court of Admiralty, in the memorable case of the orders in council, and disposed of without hesitation or

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With submission, your honors, I will reply that your premises are void of probability, your conclusion of truth. For instance; he is presumed the aggressor, who supposed himself injured; in such a case, where it is a question of intention, opinion is sufficient. The Tuscan may have supposed himself injured by the commerce of the English with the Turks. Therefore, the Tuscan, not the Englishman, was the aggressor. Again; he is presumed the aggressor who lies in wait, in arms. Such was the case of the Tuscan, who (as appears from what he had done to other vessels of ours) was cruising for our merchantmen in that trade. Again; he is presumed the aggressor, who is superior in strength. And who does not see the Tuscan vessel of war was stronger than our merchantman? Again; he is presumed the aggressor, who, being armed, is accustomed to conflicts. Does this character also suit the merchantman, or, rather, the cruiser? Finally; he is presumed the aggressor, who, under the circumstances already stated, conquers. And which is he? Why do we ask? The decree of condemnation declares that the Tuscan first fired twice on the Englishman.

"Again: Did not the Tuscan begin the battle? He is considered as beginning who has provoked to the battle, to hostility; and he is considered principal in the crime, with whom the malice began, and to him, as the aggressor, are justly imputed the consequences. And will those judges tell me that it is a practice and sign of amity to fire once and again? It is the custom of a ship of war hailing another vessel, and assuming this authority. The Tuscan vessels practiced this at that time, and in other cases. Then, the defense of the English was against a claim of authority —against threats. The object of the Tuscans was to search our ship, as appears from their transactions with others; they came, therefore, to interrupt our navigation, to intercept our commerce, as appears from what they did with others. Deeds declare the intention. The deed of the Tuscans was unlawful, if a huntsman cannot lawfully enter another man's farm without the owner's permission; if it is unlawful to injure an enemy, in a neutral territory, and if territory in this respect differ not from jurisdiction. Neither shall the custom above alluded to (if ever anywhere so received) be now obtruded upon me as a law of the sea relative to the power of ships of war; for, although the custom may be admitted on the shores of the prince to whom the vessel belongs, it cannot in other seas. Nor let us regard the opinion of those customary jurists, but adhere to those who proceed on general principles." They teach that "The defense of the English was just, fearing an attack. And the bare preparation of another against one giving me a right to assault and slay him. In fact, I am not obliged to wait till I am assailed. I have a right to commence. This is the opinion more favorable to humanity, and proved from facts on trial, and is also confirmed by all the writers. 'We must go to meet the assault, say they, not only that which actually exists, but that which may take place.'

"The defense of the English was justifiable even on the behalf of the Turks, who were to suffer injury from the Tuscans in our ship. For an injury is done to us, which is done to another in our house; and a ship is compared to a house. So, an injury done to a fellow-trader, is done to us. It was, therefore, commendable for us to defend those whom we had undertaken to carry Nay, we ourselves were entitled to be spared, although carriers" of enemy's property, simply as such "should not be so entitled. It was still necessary for us to defend ourselves, through fear lest we should suffer, by being confounded with the Turks, and by a wish to save our own property. Thus, in a case still harder to defend, Cravetta held, when a city shut its gates on its lord, through fear of being ravaged, and for the sake of preserving its property, and in order that, with a few guilty, the remaining innocent might not be confounded.

"If, then, it was a defense of ourselves, and a just defense, the attack of the Tuscans must have been unjust. But, grant that their attack was just. Certainly, in the doubtful conflict of just attack, and just defense, everyone will think the defense entitled to favor. There are all degrees of just, equitable and favored, and that which is more just is to be preferred to that which is less so. But, grant that the assault was on our side, and that it was unjust. Shall a stipulated surrender avail us nothing? They are not regarded as captured, who have surrendered, even from extreme necessity.

"But, grant that they were captured, are persons and property captured the perquisites of the captor? On this supposition, there is a kind of war between us and the Tuscans, and this a battle between enemies, which, therefore, must be adjudged by the public rules of war, and not those of pirates and murderers. The most learned Alciati is to the contrary, and the plainest law teaches that neither captured persons nor goods accrue to the captor.

"But, grant that captured goods do accrue to the captor: the goods, in this case, did not belong to the combatants; and the deed of these mariners must not prejudice the owners. The mariners are not to be understood to have done wrong by the order of the owners; nor the latter to have given orders otherwise than according to mercantile usage. 'The owners must not suffer, although the mariners should say they had acted according to orders.'

"See how, even in the liberal concessions I have made in the defense, the mariners would hardly be responsible, the owners not at all. But, since the defense of the mariners was on every principle just, what follows but that the Tuscans should restore to us, as to persons plundered, everything taken away, with damages, costs, interest, profits, etc., to the last farthing?"

difficulty, upon the plain and intelligible ground that he could not presume the prize ordinances of his own country to be repugnant to the law of nations.[1]

But, supposing it not to be a piratical aggression, or an attempt to commit one, still it was an act of deliberate, wanton, flagrant hostility, committed against the laws of nations, and the rights of this country as one of the community of nations. For such an offense there must be some punishment, and the appropriate penalty inflicted in analogous cases is that of confiscation. Thus, in the case of 21*] The Anne,[2] this court condemned, *as prize of war, enemy's property taken within neutral jurisdiction, upon the ground that the captured vessel had made the first attack upon the captor, and, by this act of aggression on the other belligerent, had disturbed the state of peace which is always supposed to exist in a neutral port.

3. There was probable cause, such as will exempt the captors from damages. Probable cause is, where a seizure is made under circumstances which warrant suspicion, and upon evidence less than that which would justify condemnation.[3] No case can be shown where a court of the law of nations has decreed damages merely for bringing in for adjudication, if the original seizure was justifiable, unless under peculiar circumstances not affecting the principle, or its application to the present case. The learned counsel here cited and classified all the cases to be found in the English books, where damages had been given or refused; and deduced from them the general inference, that wherever there is probable cause for the original seizure, the captors are only liable to make simple restitution, even if upon adjudication it turns out that their suspicions were groundless.[4]

*As to the decision of this court in [*22 Murray v. The Charming Betsey,[5] it is affirmed by Mr. *Dallas, arguendo, as a general [*23 principle of maritime law, that probable cause will justify a marine seizure, is not denied by the opposite counsel, and is impliedly conceded by the court in its judgment, the whole scope of which goes upon *an inference of [*24 fact from the evidence, that there was not probable cause of seizure, showing that if there had been, damages would not have been given. In Little v. Bareme,[6] the court did not deem it necessary to determine whether the probable cause afforded by the conduct of the captured vessel to suspect her of being an American, would exempt the captors from damages, because it was of opinion that had she been so, the seizure would still not have been warranted by the law. And the case of Maley v. Shattuck[7] was the application of the ordinary principle of the Prize Court, that if the seizure is without probable cause, the captors are liable to make restitution, with costs and dam-

1.—Edw. Adm. Rep. 311, The Fox.

2.—8 Wheat. Rep. 435.

3.—7 Cranch's Rep. 348; Locke v. United States.

4.—The three classes of cases affecting this question, are, (1) Where damages have been given or refused on restitution. (2) Where compensation has been given, or refused, the prize being lost in the hand of the captors. (3) Where, although restitution was decreed, the captors have been allowed their costs and expenses.

1. In the Cortier Maritimo, 1 Rob. 287, demurrage was given for unnecessary detention, and unjustifiable delay in proceeding to adjudication. In The Zee Star, 4 Rob. 71, demurrage was given to the claimants, and costs and expenses refused to the captors (which are usually allowed even on restitution), for improper delay in proceeding to adjudication. In The Triton, 4 Rob. 78, costs and damages were given to the claimant of the goods, and demurrage for the ship, for seizure on an insufficient ground. In The Madonna del Burso, 4 Rob. 169, all the circumstances concurred of a seizure originally unjustifiable, protracted detention, and improper delay in proceeding to adjudication; costs and damages were given. The Peacock, 4 Rob. 185, was the case of an unjustifiable detention of the prize vessel, carried into Lisbon, and delay in bringing her home to England for adjudication. The Wilhelmsburg, 5 Rob. 143, demurrage allowed, and the expenses of the application given against the captors, for loss arising from his not bringing the captured vessel to the most convenient port for adjudication, within the meaning of the prize act. In The Zacheman, 5 Rob. 152, which was a mistake as to the law of contraband under the Swedish treaty, and the seizure was pronounced perfectly justifiable, demurrage was allowed for unreasonable delay. The Anna, 5 Rob. 332, was a case of restitution, with costs and damages, for a violation of the neutral territory of the United States. The seizure itself was pronounced to be unjustifiable, and costs and damages were given because the prize ship was improperly brought from the mouth of the Mississippi to England for adjudication, instead of being carried into one of the West India Islands. In The Washington, 6 Rob. 275, damages were given for bringing the vessel to an inconvenient port. The Acteon, 2 Dods. 48, was an American ship sailing under a license, unlawfully seized and burnt. The St. Antonio, Acton, 113, was sailing under a license to enter the port of Holland, but was seized under suspicion of an intention to go to a French port. On bringing in, the captors offered to liberate on payment of their expenses, but afterwards retracted, and went on to adjudication. There was a decree of restitution, and the claimants appealed to the lords for costs and damages; the appeal was rejected, and the claimants condemned to pay the costs of the appeal. In The Catharina Elizabeth, Acton, 309, costs and damages were given by the lords for carrying the captured vessel to an inconvenient port. In The Louis, 2 Dods. 210, damages were refused by Sir W. Scott, although he held the seizure clearly illegal, it being a case of the first impression.

II. The rule on the subject of compelling the captors to proceed to adjudication, where the property is lost in their hands, is, that where the seizure is unjustifiable, the captor is answerable for every loss or damage. In cases of justifiable seizure, he is responsible for due diligence only, and is held to simple restitution in value.

The Carolina, 4 Rob. 255, was a neutral ship which had been employed in carrying French troops to Egypt, and was taken coming away. Had she been taken in actual delicto, she would have been liable to condemnation. The captors were held exempt, not only from costs and damages, but from restitution in value, the ship having been lost while in their possession by stress of weather. In The William, 6 Rob. 316, the original seizure was held justifiable, but restitution in value was decreed for a loss occasioned by not taking a pilot on board, but no damages were given. In The Der Mohr, 3 Rob. 129, the original seizure was considered as justifiable, but the captors were held responsible to make restitution in value (not for costs and damages) on account of the loss of the vessel by the ignorance and wilfulness of the prizemaster.

III. In general, the captors are allowed their expenses and costs on restitution, whenever there is probable cause of capture. The Imina, 3 Rob. 167: The Principe Edw. 70. The only exceptions to this rule are where there has been some negligence or misconduct on the part of the captors. There are a great number of cases on this head, which it was deemed unnecessary to cite.

5.—2 Cranch's Rep. 116, 122.

6.—2 Cranch's Rep. 169.

7.—3 Cranch's Rep. 458.

ages, even if the property be lost without their fault; evidently implying that if there had been probable cause for the original seizure, they would not have been so liable.

Mr. Webster, on the same side, entered into a minute examination of the evidence, in order to show that the party, who was in fact the wrong-doer, and the aggressor, now appeared before the court in the character of a plaintiff, seeking redress for a supposed injury done to himself. It had been said that the owners of the ship, and of the cargo, were not to be held responsible for the misconduct of the master. There were two answers to this objection: (1) That it was not the captors who were 25*] seeking *to punish the owners, but the owners who were seeking compensation against the captors for the consequences of the misconduct of their own agent. (2) That the universal principle, applied by courts administering the law of nations, was to consider the thing taken in delicto, as responsible, whether it was the property of the master or of others. In cases of blockade, of contraband, of carrying enemy's property with false papers, of resistance to visitation and search, he is considered as the agent of the owner both of ship and cargo. So, also, the revenue laws, from the necessity of the case, regard him in that character, and subject the vessel and goods under his control to confiscation for his unlawful acts. In every case, until the innocent are separated from the guilty, until examination and regular adjudication can be had, the law is compelled to regard the ship, and everything on board, as belonging to the master.

It had also been contended that, though the original seizure might be justifiable, the captors were liable in costs and damages for not releasing the vessel after she was subdued and seized. But it was not pretended that Captain Stockton had authority to punish her himself; and, therefore, unless the Portuguese ship had, notwithstanding all that had happened, a clear right to go off with impunity, he had an unquestionable right to send her in for adjudication. If she had a right to pursue her voyage, she would have had the same right if the consequences of her aggression had been ever so calamitous; if she had 26*] *crippled the Alligator and destroyed half her crew. The actual consequences being less serious, do not affect the right, though they may the exercise of discretion. But we have nothing to do here with the question of military discretion. The captured vessel had made war. She had committed what was, prima facie, a piratical restraint and depredation. If unexplained, it was piracy. Whether it could be satisfactorily explained, or excused, was a question to be decided by the civil tribunals. It was not too much to say that the captors had here something of a belligerent right. The act of Congress was not a mere municipal law; it was a prize ordinance. The seizure was not a mere municipal seizure. War against pirates existed, and the act was intended to define who should be treated as pirates. And, even if the court should now be of opinion that the captured vessel ought not, under all the circumstances, to be sent in, still the question recurs, whether Captain Stockton might not, at that time, have thought otherwise. He was called on, suddenly, to decide and act on a question full of difficulties, and which has occasioned no little embarrassment to the civil tribunals, with all the advantages of a deliberate examination. Even with these advantages, the learned judges of the courts below have differed in their judgments upon it; and yet, it is now contended that this naval commander was bound to be better instructed in the laws than those whose peculiar duty it is to study and expound them. Upon these grounds it was that Sir W. Scott *determined, in the [*27 case of The Louis,[1] that it being a case primæ impressionis, the captors were exempt from costs and damages, although the court was clearly of opinion that the seizure itself was unjustifiable, a right to search not existing in time of peace. A doubt respecting the true construction of the law, is as reasonable a ground for seizure as a doubt respecting the fact.[2] But, here was doubt respecting both fact and law, and that doubt is not yet cleared up. The capture was made in repelling what appeared, at the time, to be an act of piratical aggression. It has turned out not to be so, after a judicial examination. But the question is, what it appeared to be recenti facto. It cannot be maintained that an habitual course of piratical depredation is necessary to constitute the offense of piracy. A single act of piratical aggression, stimulated by revenge, or national prejudice, or wanton cruelty, would be sufficient. The act of Congress evidently supposes it, and is in conformity with the public law.

It had also been argued that this was a municipal seizure, and that the vessel having been restored without a certificate of probable cause, costs and damages followed as a matter of course. But it was insisted that municipal seizures are for offenses within our own territorial jurisdiction, or by our own citizens elsewhere. Here, the proceedings are under the law of nations; and, if found guilty, the property would be condemned, *not for a [*28 municipal offense, but as prize, and distributed as prize. And, even if it had been a municipal seizure, it could not be admitted that such consequences would necessarily follow in every case, without regard to its circumstances. The true principle applicable to seizures of every kind was, that the party having a right to cruise, and bring in some vessels, if others so conduct as to give themselves the character of those who are liable to capture, they would be entitled to nothing but simple restitution. This is laid down in clear and satisfactory terms by Sir W. Scott: "The natural rule is, that if the party has been unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before deprivation took place; technically speaking, he is entitled to restitution with costs and damages. This is the general rule; but, like all other general rules, it must be subject to modifications. If, for instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture; if he has, by his own conduct, in some degree contributed to the loss; then he

1.—2 Dods. Rep. 210, 264.
2.—5 Cranch's Rep. 311.

is entitled to a somewhat less degree of compensation—to what is technically called simple restitution."[1]

Mr. Emmett, for the appellants, in reply, argued that the second count in the libel filed in the Circuit Court, charging a hostile aggression, was inadmissible, as the original subject-29*] matter *of the suit was originally cognizable in the District Court (where the ship and cargo had been acquitted from the original charge of a piratical aggression), and to allow such an amendment would be to institute an original, and not an appellate proceeding, in the Circuit Court.

The appellants were entitled to damages as claimed. The capturing vessel derived her right under the municipal law. The piracy alluded to in the act of Congress is sea robbery. It is an act to protect commerce; and the history of the times shows that the great evil to be remedied was the system of depredations on the ocean. They were, indeed, frequently accompanied with murder, and various other enormities. But these were only subservient to the system of plunder, and intended only to facilitate or conceal the crimes of the offenders. The piracy referred to is, that by the law of nations, and not by any peculiar law of the United States.[2] And, even if our statutory piracy had been contemplated in this act, it would not apply to the present case. The crimes act of 1790 defines the piracy created by that statute to be "murder, or robbery, or any other offense which, if committed within the body of a county would, by the laws of the United States, be punishable with death." Now, as the firing by the Portuguese did no mischief, no offense was committed which, if committed on land, would be punishable 30*] with *death. Besides, it has been determined that this section of the crimes act does not extend to foreign vessels.[3] For the purposes of this case, then, if not for the purposes of every case, it may be assumed that the piratical aggression mentioned in the act of the 3d of March, 1819, c. 76, must be with intent to rob or plunder. Nor can the act affect the antecedent rights of other nations. It did not, and could not, create a state of war. Pirates are, indeed, called hostes humani generis; but the use of such metaphorical language is often calculated to mislead, and to confound our ideas of legal rights. They are, indeed, public offenders, like the highway robber, but they are not public enemies so as to give those who cruise against them any of the rights of war in respect to the subject of friendly states who are not involved in their guilt. The act could not give to our own ships the right of visitation and search, or any other belligerent rights, so far as respects foreign nations. It could not affect the pre-existing right of Portuguese subjects to maintain for themselves the privileges of a state of peace. Its utmost effect would be to impose on vessels of this country the obligation to submit to examination, and the seizures it authorizes must be regarded as strictly municipal. The commissioned vessel must, therefore, act on credible information, or on evidence it has of acts of piracy. A claim to examine *or detain vessels of another nation on [*31 suspicion, without information or evidence, would be as large as the belligerent right of search, though under another name. If the commissioned vessel acts against a foreign vessel, it acts at its own peril, and (more especially when it acts without information or evidence) must abide the consequences as to damages if it has acted erroneously. In captures jure belli, if there be probable cause, the captors are entitled, as of right, to an exemption from damages; but in case of a municipal seizure, there must be some provision of positive law creating and defining the exemption. The party who seizes does it at his peril; if condemnation follows, he is justified; if an acquittal, then he must make compensation, unless he can protect himself under some statute.[4]

It has been said, that under this construction, the act would become a dead letter. The same was said in the case of The Louis, and the answer of Sir W. Scott to the objection is conclusive and pertinent to the present case

But the objection is unfounded. The dangerous pirates are, for the most part, not difficult to distinguish. Their haunts, their habits, their appearance, point them out; and though the commissioned officer acts at his own risk, yet if he acts on those indicia, and on information and evidence, and stays his hand where he can find no trace or evidence of guilt, he incurs no real danger *of being [*32 liable to damages; and, in any event, may rely on the justice and liberality of his own government for protection. This is also the doctrine of the municipal law in analogous cases on land, both criminal and revenue proceedings.

One of the privileges of a state of peace, which the Portuguese have still a right to maintain for themselves, is the benefit of the principle that on the high seas the merchantman is equal to the man-of-war. Each may protect itself according to its sense of expediency and necessity, and resist the doing of anything by the other, as a right, which is not a right. If the man-of-war has no right to examine, the merchantman has a right to resist that examination. Even in war, a vessel navigating the ocean may, to a certain extent, draw a line of jurisdiction around itself. This is proved by the restrictions put on the right of scarch. It is said, indeed, that these are the result of treaty stipulations. But they are the result of a true interpretation of the law of nations, and have been recognized in treaties, because England had practically violated the right. A fortiori, in time of peace may every vessel draw a circle of jurisdiction around itself, and resist the exercise of that search and visitation which is not lawful in time of peace. It is upon this ground that Sir W. Scott held the doctrine, that if a neutral resist search, not knowing of the existence of a war, it is no ground of condemnation;[5] and that still more recently he has determined *that the [*33 right of visitation and search does not exist,

1.—The Acteon, 2 Dods. Rep. 48.
2.—United States v. Smith, 5 Wheat. Rep. 153; United States v. The Pirates, 5 Wheat. Rep. 184.
3.—United States v. Palmer, 3 Wheat. Rep. 610; United States v. Clintock, 5 Wheat. Rep. 144.
4.—The Apollon, 9 Wheat. Rep. 372.
5.—The St. Juan Baptista, 5 Rob. Rep. 36.

and cannot be exercised in time of peace.[1] Every ship navigating the ocean in time of peace may appropriate to her temporary use so much of it as is necessary to her protection, consulting the equal rights of others. It is a right that will lie dormant, and never be exercised except upon real apprehension. When there is no apprehension of danger, the consent to approach will never be withheld. But the right to approach in invitum can never exist; and, both parties being independent and equal, each party is to judge for himself as to the extent and reality of that danger. Unless this exclusive right of judgment is maintained, the approach of pirates could never be prevented, who frequently assume the flag of public ships, and fall upon their victims under this disguise.

The learned counsel here argued upon the evidence to show that upon a just application of these principles, the conduct of the Marianna Flora was perfectly justifiable. The first fault was committed by the Alligator in chasing, and not affirming her flag with a gun. This is the law of nations, and recognized as such by every maritime nation on the continent of Europe. The language of Azuni on this subject is peculiarly appropriate to the present case. He says "the fear of meeting with a pirate, and being the dupe of deceitful appearances, 34*] is the reason why *no credit is given to the flag of a vessel, though a ship of war."[2] Had the flag been affirmed, in this instance, in the manner to which the Portuguese are accustomed, they would not have resisted the attempt to approach their vessel, and all the present consequences would have been avoided.

They might also have been avoided, by that deliberate and impartial examination which it was Captain Stockton's duty to make, before he decided on sending in the ship for adjudication. It would have been his duty, even in war, to examine faithfully the ship's papers, and pay due respect to the evidence produced.[3] But it is said that the usual documentary evidence would prove nothing, since it was not a question of proprietary interest or neutral character. The answer is, that the ship's papers would have shown that the vessel, whom he treated as a pirate, was an innocent merchantman; and that the cargo was not liable, by the act, to confiscation, even if the vessel had been guilty of a piratical aggression. The 4th section of the act only subjects the vessel or boat to confiscation, and even that must be understood with the implication that they are the property of the wrongdoers; for the master can never be considered as the owner even of the ship, so as to subject it to forfeiture for his criminal acts, much less can he be considered as the owner of the cargo for such a pur- 35*] pose. *In the words of this court, it may be said that "however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature has authority and jurisdiction."[4]

Nor can it be maintained that here was an act of private unauthorized war committed by the Portuguese, which, being a violation of the law of nations, would subject the vessel, if taken in delicto, to confiscation. Private war never gives the right of capture and confiscation.[5] That belongs to public war alone. In time of war, every violation of belligerent rights is followed by condemnation, because it is considered as evidence of enemy's property, which, by the laws of war, is transferred to the capturing power. But in time of peace, to make every violation of the law of nations, however slight, produce the condemnation of property, however valuable, and belonging to innocent persons, would reduce the law of nations to the sweeping severity of Draco's code.

In this case, the sending in for adjudication has been sought to be justified by hypothetical reasoning, grounded upon the supposition that lives might have been lost; and a learned discussion of the municipal law of homicide was entered into, to show that if any of the Alligator's crew *had been killed, it would [*36 have been murder; and then it is asked, whether it would not have been Captain Stockton's duty to send it for trial, for what would have been clearly piracy. But we are to deal with the case as we find it. No lives were, in fact, lost; no injury done to the vessel. It was nothing but the offense of firing and in self-defense, against a vessel that turned out to be a public ship of war, but which did not at first manifest her character in the mode to which the Portuguese had been accustomed. Was it possible to suppose that such an act could produce the confiscation of the cargo belonging to innocent owners, or of the ship, the owner of which was equally innocent? It was at most a marine trespass, cognizable in the courts of the offender, because it was not a case of war, nor to be determined by the law of war; or if there were a doubt whether there was anything of national insult in it, it might be a fit subject to be represented to this government for diplomatic discussion. But, after the ship and cargo were brought in, and it was ascertained that she could not be subjected to confiscation, why were they detained and proceeded against as if captured jure belli? Here are a series of wrongs, for which they who suffer damage must look for compensation to him whom the law considers as the wrong-doer, although many of them were the acts of his agents, and done in his absence. They do not seek vindictive damages, but simple compensation only.

The long list of cases which *has been [*37 arrayed against us cannot furnish a rule for a seizure, which was not made jure belli, but which (if to be justified at all) must be considered as having been made in execution of a municipal statute. Will probable cause, even if it existed, furnish a defense in such a case? That is not the law of Hoyt v. Gelston,[6] which was a seizure under an act of Congress, and where there was probable cause, though it was not certified by the court according to the statute. Is it the law of any case where the wrong-doer acts under municipal laws on his own responsibility? Is it the law to be collected from the cases of The Acteon,[7] of Murray v.

1.—The Louis, 2 Dods. Rep. 210.
2.—2 Azuni, 204, 602, c. 3, s. 3.
3.—The Anna Maria, 2 Wheat. Rep. 327; 2 Azuni, 212, s. 8.
4.—The Appollon, 9 Wheat. Rep. 370.
4.—Stewart's Vice-Adm. Rep. 301.
5.—13 Johns. Rep. 141, 561; 3 Wheat. Rep. 246.
6.—2 Dods. Rep. 48, 52.

The Charming Betsy,[1] of Little v. Bareme,[2] of The Jeune Eugenie,[3] or even of The Louis?[4] In the last case, indeed, damages were refused, because it was primæ impressionis—a case of some doubt and difficulty as to the new construction of the law of nations, and the application of the French decree respecting the slave trade, and the parties seeking damages were stained with crime. But here the law is old, and well settled; and nothing but the offense is of novel impression. The parties are innocent; and the very novelty of the offense ought more certainly to secure its punishment.

Mr. Justice Story delivered the opinion of 38*] the *court, and after stating the pleadings, proceeded as follows:

An objection, which is preliminary in its nature, has been taken to the admissibility of this new count to be libel, filed in the Circuit Court, upon the ground that the original subject-matter was exclusively cognizable in the District Court; and to allow this amendment would be to institute an original, and not an appellate inquiry in the Circuit Court. But the objection itself is founded on a mistaken view of the rights and authorities of appellate courts of admiralty. It is the common usage and admitted doctrine of such courts, to permit the parties, upon the appeal, to introduce new allegations, and new proofs, non allegata allegare, et non probata probare. The courts of the United States, in the exercise of appellate jurisdiction in admiralty causes, are, by law, authorized to proceed according to the course of proceedings in admiralty courts. It has been the constant habit of the circuit courts to allow amendments of this nature in cases where public justice, and the substantial merits, required them; and this practice has not only been incidentally sanctioned in this court; but on various occasions in the exercise of its own final appellate jurisdiction, it has remanded causes to the Circuit Court, with directions to allow new counts to be filed. We may, then, dismiss any farther discussion of this objection, and proceed to the main questions in controversy. [Here the learned judge recapitulated 39*] *the facts of the case as they have been before stated.]

In considering the circumstances, the court has no difficulty in deciding that this is not a case of a piratical aggression, in the sense of the act of Congress. The Portuguese ship, though armed, was so for a purely defensive mercantile purpose. She was bound homewards with a valuable cargo on board, and could have no motive to engage in any piratical act or enterprise. It is true, that she made a meditated, and, in a sense, a hostile attack, upon the Alligator, with the avowed intention of repelling her approach, or of crippling or destroying her. But there is no reason to doubt that this attack was not made with a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property. It was done upon a mistake of the facts, under the notion of just self-defense, against what the master very imprudently deemed a piratical cruiser. The combat was, therefore, a combat on mutual misapprehension; and it ended without any of those calamitous consequences to life which might have brought very painful considerations before the court.

It has, indeed, been argued at the bar, that even if this attack had been a piratical aggression it would not have justified the capture and sending in of the ship for adjudication, because foreign ships are not to be governed by our municipal regulations. But the act of Congress is decisive on this subject. It not only authorizes a capture, but a condemnation in our courts, for *such aggressions; and [*40 whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that courts of justice are bound to obey and administer them.

The other count, which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle that, for gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so in ordinary cases of property taken in delicto, it is not, therefore, to be admitted that every offense, however small, however done under a mistake of rights, or for purposes wholly defensive, is to be visited with such harsh punishments. Whatever may be the case, where a gross, fraudulent and unprovoked attack is made by one vessel upon another upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults, or common negligence. It may be just, in such cases, to award to the injured party full compensation for his actual loss and damage; but the infliction of any forfeiture beyond this does not seem to be pressed by any considerations derived from public law.

Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war. And a piratical *aggression by an armed [*41 vessel sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations. But every hostile attack, in a time of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defense, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or it may be without just excuse, and then it carries responsibility in damages. If it proceed farther, if it be an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer.

These latter ingredients are entirely wanting in the case before us; and, therefore, if the question of forfeiture were now in judgment, we should have no doubt, either upon the act of Congress, or the general law, that it ought not to be enforced.

But in the present posture of this cause, the

1.—2 Cranch's Rep. 125.
2.—2 Cranch's Rep. 170.
3.—2 Mason's Rep. 409, 439.
4.—2 Dods. Rep. 210.

libelants are no longer plaintiffs. The claimants interpose for damages in their turn, and have assumed the character of actors. They contend that they are entitled to damages, first, because the conduct of Lieutenant Stockton, in the approach and seizure of the Marianna Flora, was unjustifiable; and second, because, at all events, the subsequent sending her in for adjudication was without any reasonable cause.

42*] *In considering these points, it is necessary to ascertain what are the rights and duties of armed, and other ships, navigating the ocean in time of peace. It is admitted that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true that it has been held in the courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, sic utere tuo, ut non alienum lædas.

It has been argued that no ship has a right 43*] to *approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems *indispensable for [*44 the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach or to impede them in their lawful commerce. On the other hand, it is clear, that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers; either as to delay, or the progress or course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is, whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. There is no pretense to say that he committed the first aggression. That, beyond all question, was on the part of the Marianna Flora; and her firing was persisted in after the Alligator had hoisted her national flag, and, of *course, held out a signal of her [*45 real pacific character. What, then, is the excuse for this hostile attack? Was it occasioned by any default or misconduct on the part of the Alligator? It is said that the Alligator had no right to approach the Marianna Flora, and that the mere fact of approach authorized the attack. This is what the court feels itself bound to deny. Lieutenant Stockton, with a view to the objects of his cruise, had just as unquestionable a right to use the ocean as the Portuguese ship had, and his right of approach was just as perfect as her right of flight. But, in point of fact, Lieutenant Stockton's approach was not from mere motives of public service, but was occasioned by the acts of the Marianna Flora. He was steering on a course which must, in a short time, have carried him far away from her. She lay to, and showed a signal ordinarily indicative of distress. It was so understood, and, from motives of humanity, the course was changed, in order to afford the necessary relief. There is not a pretense in the whole evidence that the lying to was not voluntary, and was not an invitation of some sort. The whole reasoning on the part of the claimants is, that it was for the purpose of meeting a supposed enemy by daylight, and, in this way, to avoid the difficulties of an engagement in the night. But how was this to be known on board of the Alligator? How was it to be known that she was a Portuguese ship, or that she took the Alligator for a pirate, or that her object in laying to was a defensive operation? When the

46*] vessels *were within reach of each other, the first salutation from the ship was a shot fired ahead, and, at the same time, no national flag appeared at the mast-head. The ship was armed, appeared full of men, and, from her manœuvres, almost necessarily led to the supposition that her previous conduct was a decoy, and that she was either a piratical vessel, or, at least, in possession of pirates. Under such circumstances, with hostilities already proclaimed, Lieutenant Stockton was certainly not bound to retreat; and, upon his advance, other guns, loaded with shot, were fired, for the express purpose of destruction. It was, then, a case of open, meditated hostility, and this, to, without any national flag displayed by the Portuguese ship, which might tend to correct the error, for she never hoisted her flag until the surrender. What, then, was Lieutenant Stockton's duty? In our view it was plain; it was to oppose force to force; to attack and to subdue the vessel thus prosecuting unauthorized warfare upon his schooner and crew. In taking, therefore, the readiest means to accomplish the object, he acted, in our opinion, with entire legal propriety. He was not bound to fly, or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate. To have hesitated in what his duty to his government called for on such an occasion, would have been to betray (what 47*] no honorable *officer could be supposed to indulge) an indifference to its dignity and sovereignty.

But it is argued that Lieutenant Stockton was bound to have affirmed his national flag by an appropriate gun; that this is a customary observance at sea, and is universally understood as indispensable to prevent mistakes and misadventures; and that the omission was such a default on his part, as places him in delicto as to all the subsequent transactions. This imputation certainly comes with no extraordinary grace from the party by whom it is now asserted. If such an observance be usual and necessary, why was it not complied with on the part of the Marianna Flora? Her commander asserts that by the laws of his own country, as well as those of France and Spain, this is a known and positive obligation on all armed vessels, which they are not at liberty to disregard. Upon what ground, then, can he claim an exemption from performing it? Upon what ground can be set up as a default in another, that which he has wholly omitted to do on his own part? His own duty was clear, and pointed out; and yet he makes that a matter of complaint against the other side, which was confessedly a primary default in himself. He not only did not hoist or affirm his flag in the first instance, but repeatedly fired at his adversary with hostile intentions, without exhibiting his own national character at all. He left, therefore, according to his own view of the law, his own duty unperformed, and fortified, as against himself, the very inference that his ship 48*] *might properly be deemed, under such circumstances, a piratical cruiser.

But we are not disposed to admit that there exists any such universal rule or obligation of an affirming gun, as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded in their own usages or positive regulations; but it does not hence follow that it is binding upon all other nations. It was admitted, at the argument, that the English practice is otherwise; and surely, as a maritime power, England deserves to be listened to with as much respect, on such a point, as any other nation. It was justly inferred that the practice of America is conformable to that of England; and the absence of any counterproof on the record, is almost of itself decisive. Such, however, as the practice is, even among the continental nations of Europe, it is a practice adopted with reference to a state of war, rather than peace. It may be a useful precaution to prevent conflicts between neutrals, and allies, and belligerents, and even between armed ships of the same nation. But the very necessity of the precaution in time of war arises from circumstances which do not ordinarily occur in time of general peace. Assuming, therefore, that the ceremony might be salutary and proper in periods of war, and suitable to its exigencies, it by no means follows that it is justly to be insisted on at the peril of costs and damages in peace. In any view, therefore, we do not think this omission can avail the claimants.

*Again; it is argued that there is a gen- [*49
eral obligation upon armed ships, in exercising the right of visitation and search, to keep at a distance, out of cannon-shot, and to demean themselves in such a manner as not to endanger neutrals. And this objection, it is added, has been specially provided for, and enforced by the stipulations of many of our own treaties with foreign powers. It might be a decisive answer to this argument, that here no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the Marianna Flora, in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation.

Doubtless, the obligation of treaties is to be observed with entire good faith and scrupulous care. But stipulations in treaties having sole reference to the exercise of the rights of belligerents in time of war, cannot, upon any reasonable principles of construction, be applied to govern cases exclusively of another nature, and belonging to a state of peace. Another consideration, quite sufficient to establish that such stipulations cannot be applied in aid of the present case, is, that whatever may be our duties to other nations, we have no such treaty subsisting with *Portugal. It will scarce- [*50
ly be pretended that we are bound to Portugal by stipulations to which she is no party, and by which she incurs no correspondent obligation.

Upon the whole, we are of opinion that the conduct of Lieutenant Stockton, in approaching, and, ultimately, in subduing the Marianna Flora, was entirely justifiable. The first wrong was done by her, and his own subsequent acts were a just defense and vindication of the rights and honor of his country.

The next inquiry is, whether the act of sending in the Marianna Flora for adjudication, was, under all the circumstances, unjustifiable, so as to carry with it responsibility in damages.

It is argued that, upon examination of the ship's papers, the crew, and the cargo, it must clearly have appeared that the ship was a merchant ship bound on a lawful voyage, and not a piratical cruiser. This state of the case must be admitted to have been apparent. But the real difficulty is of another sort. Her papers, and cargo, and destination, could give no information of the nature of the attack made upon the Alligator. However hostile, malignant, or even piratical the aggression might be, the papers could shed no light upon the subject. The owners of the cargo, and the owners of the ship (so far at least as their duties and responsibilities were not bound up by the acts of the master, as their agent), might be innocent; the voyage might be of a purely mercantile character, and yet, acts of [*51 aggression might be committed, *which might bring the case completely within the act of Congress, or of the general law of nations, as a gross and violent injury, calling for ample redress. The real duty imposed upon Lieutenant Stockton was, not to examine the papers, unless so far as they might explain doubtful circumstances, but to ascertain the nature, object and intent of the attack upon his vessel. He was bound to exercise an honest and fair discretion on the subject, and to obtain such explanations as might guide his judgment. What was the excuse offered for the attack upon him? It was not that the guns were fired by mistake or accident. They were admitted to have been by authority and design. They were fired after his own flag was displayed, and with the express intention of disabling the vessel and destroying the crew. The only excuse offered for this unjustifiable act was, that the commander entertained a fear that the Alligator was a pirate. But such a fear, unauthorized by any acts on the other side, was no excuse for a wrong which might have led to the most fatal consequences. If the Alligator had been seriously injured, or any of her crew had been killed, no doubt could exist that, under such circumstances, the ship ought to have been sent in for adjudication, to enforce redress, and also to administer, if necessary, punishment. The attack was not the less inexcusable because the consequences were not as injurious as the master intended.

It is a different thing to sit in judgment upon this case, after full legal investigations, [52* aided by *the regular evidence of all parties, and to draw conclusions at sea, with very imperfect means of ascertaining facts and principles, which ought to direct the judgment. It would be a harsh judgment to declare that an officer charged with high and responsible duties on the part of his government, should exercise the discretion intrusted to him at the peril of damages, because a court of law might ultimately decide that he might well have exercised that discretion another way. If Lieutenant Stockton had acted with gross negligence or malignity, and with a wanton abuse of power, there might be strong grounds on which to rest this claim of damages. But it is conceded on all sides, and in this opinion the court concurs, that he acted with honorable motives, and from a sense of duty to his government. He thought the aggression was piratical, and that it was an indignity to the national flag, utterly inexcusable. The view now taken by this court, in respect to the whole case, upon a full examination of all the facts, is certainly somewhat different. It leads us to say that Lieutenant Stockton might, without justly incurring the displeasure of his government, have released the ship, not because she had done no wrong, but because the wrong was not of such a nature as called for vindictive redress.

But, the question upon which damages must depend, is not whether he might not have released the ship, but whether he was, at all events, bound so to do; and whether that obligation *was so imperative that the omis- [*53 sion ought to be visited with damages.

We are, then, to consider the real difficulties of Lieutenant Stockton's situation. An attack had been made upon a national ship under his command without cause. It was a hostile act, an indignity to the nation, and a trespass upon its rights and sovereignty. It was not an accidental, but a meditated act; not necessarily carrying its own excuse along with it, but susceptible of different interpretations. It was not an affair in which he was at liberty to consult his own wishes or honor merely, although a brave and distinguished officer might naturally feel some solicitude to preserve his high reputation untarnished in the eyes of his government. He was bound to look to the rights of his country. He might well hesitate in assuming the arbitration of national wrongs. He might well feel a scrupulous delicacy in undertaking to waive any claim which the government had authority to enforce, or to defeat any redress which it might choose to seek, or to prevent any inquiries which, through its established tribunals, it might think fit to institute, in respect to his conduct, or that of the offending vessel. Considerations of this nature could not but weigh heavily upon the mind of a gallant officer; and they are not unfit to be entertained by this court in forming its own judgment.

It is, also, farther to be observed, that the case was confessedly new in its character and circumstances. The researches of counsel throughout *the progress of this pro- [*54 tracted controversy have not discovered any case which, in point of law, can govern this. If it is new here, it may well be deemed to have been new and embarrassing to Lieutenant Stockton. In such a case, it is not matter of surprise that he should come to the conclusion that it was not proper to take upon himself the responsibility of a final decision; but to confide the honor of the nation, as well as the rights of the other party, to judicial decision. No inference is attempted to be drawn that his acts were intentionally oppressive and harsh; and it would be going a great way to declare that an exercise of honest discretion, in a case of wrong on the other side, ought to draw after it the penalty of damages.

There is another more general consideration

difficulty of the said M'Cullough in procuring security, if not render it impossible for him to procure it; yet, if they shall also be of opinion that the defendant without making any inquiries of the plaintiffs on the subject of such information and intention, or holding any communication with them on the subject of his intended indorsement, did, of his own accord, on the application of the said M'Cullough, and for the purpose of giving effect to the said arrangement, indorse the said note on which this action is brought, that there was nothing in the evidence so given by the defendant, to affect the plaintiff's right of recovery in this action. That, in order to vitiate the said note and indorsement in law, and to bar the plaintiff's right of recovery thereon, on the ground of a fraudulent misrepresentation, or fraudulent concealment of circumstances known to them and unknown to the defendant, it was incumbent on the defendant to show that he applied to the plaintiffs for information, or held some communication with them for the purpose of receiving such information, and that on such application or communication, the plaintiffs either misrepresented or concealed such circumstances; and that, in the absence of such proof, there was nothing in the facts so given in evidence by the defendant, to affect the right of recovery in the action.

64*] *The court gave the instruction as asked, to which an exception was taken.

The counsel for the defendant then moved the court for instructions, that if the jury should draw from the evidence certain inferences which were stated, the plaintiffs were not entitled to recover. These inferences were, that the bank was fully informed in March, 1819, of the fraudulent conduct of M'Cullough, the extent of his misapplication of their funds, and of his insolvency; that on receiving this information, they became satisfied of his unfitness to continue in office, and determined to remove him. That, however, they continued him in office until the 18th of May, carefully concealing the circumstances, and their determination, for the purpose of obtaining security of the debt due to them from the said M'Cullough, one of which so contemplated securities was the note in question. That the defendant was, to the knowledge of the plaintiffs, ignorant of M'Cullough's breach of duty, and of the determination to remove him, and indorsed the note by reason of that ignorance.

The court refused to give this instruction, unless the jury should be further of opinion that the defendant was led into this state of ignorance in consequence of inquiries made by him of the plaintiffs, or of some previous communication between them and him.

On the farther application of the counsel for the defendant, praying the court to instruct the jury that, on the statement and evidence 65*] contained *in the bills of exception, if the jury believed the same, the plaintiffs were not entitled to recover, the court refused to give the instruction asked, and directed the jury that on the evidence aforesaid the plaintiffs were entitled to recover.

Judgment was rendered for the plaintiffs in the court below, and the cause was brought by writ of error to this court.

The cause was argued by Mr. Webster and Mr. Taney for the plaintiff in error, and by the Attorney-General and Mr. Emmett for the defendants in error. The discussion took a wide range upon the doctrine of misrepresentation and concealment in contracts; but as that point was not determined by the court, it has not been thought necessary to report anything more than a concise summary of the arguments of counsel.

The following points were made for the plaintiff in error, upon the instructions given and refused by the court below:

1. That the concealment of the facts and circumstances above mentioned, or the concealment of any one of them, whereby the plaintiff in error was induced to enter into the contract in question, was a fraud upon him, and vitiated the contract.

2. That if the mere omission to communicate the said facts and circumstances would not be a fraud, yet, the act of the defendants in error, of continuing M'Cullough in office, in order to give *him credit, and thereby [*66 to procure the security in question, by which means the plaintiff in error was deceived, and induced to indorse the said note, was a fraud upon him, and vitiated the contract.

3. That the continuance of M'Cullough in the office of cashier, from the 16th of March, 1819 (when his misconduct in office came to the knowledge of the president and directors of the bank), until the 18th of May following, when he was dismissed, was a violation of the duty of the president and directors to the government of the United States, and to the public, and therefore vitiated any contract obtained by means of such continuance in office.

Upon the first point, it was argued that the concealment of material circumstances, known to one party, and unknown to the other, vitiates the contract.[1] In the opinion given by the court below, the principle was admitted, but with this qualification, that it must be on inquiry or communication, for the purpose of information. In this view of the subject, the only question would be, whether the rule is subject to this limitation, i. e., of inquiry or communication for the purpose of information. But an exception to the rule was supposed to exist, and it might be said that a party is not bound to communicate circumstances extrinsic *to the contract, and that the circum- [*67 stances concealed were extrinsic. If this proposition were true, although there had been inquiry and communication, yet the facts themselves being of such a character that they need not to have been disclosed, that alone created the exception to the rule. But it was insisted the exception ought to be confined to those facts which are equally open to both parties.[2] The ground upon which Etting undertook for M'Cullough's preformance, was his confidence in his supposed integrity, and in his resources and credit derived from his connection with the bank. No case could be found which states that inquiry is necessary to create the obligation to disclose material facts, which are

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On the second point, it was argued that here was an act done in order to give a false credit, and it did give false credit. It was a positive deceit by acts, though not by words. It was asked, whether a party might lawfully deceive in one way, and not in the other. The law is more consistent with common justice, and says you must do nothing to deceive.[2] It was a case of industrious concealment.[3] By continuing the cashier in office, the defendants in error gave him a fictitious credit which they knew did not belong to him. It was analogous to the ordinary case of the fraudulent misrepresentation of the credit of another.[4] It had been said there was no inquiry. Why was there none? Because the very continuance of the officer in office was evidence that they thought him honest. It might, perhaps, be contended that nothing was positively said or done by the bank calculated to mislead the surety. But silence, or an omission to act, may, in many cases, as effectually deceive the party, as the most explicit declaration, or the most positive acts. Continuing the cashier in office was equivalent to a suggestio falsi.[5]

69*] *On the third point, the peculiar character of the bank was insisted on, as an instrument of the government, not created for its own profit merely, but as a means to aid the financial operations of the government.[6] Both the public and the government were deceived and injured by the misplaced confidence of the bank in their cashier. It was their duty to have removed him the instant his default was discovered. It is contrary to the policy of the law to enforce a contract obtained by a breach of duty to the public. The bank may be considered as a public officer, and is bound by the same obligations, and owes the same duties, as any other public officer. But would it be pretended that a public officer could keep an unworthy agent or deputy in office, for *the [*70 mere purpose of securing a debt due to himself?

On the part of the defendants in error, it was stated that the rule is accurately laid down by Mr. Fonblanque, as to what circumstances a contracting party is bound to disclose: "If a man, by the suppression of a truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of a good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation."[7] Under certain modifications, and with certain exceptions, the party is bound to communicate all circumstances intrinsic in the contract itself; all those circumstances which enter into the contract as ingredients, and form constituent parts of it. But, with regard to circumstances extrinsic to the contract, though forming inducements to enter into it, however powerfully he may believe and know they are operating with the opposite party, he is at liberty to keep silence. Intrinsic circumstances are such, for example, as regard the quality and price of the article, which must, of necessity, enter into the inducements. Extrinsic circumstances are those considerations which form no component part of the contract itself, but which may form inducements with the party to enter into it. The distinction is founded *in reason, [*71 and is necessary to the business of life.[8] With regard to the whole class of extrinsic circumstances, though, if the party undertake to disclose them, he must take care to state the truth, yet, he may maintain the most obstinate silence respecting them, and the contract will still be valid.

As to the objection that the rule must be received with the qualification, that the facts are equally accessible to both parties, it was said that if by this was meant that they must be equally accessible to both by the use of ordinary diligence, it could not be considered as well founded.[9] And if it meant nothing more than that it was physically accessible, where the party pushes his inquiries in all possible directions, and takes sufficient time to make the discovery, then it was inapplicable to any practical purpose in the business of life. The

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On the part of the defendants in error, it was stated that the rule is accurately laid down by Mr. Fonblanque, as to what circumstances a contracting party is bound to disclose: "If a man, by the suppression of a truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of a good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation."[7] Under certain modifications, and with certain exceptions, the party is bound to communicate all circumstances intrinsic in the contract itself; all those circumstances which enter into the contract as ingredients, and form constituent parts of it. But, with regard to circumstances extrinsic to the contract, though forming inducements to enter into it, however powerfully he may believe and know they are operating with the opposite party, he is at liberty to keep silence. Intrinsic circumstances are such, for example, as regard the quality and price of the article, which must, of necessity, enter into the inducements. Extrinsic circumstances are those considerations which form no component part of the contract itself, but which may form inducements with the party to enter into it. The distinction is founded *in reason, [*71 and is necessary to the business of life.[8] With regard to the whole class of extrinsic circumstances, though, if the party undertake to disclose them, he must take care to state the truth, yet, he may maintain the most obstinate silence respecting them, and the contract will still be valid.

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qualification had been borrowed from the law with regard to intrinsic circumstances, to which it was properly applied, and transferred to extrinsic circumstances, to which it was wholly inapplicable. Assuming that, with regard to extrinsic circumstances, a party may conceal them without impairing the contract, there was not a feature in any one of the instructions in this case which was not justified by the operation of that principle. The keeping the cashier in office was doing nothing. 72*] *It was a mere forbearance to act. All the cases referred to, of industrious concealment, admitted of two answers: (1) That the concealment was of circumstances intrinsic to the contract. (2) That, in all the cases, no acts were done to alter the antecedent state of things for the purpose of concealment. As to the case of Smith v. The Bank of Scotland,[1] which had been relied upon as analogous to the present, it would be found that there was a positive misrepresentation on the part of the bank, they alleging that further security was wanted on account of an increase of business, when, in fact, there was a decrease. Another case from the same book might have been cited, where an attempt was made to set aside a security bond, alleged to have been obtained by unfounded representations of circumstances generally, without any direct reference to the bond, and the court having, according to the forms of the Scottish law, appointed the sureties to say whether they would refer to the respondent's oath, "that he did elicit that bond;" and the sureties having admitted that "they never meant to say that there was any degree of personal influence with either of them to elicit the bond of relief," the Court of Session pronounced in favor of the bond, which was affirmed by the House of Lords on appeal.[2] So, here, it might be asked, whether the plain- 73*] tiffs below had done anything to *elicit the note. All that was alleged was, that they had not communicated their intention of removing the cashier, when they were not asked respecting their intentions, and when it was equally lawful for them to retain or to remove him. The effort on the other side is to induce the court to establish a new rule of law, which, however analogous to other principles merely applicable to the contract of insurance, was admitted, even by the ingenious and learned author of the treatise which had been referred to, not to form a part of the jurisprudence of this country.[3]

Mr. Chief Justice **Marshall** delivered the opinion of the court:

If this case depended on the deservedly high character of the individuals who were engaged on the part of the bank in the transactions in which the suit originated; if elevation above the possibility of suspicion that they could have meditated anything believed by themselves to be legally or morally wrong, could decide it, this cause would not have required the great efforts which have been bestowed upon it. The names which appear on this record can never be connected with actual fraud; nor would any difficulty be found in protecting them from the imputation, were it possible that it could be made. But judicial inquiries are into the rights of the parties; *and although high and honorable charac- [*74 ter has, and ought to have, great influence in weighing testimony in which that character is in any manner involved, yet, when the inferences from that testimony are drawn by others, and a court is required to pronounce the law arising upon them, character is excluded from the view of the judge, and legal principles alone can be acknowledged as his guide.

At the trial several points of law were raised by both parties, on which opinions were given, to which exceptions were taken, and the correctness of those opinions constitutes the single inquiry in this court. [Here the learned Chief Justice stated the case, as it is stated above.]

As preliminary to the inquiry, whether the law arising on the facts, and on the inferences assumed in the bills of exceptions contained in the record, was correctly stated by the court, a point has been made at the bar which must be disposed of. It has been contended that a court is not bound to answer abstract or hypothetical questions of law, not growing out of the testimony in the cause, which may be propounded at the bar; and, to apply this principle, it has been also contended that the testimony contained in the record, and referred to in the bills of exceptions, contains nothing from which the jury could possibly draw those inferences of fact upon which the court was asked to declare the law. That the points made in the bill of exceptions constitute a distinct and totally different case from that made by the evidence.

*That a judge cannot be required to [*75 declare the law on hypothetical questions which do not belong to the cause on trial, has been frequently asserted in this court, and is, we believe, incontrovertible.[4] The court may, at any time, refuse to give an opinion on such a point; and if the party propounding the question is dissatisfied with it, he may except to the refusal, which exception will avail him if he shows that the question was warranted by the testimony, and that the opinion he asked ought to have been given. But, if the judge proceeds to state the law, and states it erroneously, his opinion ought to be revised; and if it can have had any influence on the jury, their verdict ought to be set aside.

It cannot, however, we think, be correctly affirmed with respect to the case now under consideration, that the points stated in the bills of exception have no relation to the testimony to which those bills refer. That testimony consists of various communications and reports made to the bank, of their own transactions, and of the admissions of parties. It has been said that this testimony is all in writing, and is to be construed by the court; and from this proposition is deduced the corollary, that the jury was not at liberty to draw inferences from it.

Were the fact as alleged, and were it true that the testimony is all in writing, the consequence drawn from it cannot be admitted. Conceding it to be the province of the court to con-

1.—1 Dow. Parl. Rep. 272.
2.—Webster v. Chrystie, 1 Dow. Parl. Rep. 247.
3.—Verplanck on Contracts.
4.—Hamilton v. Russell, 1 Cranch's Rep. 309, 318.

strue any particular paper which was offered in 76*] *evidence, the report of the 30th of March for example, and to declare the meaning of every sentence, and of the whole instrument, yet this report contains a great variety of extrinsic circumstances, suggests measures of deep interest, was followed by numerous successive acts which took place in the country, and which do not derive all their influence on the cause from the construction of the particular papers in which they are communicated, but, in a considerable degree, from their connection with each other, from the motives in which they originate, and from the effects they were calculated to produce, and did produce, on others. These subjects are peculiarly proper for the consideration of a jury. If the testimony be examined, it will, we think, appear that the counsel for the plaintiffs has not asked the court to give its opinion on any inferences of fact which it was not at least possible for the jury to draw from the evidence. The knowledge of the bank is not questioned. The ignorance of Etting might be inferred from the absence of all testimony proving his knowledge that any fraud had been practiced by M'Cullough. The original resolution of the bank to remove M'Cullough might be inferred from their knowledge of his unfitness for the office, and from the fact that they did remove him the instant the securities were obtained which they expected from him. The same facts might justify the inference respecting motives which induced the bank to retain him in office until those securities were procured.

We are far from saying that these inferences 77*] were *all of them such as the jury ought to have drawn. It is not difficult to perceive that the bank might have acted on motives equally unexceptionable in morals and in law. The jury might very well have believed that the bank thought the 26,550 shares of stock were not worth more than the sums for which they were pledged, or, at any rate, were not a safe security, and might, therefore, think it advisable to relinquish that pledge, if other security could be substituted in its place. Others might estimate that stock more highly than they did, and might estimate it rightly. Friends, therefore, acting on their own judgment of the value of this stock, might be found willing to indorse the paper of Mr. M'Cullough on receiving it as a pledge. The motive, too, for retaining Mr. M'Cullough in office might be to induce him to do the bank all the justice in his power, not to induce others to indorse his notes. The whole subject was before the jury, and they might have drawn from the testimony either these inferences, or those which are stated in the bills of exceptions. The counsel for the plaintiffs, believing the law to be in their favor, even upon that view of the testimony which is taken in the exceptions, and fearing that the jury, should they take that view, might find for the defendant, chose to refer the law to the court. Whether his fears respecting the jury were well or ill founded, this cause must now be decided on the correctness of the opinion given by the Circuit Court.

In the very elaborate arguments which have 78*] *been made at the bar, several cases have been cited which have been attentively considered. No attempt will be made to analyze them, or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued, cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it.

Judgment affirmed.

[Assignment for the Benefit of Creditors. Evidence.]

BROOKS v. MARBURY.

A debtor has a right to prefer one creditor to another in payment; and it is no objection to the validity of an assignment for that purpose, that it was made by the grantor, and received by the grantee, as trustee, in the hope and expectation, and with a view of preventing prosecution for a felony connected with his transactions with his creditors, if the preferred creditors have done nothing to excite that hope, and the assignment was made without their knowledge or concurrence at the time of its execution, and without a knowledge of the motives which influenced the assignor, or was not afterwards assented to by them under some engagement express or implied to suppress or forbear the prosecution.

An assignment for the benefit of preferred creditors is valid, although their assent is not given at the time of its execution, if they subsequently assent in terms, or by actually receiving the benefit of it.

It is no objection to such an assignment, that it defeats all other creditors of their legal remedies, even if amounting to a majority in number and value, unless there be some express provision of a bankrupt law to invalidate the deed.

*Quære, How far, and under what circum- [*79 stances, the possession of the property assigned to trustees for the benefit of creditors, continuing in the grantor, will invalidate the assignment.

A certified copy of a registered deed cannot be given in evidence, if within the power of the party claiming under it to produce the original, unless there be some express provision by statute making an authenticated copy, evidence.

ERROR to the Circuit Court for the District of Columbia.

This is the same case which is reported ante, Vol. VII., p. 556. The judgment of the court below was then reversed, and a venire de novo awarded. At the new trial, exceptions were taken to the instructions given by the court to the jury; and the cause having again been brought before this court for revision, was argued by Mr. Jones and Mr. Coxe for the plaintiff,[1] and by the Attorney-General and Mr. Key for the defendant.[2]

1.—They cited 6 Harris & Johns. Rep. 234; Hamilton v. Russell, 1 Cranch's Rep. 310; Hildreth v. Sands, 2 Johns. Ch. Cas. 35; Edwards v. Harlin, 2 Term. Rep. 587.

2.—They cited Marbury v. Brooks, 7 Wheat. Rep. 556; Wheaton v. Sexton, 4 Wheat. Rep. 503; Astor v. Wells, 4 Wheat. Rep. 466; Sands v. Hildreth, 14 Johns. Rep. 493.

NOTE.—As to validity of preferential assignments, see note to Marbury v. Brooks, 7 Wheat. 556. See also Spring v. So. Car. Ins. Co. 8 Wheat. 268. As to constitutionality of state insolvent laws, see note to Sturges v. Crowinshield. 4 Wheat. 122.

How far possession of property by grantor affects assignments.

An absolute bill of sale of chattels is fraudulent

Mr. Chief Justice Marshall delivered the opinion of the court:

This case depends on the validity of a deed executed by Richard H. Fitzhugh on the 31st of December, 1819, purporting to convey to the defendant, for the use of certain enumerated creditors, his slaves, goods and debts, which 80*] deed *was recorded in the record book for the county in which the parties resided, on the 3d of January, 1820. Immediately after executing this deed, the said Fitzhugh absconded; and on the 10th of February, thereafter, the plaintiff sued out an attachment to attach his effects in the hands of the said Marbury. The garnishee denies that he has any effects of the said Fitzhugh in his hands which can be affected by the attachment, the same not being sufficient to satisfy the creditors enumerated in the deed which has been mentioned. The plaintiff contests the validity of that deed. The jury found a verdict in favor of its validity, upon which the Circuit Court rendered a judgment against the plaintiff, which he has brought before this court by a writ of error. In the course of the trial, exceptions were taken by the counsel for the plaintiff to some opinions given by the court, and to its refusal to give others for which they applied. The correctness of the opinions given, and of the refusal of those not given, will now be considered.

On the trial, the garnishee offered to read from the record books of the county, the memorial of the deed which has been mentioned, to which the plaintiff objected, and insisted that the original ought to be produced. The court overruled this objection, and the copy was read. To this opinion of the court the plaintiff's counsel excepted; and he now insists that there is no law of the state of Maryland which directs a deed of the description of that of which a copy was read in this case, to be recorded; and 81*] that, if there *were such a law, still the original ought to be produced, if within the power of the party claiming under it.

The act of 1729, ch. 8, enacts "that from and after the end of this session of assembly, no goods or chattels whereof the vendor, mortgageor or donor shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, unless the same be by writing, and acknowledged before one provincial justice of the county where such seller, mortgageor or donor shall reside, and be within twenty days recorded in the records of the same county."

The counsel for the plaintiff insists that this law directs the recording of those deeds only which convey property of which the donor remains in possession, and that the possession in this case must be supposed to have passed with the deed, unless the contrary be shown.

This objection is not without its weight. It, however, does not appear to have been suggested at the trial, and probably did not occur to the court or the parties at the time, or it might have been shown that in point of fact the possession was not immediately changed. Since, however, the admission of the evidence was not made to depend on the circumstance of possession, this objection cannot be overlooked.

It has been also contended by the plaintiff, that if possession did not accompany and follow the deed, it is void as to creditors under the authority *of the case of Hamilton v. [*82 Russel, 1 Cranch's Rep. 310. On this point, it may be proper to observe that in Hamilton v. Russel the deed purported to convey the property to the vendee for his own immediate use, and the subsequent continued possession of the vendor was incompatible with the instrument. This is a deed of trust, not for the benefit of the person to whom it is made, but for the benefit of certain enumerated creditors. The continuance of the possession with the donor until the trust can be executed, may not be so incompatible with the deed as to render it absolutely void under all circumstances. The court does not mean to express any opinion on this point, farther than to say that it is not supposed to be decided in Hamilton v. Russel.

Should the act of 1729 be considered as applying to this case, the question would then arise, whether the copy of a deed be admissible where the original is in the power of the party offering the copy. This would be contrary to the great principle that the best evidence which the nature of the case admits of ought to be required. But it has been said, in answer to this objection, that the courts of Maryland have so decided. This court will certainly respect the decisions made in the state; but we are not satisfied that the principle is settled. In the case cited from 6 Harris & Johnson, 234, the question arose on the conclusiveness, not on the admissibility, of the evidence. The suit

as to creditors, unless possession accompanies and follows the deed. Hamilton v. Russell, 1 Cranch, 310.

The fact that the grantor retains possession of property which he has conveyed, is not an evidence of fraud, when the conveyance, from its terms, is to leave the possession in the vendor. United States v. Hooe, 3 Cranch, 458.

In general, the want of possession constitutes fraud which renders the transaction as to creditors void. But the rule as to possession is not applicable where the possession of the grantor is consistent with the deed, or where the property conveyed is, at the time of the conveyance, abroad and incapable of delivering. In the latter case the title is complete, provided the grantee takes possession within a reasonable time after the property comes within his reach. U. S. v. Hooe, 1 Gall. 419.

How far it is necessary that a change of possession of the property should immediately follow the assignment. See Wheeler v. Sumner, 4 Mas. 183; Bohler v. Cleveland, 5 Mas. 174.

If there is a secert agreement between the parties that the grantor shall enjoy possession for a limited time, for his own benefit, this will render the deed void. Lukins v. Aird, 6 Wall. 78.

Suffering the grantor to remain in possession, is presumptive evidence of fraud. Bank of Orange Co. v. Fink, 7 Paige, 87; Jackson v. Cornell, 1 Sand. Ch. 348; Dewey v. Adams, 4 Edw. 21; Hart v. Crane, 7 Paige, 37; Connah v. Sedgwick, 1 Barb. 210.

Actual removal not necessary, where possession of the property remains in possession of the assignor for the accommodation of the assignee. Vredenburgh v. White, 1 John. Cas. 156; Hitchcock v. St. John, Hoff. 511; Cram v. Mitchell, 1 Sand. Ch. 251.

Suffering the assignor and his clerk to remain in possession of goods in a store, selling at retail, as before the assignment, unexplained, renders assignment void as to creditors. Hart v. Crane, 7 Paige, 37; Adams v. Davidson, 10 N. Y. 309; Pine v. Rikert, 21 Barb. 469; Butler v. Stoddard, 7 Paige, 163; Van Nest v. Yoe, 1 Sand. Ch. 4; Connah v. Sedgwick, 1 Barb. 210; Mead v. Phillips, 1 Sand. Ch. 83; Browning v. Hart, 6 Barb. 91.

was on an administrator's bond, and Mr. Mc-83*] Gruder said, in argument, that *the law requires such a suit to be brought on a copy of the bond. Of course, such copy must be admissible. It is true, that in deciding against its conclusiveness, the court said, generally, that a copy is prima facie evidence in all cases where the law directs an instrument in writing to be recorded. This is the assertion of a general principle, not the construction of a particular act, and we understand that the courts of Maryland have not adhered uniformly to the principle thus laid down. There is some contrariety of opinion on this point; but the majority of the court conceives that the copy should not have been read without showing that the original was not in the power of the party.

Although the judgment of the Circuit Court must be reversed for error in admitting improper testimony, yet, as the record presents other points which must again arise, and which have been fully argued, this court will proceed to indicate its opinion on those points.

The deed having been admitted, its validity came on to be discussed.

Richard H. Fitzhugh had made notes to a very considerable amount, and had forged the names of indorsers thereon; after which, he had discounted them in the banks of Georgetown, and of this city. The proceeds of the deed were to be applied, in the first instance, to the payment of these forged notes; after which, the residue was for the benefit of the creditors generally. It is understood that there is no residue; and that if the deed be val-84*] id, the debts due to the favored *creditors will be paid to the exclusion of all others; if it be invalid, the whole proceeds must be paid to the attaching creditors in the order in which they stand, to the exclusion of those for whose benefit the deed was made, and of those attaching creditors also for whom nothing shall remain after satisfying prior attachments. It is, then, a mere question of legal preference, unmixed with any equitable considerations whatever.

It is contended by the plaintiff, that the deed is void because the consideration is illegal, it being given for the purpose of suppressing a prosecution for a felony.

The testimony in the cause was abundantly sufficient to justify the jury in drawing the inferences that the deed was executed by Fitzhugh in the hope that payment of the forged notes would enable him to escape a prosecution; and that the same hope was entertained by Marbury. It is not doubted, that had there been any previous communication with the banks which led to this hope, or any evidence that the prosecution was not instituted in consequence of the notes being paid, or that their payment was to depend on a forbearance to prosecute, the deed would have been against the policy of the law, and utterly void. But the evidence stated in the case, and the opinions which were given, as well as those which were refused by the court, present the question whether, assuming the entire innocence of the favored creditors, the deed to Marbury is annulled by any hope which might have lurked in the bosoms of both the grantor and 85*] *grantee, that the payment of the notes it was intended to secure might save Fitzhugh from a prosecution.

This case has once already been before this court, on a writ of error to a judgment of the same Circuit Court, made in favor of the attaching creditor, which judgment was reversed.[1] But, although the facts were the same, the opinions on which the case depended were essentially different from those which are now to be considered. The case wears a new aspect in many respects, and stands on principles which are not absolutely the same. Although any point already determined will not be changed lightly or inconsiderately, yet we think that the decision in the former case does not positively determine this.

The first exception is to an opinion given on the prayer of the defendant. The court instructed the jury "that if they believed, from the evidence, that Richard H. Fitzhugh executed the deed in question, and William Marbury accepted the same, without the concurrence or knowledge of the banks mentioned in the deed; and that the said banks assented to the same without any engagement, express or implied, to suppress or forbear the prosecution of the said Fitzhugh, then the plaintiff is not entitled to recover." To this instruction given by the court to the jury, the counsel for the plaintiff excepted.

*The case assumed is, that the deed [*86 was executed "without the concurrence or knowledge of the banks." At the time of its execution, then, they cannot be considered as having in any manner participated in it. The terms exclude any agency whatever on their part in obtaining it. The case proceeds, "and that the said banks assented to the same without any engagement, express or implied, to suppress or forbear the prosecution of the said Fitzhugh." This branch of the statement supposes equal innocence on the part of the banks when the deed was accepted. The case put is, that they had entered into no express or implied engagement to suppress or forbear the prosecution. This certainly left the jury at full liberty to infer an understanding between Marbury and the banks, which is an implied engagement, from the fact that they forebore to prosecute when it was in their power to do so, if such was the fact. It left the jury at full liberty to draw this inference from any language or conduct of the favored creditors, either before or after the deed was accepted, which, in their opinion, would justify it. If, then, the court erred in giving the instruction, that, in such a state of things, the plaintiff was not entitled to recover, it is because the belief on the part of Fitzhugh and Marbury, that the payment of the forged notes might save Fitzhugh from a prosecution, although such a belief was unauthorized by those for whose benefit the deed was made, and was not communicated to them, vitiates the conveyance, so that nothing passed by it.

*The general principle, that notice to [*87 a trustee, or an agent, is notice to the cestui que trust, or to his employer, is too well settled to be drawn into question. But the case put to the court does not suppose Marbury to be the trustee or agent of the creditors. He is the

1.—7 Wheat. Rep. 556.

trustee and agent of Fitzhugh, to perform an act for him which his situation disabled him from performing in person. This act was entirely consistent with law; it was to sell his property, and apply the proceeds to the payment of creditors of a particular description in the first instance, and afterwards, to creditors generally. His right to give the preference is not questioned, nor is the validity of the consideration, so far as it moved from the creditors, infected with any vicious principle, or in any manner brought into doubt. A contract, the consideration of which is the compounding of felony, is admitted to be void; and if this conveyance had been induced by such composition, or the promise of it, or had depended on it, the fact that it was made for the payment of debts justly due would not have secured it from the effect of this contaminating ingredient. But no such ingredient enters into the case. Everything on the part of the creditors, or of any person acting for them, or by their authority, is unexceptionably fair and legal. The plaintiffs rest their claim to set aside this deed on the expectations which Fitzhugh and his agent had formed of its operation on the conduct of the creditors, although the proceedings under the deed were not to be influenced 88*] by the success or failure *of their hopes. The case put in this prayer for the instruction of the court, does not, indeed, suppose such expectations; but as it does not exclude them, and as the instruction to the jury is that the plaintiff cannot recover, whatever inferences they may draw from the testimony, not inconsistent with those which the court supposes to decide the cause, it becomes necessary to inquire whether these expectations vitiate the deed.

It cannot be questioned that Fitzhugh might have sold his property, and paid the proceeds to the banks, and that such sale and payment would not have been vitiated by any expectation he had formed that it might save him from a prosecution. Had he communicated this expectation to the purchaser, told him the use he intended to make of the money, and that his motive for preferring the holders of these forged notes to other creditors, was the hope, that on receiving payment, they might be less active in the prosecution, would this have rendered the sale a nullity? We cannot conceive that such a communication would have effected the transaction.

Had Fitzhugh conveyed his property directly to the banks, in trust, to sell it for the payment of these notes in the first instance, so that their right became absolute, without any engagement, express or implied, to suppress or forbear a prosecution, and without any previous or simultaneous communication with them, would the hope cherished in his own mind, that this payment might operate in his 89*] favor with them, avoid the *transaction? We can perceive no reason for giving such an effect to a latent hope which could have no influence on those to whom it was not communicated. If, then, this very transaction, passing directly between Fitzhugh and the banks, would have been legal, why should it be rendered illegal by the agency of Marbury, who was employed by Fitzhugh, and who was impelled by the same motives which influenced his principal? If Fitzhugh might have conveyed directly to the banks, with power to sell for their own benefit, why might he not convey to Marbury, with power to sell, and pay the money to the banks? If a real distinction exists between the cases, we are incapable of perceiving it.

The preference of creditors of a particular description, over others, being one which a debtor has a right to make, the sale of his property, and the payment of the proceeds to such favored creditors, being an act which the debtor may perform by himself or his agent, we cannot conceive that the motives which may have induced the preference, although communicated to the agent, can, in reason, affect the transaction, provided nothing has occurred on the part of the creditors which is in any degree exceptionable, either in law or justice.

It has been said that this deed, as between Fitzhugh and Marbury, is fraudulent, and that no person, however innocent, can take anything under a fraudulent deed.

This proposition is certainly laid down too *broadly. That deeds which are abso- [*90 lutely void cannot be the foundation of title, or that a cestui que trust can claim nothing under a deed which is fraudulently obtained by his trustee, or agent, acting by his authority, need not be controverted; but that a principal and his agent, meditating, as the probable consequence of their act, an object forbidden by the policy of the law, cannot, because the one has conveyed to the other in furtherance of this design, sell to a fair creditor, or for the benefit of a fair creditor, not participating in their views, or cognizant thereof, is more than this court is prepared to say.

The counsel for the plaintiff suppose that this proposition is sustained by the opinion of Chancellor Kent, in Hildreth v. Sands et al. 2 Johns. Ch. Rep. 35. Any opinion expressed by that judge is, undoubtedly, entitled to great attention, and will be highly respected by this court. In that case, the chancellor said: "If the deed is admitted to be fraudulent on the part of Comfort Sands, the grantor, there would be difficulty in allowing the deed to stand, even if the grantee was, as he alleges, innocent of the fraud."

This expression of Chancellor Kent must, undoubtedly, be understood in reference to the case in which it was used. He has not said, nor could he mean to say, that in every possible case, a fraudulent intent on the part of the grantor would avoid a deed to a bona fide purchaser for a full and valuable consideration, having no knowledge of the fraud. He has only said that if the *particular deed in [*91 that case be admitted to be fraudulent on the part of the grantor, there would be difficulty in allowing it to stand, even if the grantee was ignorant of the fraud. An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different. In the case in 2 Johns. Ch. a deed from Comfort Sands, to his brother Robert, was declared to be fraudulent and void, because (1) the consideration was inadequate. (2) There was no proof that the consideration was paid or secured. (3) The grantor continued in possession, exercising acts of ownership. (4)

That there were many circumstances attending the execution of the deed, showing that it was not a bona fide sale. The bill had been taken for confessed against the grantor, but the grantee had denied fraud. In this case, the chancellor said that if this deed is admitted to be fraudulent on the part of the grantor, there would be difficulty in allowing it to stand, even if the grantee was innocent. But, in this case, the grantor and grantee were the sole parties. The vice of the deed was in its consideration, in its not being intended or used as a bona fide transfer of other property, and in other circumstances, in all which the grantee necessarily participated. The chancellor did not decree, nor did he think himself justifiable in decreeing, against the grantee, on a bill taken for confessed against the grantor. Yet, this circumstance established the fraud of the grantor as completely as it could be estab-92*] lished by testimony. *Why did he not proceed upon this fact? The reason is, that it would not sustain a decree against the grantee. We think that this declaration has been pressed much farther in argument than the eminent judge who made it would be willing to carry it.

The opinion, that Chancellor Kent intended to confine this observation to the particular case, is strengthened by a reference to the authority on which he relies. He cites Huguenin v. Baseley, 14 Vesey's Rep. 273, in which case the Lord Chancellor said: "With regard to the interests of the wife and children of the defendant, there was no personal interference on their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt could be entertained whether it is not competent to a court of equity to take away from third persons the benefit which they have derived from the fraud, imposition or undue influence of others."

These expressions were used in a case in which Baseley had obtained from Mrs. Huguenin, by means which the court pronounced fraudulent, a settlement of her estate, after her death, upon himself, his wife and children. No consideration moved from the wife and children. They were volunteers claiming under a fraudulent deed, obtained by a husband and a father, acting for their interests as well as his own. In this case, the chancellor said: "He should regret 93*] *that any doubt should be entertained whether it is not competent to a court of equity to take away from third persons the benefit which they have derived from the fraud, imposition or undue influence of others." We should join in that regret. But the distinction between a declaration that a third person, a mere volunteer, claiming under a deed fraudulently obtained by a person acting for his interest, can be reached by a court of equity, though such volunteer had "no personal interference in the transaction," and a declaration that every person claiming under such a deed for a valuable consideration, though entirely untainted by the fraud, and unconnected with those concerned in it, must necessarily lose his property, is too obvious not to be perceived.

The cases cited by the Lord Chancellor, in support of his opinion, which are also referred to in Hildreth v. Sands, are all cases in which the third person affected by the fraud claimed as a volunteer, and was, in some measure, connected with the party practicing the imposition. The mischief which these decisions were intended to reach, was the attempt (to use the language of Lord Chief Justice Wilmot) "to purify the gift, by partitioning and cantoning it out amongst his relations and friends." That a question could exist in such a case, furnishes a very strong argument in favor of the parties claiming under this deed.

The very respectable opinion, then, of Chancellor Kent, does not bear upon this case, nor have we found in the books any decision which *does bear upon it, so as to affect the [*94 creditors who claim under the deed of the 31st of December, 1819. We think, then, there is no error in this first instruction given by the court to the jury.

The counsel for the plaintiff moved the court to instruct the jury "that if they should be of opinion, from the evidence, that the deed was devised and executed by Fitzhugh, and procured and excepted by Marbury, with the motive and intent, and for the purpose and object, of suppressing a prosecution against said Fitzhugh, by prevailing with the holders of the said forged notes to forebear and forego a prosecution for the said forgeries, that then the said deed is fraudulent and void in law as against the plaintiff."

In discussing the propriety of refusing to give this instruction, it may be proper to observe that there is no error in rejecting a motion of this description, unless it ought to have prevailed in the very terms in which it was made. Nor is a court to be required to give opinions on abstract propositions not supported by any evidence in the cause. The language in which counsel addressed this application to the court, presents different ideas to the mind, and is susceptible of different constructions. The court is required to say that the deed is void if executed by Fitzhugh, and procured and accepted by Marbury, with the intent of suppressing the prosecution, by prevailing with the holders of the said forged notes to forbear and forego a prosecution for the said forgeries. If this was to be the effect of *the deed [*95 itself, unaccompanied by any stipulations which were to be the condition of its application to the purposes for which it professes to be made, then the instruction would have contradicted that previously given, and was properly withheld. But if the counsel is to be understood as praying the court to say that if the deed was to be used by Marbury, as an instrument by which to procure the suppression of the prosecution, that being the condition on which the holders of the forged notes were to entitle themselves to its advantages, it was fraudulent and void as to the plaintiff, there can be no doubt that the instruction ought to have been given, unless the court was satisfied that there was no evidence in the cause to which it could apply.

The second motion is, in substance, that if the jury find, from the whole evidence, that the deed was executed for the intent and purpose afore-mentioned, and that the preferred creditors accepted the agency of the said Marbury, and adopted his act in procuring and accepting said deed, it is competent to the jury to infer a notice, either actual or constructive,

to the said preferred creditors, through their said agent, of the illegal consideration, intent and object of the said deed.

This instruction was refused, because there was, in the opinion of the court, no evidence to authorize the conclusions of fact, in the making of which the law was to arise. There was no error in refusing it on this ground. There would have been error had there been testimony 96*] *in the cause to authorize the conclusions of fact assumed. The counsel also moved the court to instruct the jury that if the preferred creditors named in the said deed, or any other creditors of the said Fitzhugh, have not accepted or claimed any benefit under it, and that the same remains the mere act of Marbury and Fitzhugh, without any participation before or after, on the part of the preferred or other creditors of the said Fitzhugh, then the said deed is fraudulent and void as against the plaintiff.

The court refused to give this instruction. In discussing the propriety of this opinion, it becomes necessary to inquire whether the deed remained imperfect, passing nothing in law to Marbury, until it received the assent of the creditors. Upon its face it purports to transfer the property immediately, without any act on the part of the creditors or others. It is incumbent on the plaintiff to show that this is not its legal operation.

It will be very readily conceded that, had the creditors disclaimed the advantages proffered to them in this deed, or looked on as unconcerned spectators while the property was applied by Marbury to the use of Fitzhugh, these, or other circumstances tending to show that the deed was not made in good faith for the purposes expressed in it, would have induced a court of chancery to set it aside, or have justified a court of law in instructing a jury to consider it as fraudulent. But nothing of this sort is alleged. The single inquiry is, whether 97*] the assent of the *creditors be necessary to the completion of the deed. If it be, then the title to the property it purported to convey remained in Fitzhugh until such assent should be given, and might be subjected to this attachment. If the instrument was complete without such assent, then the property passed immediately to Marbury for the purposes of the deed, and did not remain liable to attachment.

Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made, has ever been required as preliminary to the vesting of the legal estate in the trustee. Such trusts have always been executed on the idea that the deed was complete when executed by the parties to it. The counsel for the plaintiff could mean no more than to insist that the omission of the creditors to assent to the deed, or claim under it, was such evidence of fraud that the jury ought to find it fraudulent. Let this circumstance be examined.

Real creditors are rarely unwilling to receive their debts from any hand which will pay them. No such unwillingness can be gratuitously ascribed to the holders of forged notes. Unless there be proof to the contrary, the banks must be considered as willing to receive payment from Mr. Marbury, or any other person, from the proceeds of the sales of this property, or from any *other fund. This [*98 deed was executed on the 31st day of January, 1819, and the attachment was sued out on the 10th of February, 1820. Time was required to sell the property, and to collect the proceeds of the sales. It is not alleged in the statement, on which the opinion of the court was prayed, that any notes fell due before the attachments were issued, and remained unpaid. These circumstances do not, we think, afford any ground for the presumption that the deed was fraudulent, so that the property it purported to convey was, on the 10th of February, the property of Fitzhugh, and, consequently, liable to be taken by this attachment.

The counsel for the plaintiff then moved the court to instruct the jury that if the great majority in number and value, of the creditors of the said Fitzhugh, were, by means of said deed, unjustly and purposely hindered, delayed and defeated, in their proper suits and remedies, for the recovery of their said debts, on the absconding of Fitzhugh, and that the deed was executed with the purpose of defeating all legal recourse in behalf of such majority of creditors against the property and effects which said Fitzhugh intended to leave behind, and did leave behind him, then the said deed is fraudulent and void. This instruction also was refused.

The right of a debtor to prefer particular creditors, where no bankrupt or other law prohibiting such preference exists, is not questioned. Yet such preference defeats all other creditors, whether they amount to a majority in number *and value or not. The court [*99 ought not to have left it to the jury to defeat this right, because they might think it unjust. The instruction prayed by the counsel, if given, would have defeated it.

The last prayer of the plaintiff supposes that the deed was obtained for the purpose of being used as the means of suppressing the prosecution; and, farther, that Marbury acted as the agent of the preferred creditors. The refusal of the court to give this instruction must have been founded on the opinion that the question was entirely abstract in its nature. If there was any evidence tending to this conclusion, which ought to have been submitted to the jury, the instruction ought to have been given. But if there was no such evidence, the court could not be required to say, hypothetically, what would be the law had the evidence existed.

This court is of opinion that the Circuit Court erred in admitting the record of the deed offered in evidence to be read to the jury without any evidence that the original was not in the power of the party offering the copy. The judgment, therefore, is to be reversed, and the cause remanded to the said court, with directions that the verdict be set aside, and a venire facias de novo be awarded.[1]

1.—The general principal that, in the absence of any express provisions of a bankrupt law applicable to the case, a debtor has a right to prefer one creditor to another, by actual payment, or a transfer to the creditor himself, or by an assignment in trust, if the creditor be a party to the assignment,

103*] [*Chancery. Fraudulent Deed.]

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ASA HANDY and CALEB WHEATON, Respondents.

ASA HANDY and CALEB WHEATON, Appellants,
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There must be sufficient equity apparent on the face of the bill to warrant the court in granting the relief prayed; and the material facts on which the plaintiff relies must be so distinctly alleged as to put them in issue.

A court of equity has jurisdiction of a suit brought by heirs-at-law to set aside a conveyance of lands obtained from their ancestor by undue influence, he being so infirm, in body and mind, from old age, and other circumstances, as to be liable to imposition, although his weakness does not amount to insanity.

The same jurisdiction may be exercised where one of the heirs-at-law has, with the consent of the others, taken such a deed, upon an agreement to consider it as a trust for the maintenance of the grantor, and, after his death, for the benefit of his heirs, and the grantee refuses to perform the trust.

Under what circumstances such a conveyance may be allowed to stand as security for actual advances and charges, and set aside for all other purposes.

In such a case, not depending on the absolute insanity of the grantor at the time of executing the conveyance, the court may determine the question of capacity without directing an issue.

The verdict of a jury as to the sanity of the grantor at the time of executing such a conveyance, would not be conclusive, the court being competent to determine for itself the degree of weakness, or of imposition, which will induce it to set aside the instrument.

Exceptions to the report of a master are to be regarded by the court only so far as they are supported by the special statements of the *mas- [*104
ter, or by a distinct reference to the particular portions of testimony on which the party excepting relies. The court does not investigate the items of an account, nor review the whole mass of testimony taken before the master.

Rules of practice in accounting before a master.

In a suit in equity brought by heirs-at-law to set aside a conveyance obtained from their ancestor by fraud and imposition, a final decree for the sale of the property cannot be pronounced, until all the heirs are brought before the court as parties, if they are within the jurisdiction.

If all the heirs cannot be brought before the court, the undivided interest of those who are made parties may be sold.

THESE were cross appeals from the decrees of the Circuit Court of Rhode Island.

The bills filed in the court below by the appellants, Harding, and Nancy, his wife, and

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or subsequently assents thereto, has been settled 100*] in a variety of cases in the different *courts of this country, both state and of the Union. Hatch v. Smith, 5 Mass. Rep. 42; Putnam v. Dutch, 8 Mass. Rep. 287; Widgery v. Haskell, 5 Mass. Rep. 144; Stevens v. Bell, 6 Mass. Rep. 339; Thomas v. Goodwin, 12 Mass. Rep. 140; Cushing v. Gore, 15 Mass. Rep. 74; Meeker v. Wilson, 1 Gallis. Rep. 419; Brown v. Minturn, 2 Gallis. Rep. 557; M'Menomy v. Ferrers, 3 Johns. Rep. 72; Wilkes v. Ferris, 5 Johns. Rep. 335; Phœnix v. Ingraham, 5 Johns. Rep. 412; Hendricks v. Robinson, 2 Johns. Ch. Rep. 283; Murray v. Riggs, 15 Johns. Rep. 571; Austin v. Bell, 20 Johns. Rep. 442; Wilt v. Franklin, 1 Binn. Rep. 502, 514; Bird v. Smith, 4 Dall. Rep. 85, in note; Lippincott v. Barker, 2 Binn. Rep. 186; Marbury v. Brooks, 7 Wheat. Rep. 556.

The resulting trust, or residuary interest, remaining to the assignor, after the purposes of an assignment for the payment of debts are satisfied, does not avoid the deed, unless it be made mala fide, and for the sake of the resulting trust; nor is such interest liable to execution against the grantor's property. Wilkes v. Ferris, 5 Johns. Rep. 336. But, where an assignment was made in trust, (1) to pay certain preferred creditors; (2) to pay the other creditors of the assignor on condition of their releasing their demands; (3) in case any of them should refuse to release, then in further trust to pay such of the creditors of the assignor as he should appoint. Certain of these creditors refused, obtained judgment, and levied on the property in the hands of the trustees. It was held, that the trust failing as to them, resulted for the benefit of the assignor, and the deed was, therefore, void by the statute of frauds as to the other creditors; and being void in part, was void in the whole. Hyslop v. Clark, 14 Johns. Rep. 458. But an assignment by a debtor, in trust, with a power of revocation, is fraudulent only as regards judgment creditors, or such as are taking measures to recover their debts by suit. Murray v. Riggs, 15 Johns. Rep. 571, 588. It would therefore seem that an assignment like that in Hyslop v. Clark would be good, if the new appointment were made before any creditor refusing to discharge had obtained a judgment, or brought a suit. It could not, then, be said to be made to "delay, hinder or defraud creditors," according to the language of the statute of frauds of Elizabeth. Thus, where A. on the 23d of March, 1798, assigned property to B, in trust, to pay him, and certain other creditors, *with a power of revocation, and to [*101
appoint new trusts, and, on the 31st of May, 1800, executed an irrevocable deed to B, in trust, having before made several intermediate deeds, all in relation to the same subject, and reserving the same power of revocation; it was determined that the last deed was valid, and might be taken in connection with the first, and no rights of creditors having intervened, the first deed was confirmed by the last. Murray v. Riggs, 15 Johns. Rep. 571, 588. And it has been held in the state of New York that the deed of assignment may exclude from its benefits such creditors as neglect or refuse to assent to the assignment within a limited time, throwing the distributive shares, to which they would have been entitled, into the general mass, for the benefit of the other creditors provided for by the deed. S. C. Ib. But if the deed, instead of merely excluding the dissenting creditors, and throwing their shares into the general mass, reserves the shares of the dissenting creditors, and directs them to be paid to the grantor himself, the deed of assignment is fraudulent and void. Austin v. Bell, 20 Johns.

NOTE.—Insanity, fraud, etc., in avoidance of a deed in equity.

A person of non-sane memory was formerly held incapable of making a deed. See Shep. Touch. 56; Doe v. Dingnowitty, 4 Sm. & M. Miss. 57; Dicken v. Johnson, 7 Ga. 484; Den. v. Clark, 2 Ired. N. C. 23.

But according to the modern decisions, a deed executed by a person of non-sane mind, whether insane, imbecile, or an idiot, is voidable rather than void. Miles v. Lingerman, 24 Ind. 387; Wait v. Maxwell, 5 Pick. 217; Hovey v. Hobson, 53 Me. 451; Dennett v. Dennett, 44 N. H. 538.

A deed may be avoided on account of drunkenness of the maker. Prentice v. Acorn, 2 Paige, 30; Donelson v. Posey, 13 Ala. 752; Freeman v. Staats, 8 N. J. Eq. 814; See Eaton v. Perry, 29 Mo. 96; Belcher v. Belcher, 10 Yerg. Tenn. 121; Woods v. Pindell, Wright, Ohio, 507; Wamock v. Campbell, 25 N. J. Eq. 485.

A deed may be avoided on the ground of duress but only upon clear and conclusive evidence. Davis v. Fox, 59 Mo. 125; Brown v. Peck, 2 Wis. 261.

The threats must be such as to strike with fear a person of common firmness and constancy of mind; duress by mere advice, direction, influence and persuasion being unknown to the law. Benett v. French, 1 Conn. 354.

A threat to sue is not such duress as will avoid a deed. Harris v. Tyson, 24 Penn. St. 347; See Olivari v. Menger, 39 Tex. 76; Cook v. Moore, 39 Tex. 255; Deputy v. Stapleford, 19 Cal. 303; Baker v. Morton, 12 Wall. 150; See also U. S. v. Child, 12 Wall. 232.

A deed obtained by fraud is void as against the party defrauded. Jackson v. Summerville, 13 Penn. St. 359; Thompson v. Drake, 32 Ala. 99; Somers v. Pumphrey, 24 Ind. 231; Gwin v. Hodge, 4 Jones, (N. C.) L. 168; Gage v. Gage, 29 N. H. 533; Montgomery v. Montgomery, 116 Mass. 227;

Sterling Wheaton, alleged that they, with four others not made parties to the suit, together with Caleb Wheaton, one of the defendants, were entitled, as heirs-at-law of Comfort Wheaton, deceased, to the real property mentioned in the bill, and situate in the state of Rhode Island. That Comfort Wheaton, about the year 1802, began to exhibit symptons indicating a loss of intellect, and soon became, from various causes mentioned in the bill, incompetent to the management of his estate, and died in 1810. That, under these circumstances, the defendant, Caleb Wheaton (his son), and who acted as well for himself as in behalf of the plaintiffs, and the defendant Handy (the son-in-law of Comfort Wheaton), entered into an agreement to endeavor to take his estate out of his hands, and to preserve it for the benefit of his heirs-at-law. That it was agreed that Comfort Wheaton should be prevailed on to convey 105*] his real property to *Handy, for a nominal consideration, who should forthwith execute an instrument of writing, declaring that he took and held the same in trust; first, to provide for the decent support of the grantor, during his life; and after a full remuneration for his expenses and trouble in that respect, to hold the residue of the estate for the benefit of the heirs-at-law. That, on the 9th of May, 1805, Handy did procure such conveyance, for the nominal consideration of $2,178, from Comfort Wheaton, and entered upon, possessed and enjoyed the property in question; but that he refused to execute any declaration of trust as he had agreed, but held the property, claiming it as his own. The bill then alleged that the defendant, Caleb Wheaton, after the death of his father, Comfort Wheaton, acting on behalf and for the benefit of the heirs, procured letters of administration of the personal estate of Comfort Wheaton to be issued by the proper court, and caused such further proceedings to be had as that the administrator exposed to sale the real property before mentioned, which had been conveyed to Handy, and that Caleb Wheaton became the purchaser thereof, for the general benefit of the heirs. That various suits at law had resulted from these transactions (and, among others, an ejectment brought by the defendant, Handy, against the defendant, Caleb Wheaton), by which the value of the property had been much deteriorated. The bill then prayed for an account respecting the property; that a decree might be rendered, exonerating it *from the deeds to the de- [*106 fendant, Handy, after satisfying his just claims, and ordering one-fifth part of the real estate to be set-off to the plaintiff, Nancy

Rep. 442. In Massachusetts, it seems that an assignment in trust for such creditors as should, within a certain time, become parties to the deed, and release their demands, is void as against the dissenting creditors. Ingraham v. Geyer, 13 Mass. Rep. 146. But see Hastings v. Baldwin, 17 Mass. Rep. 552. In Pennsylvania, the rule to be extracted from the decisions seems to be, that where no definite time is limited, or a period very remote, within which the assent of creditors is to be given, the assignment is considered as fraudulent. But, where a reasonable time is limited, within which the trust property is to vest in those for whom the beneficial interest was intended, it is valid. Whart. Dig. tit. Deed, 1, pl. 70, 76.

In the case of Murray v. Riggs, 15 Johns. Rep. 571, 588, it was held by the Court of Chancery, and the Court of Errors of New York, that a reservation, in the assignment, of a sum sufficient for the maintenance of the assignor until discharged from his debts, does not invalidate the assignment; though, in case of a deficiency, the creditors are entitled to have the part reserved applied in satisfaction of their debts. But, in the recent case of Mackie v. Cairns, which has not yet been reported, it was determined that such a reservation rendered the conveyance totally void.

As to the question how far the fact of the possession of the property assigned, still continuing 102*] in the grantor, would affect the validity *of the deed, it seems to be generally considered that if the possession of the grantor be consistent with the deed, as when the possession is continued at the request, and for the benefit of the assignees, for their convenience in making the sale, or where the property is at sea, or out of the country, if possession is taken by the trustees within a convenient and reasonable time, the conveyance will be valid. Vredenberg v. White, 1 Johns. Cas. 156; Meeker v. Wilson, 1 Gallis. Rep. 419; Dawes v. Cope, 4 Binn. Rep. 258; Wilt v. Franklin, 1 Binn. Rep. 517; Putnam v. Dutch, 8 Mass. Rep. 287; Lippincott v. Barker, 2 Binn. Rep. 174. So, a delivery of the key of the warehouse in which the goods are stored, is a sufficient delivery to transfer the property. Wilkes v. Ferris, 5 Johns. Rep. 335. So is a delivery of the receipt of the storekeeper for the goods, it being the regular documentary evidence of the title. Ib.

As to the effect of an assignment for the benefit of creditors (whether under a bankrupt law, or a voluntary private assignment, valid by the lex loci), on property, or the rights of creditors, in another state or country than that where the assignment is made, see Hatch v. Smith, 5 Mass. Rep. 42; Widgery v. Haskell, 5 Mass. Rep. 144; Harrison v. Sterry, 5 Cranch's Rep. 289; Ingraham v. Geyer, 13 Mass. Rep. 146; Le Chevalier v. Lynch, Dougl. Rep. 170; Hunter v. Pots, 4 Term Rep. 182; Milne v. Morton, 6 Binn. Rep. 353; Burke v. M'Clain, 1 Harr. & M'Henry's Rep. 236; Taylor v. Geary, Kirby's Rep. 313; Wallace v. Patterson, 2 Harr. & McHenry's Rep. 463; Ward v. Morris, 4 Harr. & M'Henry's Rep. 330. This point was much discussed in the case of Holmes v. Remsen, 4 John's Ch. Rep. 460; S. C. 20 John's Rep. 229, where all the authorities on the subject will be found collected. Even after these very learned and able discussions, it must still be considered as an unsettled question of international law.

Young v. Pate, 4 Yerg. Tenn. 164; Goodhue v. Berrien, 3 Sand. Ch. 630.

A deed may be set aside by undue influence where relations of confidence exist between the parties, and the deed is the result of an improper exercise of such relations. The relation may be of any kind implying confidence, as trustee and beneficiary, attorney and client, parent and child, guardian and ward, physician and patient, nurse and invalid, confidential friend or adviser. Express proof of such influence need not be made, but will be implied from the known relation of the parties. Bayliss v. Williams, 6 Coldw. Tenn. 440; Turner v. Turner, 44 Mo. 535; Green v. Green, 9 Gratt. Va. 330; Millican v. Millican, 24 Tex. 426; Suttles v. Hay, 6 Ired. (N. C.) Eq. 124; Corbit v. Corbit, 7 Iowa, 60; Fuller v. Fuller, 44 Ala. 301.

Fair argument and persuasion may be used without having the effect of avoiding a deed. Taylor v. Taylor, 6 Ired. (N. C.) Eq. 124; Bowles v. Watham, 54 Mo. 261.

The deed of a lunatic is voidable, and may be avoided by himself, or his heirs, or by one to whom he conveys after the recovery of sanity, or during a lucid interval. Breckenbridge v. Ormsby, 1 J. J. Marsh. 254; Cates v. Woodson, 2 Dana, 452.

Insanity not a defense to a contract made by a person in good faith, and for a full consideration paid, and without the knowledge of the insanity of the other party, or such information as would lead a prudent person to a belief of his incapacity. Matter of Beckwith, 3 Hun, 443; 6 Thomp. & C. N. Y. 13; Eaton v. Eaton, 8 Vroom, 108; 18 Am. R. 716; Younger v. Skinner, 1 McCarter, 389; Mattheirsen v. McMahon, 38 N. J. Law, 536; Beavan v. McDonnell, 9 Exch. 309; Elliott v. Luce, 7 Deyl. M. & G. 475; Beals v. Lee, 10 Penn. St. 56; Nace v. Boyer, 30 Penn. St. 99; State Bk. v. McCoy,

Harding, and one-fifth to the plaintiff, Sterling Wheaton, and for general relief.

The answer of the defendant, Handy, denied that Comfort Wheaton was incapable of conveying his property when the deeds of the 9th of May, 1805, were executed; and insisted that his intellect was perfectly sound at that time. It also denied that he, the defendant, purchased as a trustee, and averred that he was a purchaser for a valuable and full consideration. The answer of the other defendant, Caleb Wheaton, admitted the allegations of the bill, and submitted to any decree the court might think equitable.

A great mass of testimony taken in the court below appeared in the record, which was very contradictory as to the capacity of Comfort Wheaton to make the conveyance in question.

The Circuit Court, by its interlocutory decree, directed that the deeds of the 9th of May, 1805, should be set aside, as having been obtained by false impressions made on a mind enfeebled by old age, and various other causes; and that an account of the receipts and disbursements of the defendant, Handy, should be taken, and that he should be credited for all advances made, and charges incurred, for the maintenance of Comfort Wheaton during his life-time, and for repairs and improvements made on the real estate. Exceptions were filed 107*] by both parties to the report, *which was confirmed by the court below. The final decree declared that the real estate conveyed to the defendant, Handy, should stand charged with the amount of the balance of the account due to him; that the same should be sold, and the proceeds brought into court; that the said balance should be paid to him, deducting his proportion of the charges, etc., and the residue, deducting their proportions, etc., should be paid over, and distributed among the heirs-at-law of Comfort Wheaton. If there be any such heirs, not made parties, they to be at liberty to come in under the decree, and receive their shares, paying their proportions of costs and expenses; otherwise to be excluded. That each party before the court should pay his own costs, excepting the fees of the officers of the court, which should be a charge on the property, and borne by the parties according to their respective proportions of interest in the proceeds of the sale.

From this decree both parties appeal.

Mr. Wheaton, for the original plaintiffs, made the following points:

1. That the decree ought to be reversed, so far as it declared that the real property should stand charged with the advances made by the defendant, Handy.

2. That it ought, in all other respects, to be affirmed.

On the first point, he contended, that the deeds having been obtained by the imposition of the grantee on the grantor, the property ought not *to stand charged with the [*108 expenses incurred by the former. That, even supposing him to have held as a trustee during the life-time of the plaintiff's ancestor; after that period he ceased to hold in that capacity, and became a malæ fidei possessor, who was not entitled to be allowed for improvements made on the land.[1]

On the second point, he argued, (1) as to the objection made in the court below, of the defect of jurisdiction in that court, that the words of the judiciary act of 1789, c. 20, s. 16, providing that suits in equity should not be sustained in the courts of the Union, "in any case where plain, adequate, and complete remedy, can be had at law," were not intended to abridge the equity jurisdiction of those courts; that it had been frequently determined that the proceedings in those courts were to be according to the English system of equity, both as to principles, practice, and jurisdiction;[2] that fraud and trust were familiar subjects of cognizance in the Court of Chancery; and that equity often interfered to redress fraud, even

1.—Green v. Biddle, 8 Wheat. Rep. 77-83; 2 Ves. Sen. Rep. 516; 2 Ves. Rep. 281; Belt's Supplement, 345, 396; 1 Bro. Ch. Rep. 420.

2.—Robinson v. Campbell, 3 Wheat. Rep. 221; United States v. Howland, 4 Wheat. Rep. 108.

69 Penn. St. 204; Lancaster County Bank v. Moore, 78 Penn. St. 407; 21 Am. R. 24; Molton v. Camroux, 2 Exch. 487; Wilder v. Weakley, 34 Ind. 181; Lincoln v. Buckmaster, 32 Vt. 658.

A court of equity will set aside a conveyance which has been obtained by undue influence over a person who is weak or imbecile in mind. Boyce v. Grundy, 3 Pet. 210.

The fact that the mortgagee was the pastor of the mortgageor, does not expose the deed to suspicion of undue influence. Jackson v. Ashton, 11 Pet. 229.

A deed by one in weak state of mind, of all his property to his brother, in whom he had entire confidence, and who had great influence over him, and where a fair consideration is not clearly shown, will not be supported. McCraw v. Davis, 2 Ired. Eq. 618.

Deeds by a woman, immediately before marriage, giving away her property, without knowledge of her intended husband, are fraudulent as to the husband. Walker v. Armistead, 2 Leigh. 11.

Deeds by a ward to a guardian, just after ward arrives at full age, before delivering of ward's estate, and without any settlement of accounts, are void on a principle of public policy, without proof of actual fraud. Walker v. Armistead, 2 Leigh. 11.

A deed from an old man, easily imposed upon, and incapable of business, for a sum greatly under value, purchaser taking advantage of variance between grantor and his son, and using pretenses not intended to be realized, set aside. Keeble v. Cummins, 5 Hayw. 43.

Deed by a weak man, in necessitous circumstances, for a most inadequate price, set aside. Bunch v. Hurst, 3 Desau. 273; Whitehorn v. Hines, 1 Munf. 557.

A court of equity has jurisdiction to declare deeds and other instruments void, and order them to be cancelled and delivered up. Stewart v. Dailey, Litt. Sel. Ca. 212; Thompson v. Graham, 1 Paige. 384; Johnson v. Cooper, 2 Yerger, 524; Jones v. Perry, 10 Yerg. 59.

Acquiescence may amount to confirmation of deed, voidable for imbecility or fraud. Jones v. Evans, 7 Dana, 96; Breckenbridge v. Floyd, 7 Dana, 459.

A deed voidable by an infant may be avoided by his privies in blood, or heirs. Prevost v. Graves, 5 J. J. Marsh, 114.

A court of equity will set aside a gratuitous transfer of property from a wife to her husband, if in anyway induced by untrue representations, on the ground of mistake, though no fraud be shown. Boyd v. De La Montagnie, 73 N. Y. 498.

Deed from heir to executor, induced to be executed for an adequate consideration, claimed by executor to be full value of the heir's interest in the land, set aside. Lambert v. Browning, 19 Daily Reg. N. Y. No. 9.

One seeking to sustain contract with a lunatic, on the ground that it was made in good faith, for the benefit of the lunatic, and without knowledge of his incapacity, and that it has been executed, must allege and prove the facts. Riggs v. Am. Tract Soc'y, 84 N. Y. 330.

after a verdict and judgment at law;[1] that this was not a case analogous to that which had been cited in the proceedings below, where the only ground of equitable interference was a 109*] discovery sought to establish the *fraud, and the plaintiff having failed in the discovery, and having a complete remedy at law, should not be allowed to proceed in equity.[2]

2. Another objection was, that this was an attempt to establish a trust by parol evidence, contrary to the statute of frauds. The court below did not consider it necessary to determine this point, because, at all events, there was a resulting trust for the heirs (after allowing for advances, etc.), which, even in England, might, unquestionably, be established by parol. But a comparison of the English statute of frauds, 29 Charles II. c. 3, with the provisions of the local statute of Rhode Island on the same subject, would show that the latter did not extend to trusts, and, therefore, there could be no question of the admissibility of parol evidence in this case.

3. It was a case of imposition practiced by a son-in-law upon his father-in-law, an old man, infirm in body and mind, morally and physically incapable of managing his own affairs, and of resisting the influence and importunities of the other party, standing in that intimate relation. It was analogous to other cases of fraudulent and hard bargains made with expectant heirs, and other persons standing in peculiar relations, rendering them liable to imposition. The great leading case on the general analogy, was that of Chesterfield v. 110*] Jansen,[3] which was not cited *as a direct authority, but as illustrating the general principle. Lord Hardwicke there lays down the rule on which the Court of Chancery proceeds, and classifies the cases in which it will interfere. These are: (1) Actual fraud. (2) Such as is apparent, from the nature of the bargain itself, as being fragrantly unequal. (3) A kind of fraud which may be presumed from the circumstances and condition of the parties contracting. (4) Which may be inferred from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. (5) Fraud, infecting catching bargains with heirs, reversioners, expectants, etc. There are to be found in the books a great variety of applications of these principles. Thus, in Clarkson v. Hanway,[4] the suit was brought by an heir-at-law to set aside a conveyance by his ancestor, who is described as a "weak man," 72 years old, who had conveyed his estate for a small annuity. The conveyance was set aside on those circumstances alone, by the master of the rolls, and decree confirmed, on appeal, by Lord Macclesfield. In Bates v. Graves,[5] the bill was filed by a son to set aside a conveyance (which was confirmed by a will) by his father to a son-in-law, under circumstances of fraud, and undue practices, upon the weakness of the grantor. Lord Thurlow and Lord Rosslyn concurred in holding these circumstances to be sufficient to annul the conveyance, *though the party was [*111 not a lunatic. In a still more recent case,[6] Lord Eldon relieved against a bargain with an expectant heir, where there was no fraud or imposition, upon the ground of inadequacy of consideration, where there was an inequality of condition in the parties. Mere inadequacy of consideration was held insufficient, but, coupled with the other circumstance, was deemed a sufficient ground to annul the contract. In Huguenin v. Baseley,[7] a settlement by a widow, upon a clergyman and his family, was set aside, as having been obtained by undue influence, and abused confidence in the party, as the agent of the grantor's affairs, upon the principle of public policy and utility, applicable to the analogous cases of guardian and ward, attorney and client, etc. It was there earnestly contended that the law of England does "not prevent a prodigal disposition by a person of sound mind." But the argument was overruled by Lord Eldon; and the words of Sir S. Romilly, arguendo, in that case, are remarkably pertinent to the present: "Though no direct authority is produced, your lordship, dispensing justice by the same rules as your predecessors, upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide accordingly." *The same prin- [*112 ciples and authorities had been applied, by a court of justice of our own country, to a case almost the same with the present in all its material circumstances.[8] They are applied in every system of jurisprudence having a due regard to the protection of the weak from the artifices of those who have the means of unduly influencing or controlling their conduct. Thus, in the countries governed by the Roman law, the provisions of positive law prohibiting donations inter vivos, between persons standing in certain peculiar relations of mutual confidence and dependence, are extended by equity to other relations of a similar character, and falling within the reason of the prohibition.[9] The court below seems to have considered that it might have been justified, on these principles, in declaring the deeds in question utterly void, though, in framing its decree, it thought proper to take a more mitigated view of the defendant's conduct.

Mr. Coxe (with whom was Mr. Webster), for the defendant, Handy, argued: (1) That there was a defect of jurisdiction in the court below, proceeding as a court of equity. A complete and adequate remedy at law existed. If the deeds were invalid on the ground of fraud and imposition, that question might be tried in an *action at law. It had been so tried [*113 and determined.[10]

2. It appeared, on the face of the bill itself, that there were other children of Comfort

1.—2 P. Wms. 425; 2 Vern. Rep. 146; 2 Ves. Sen. Rep. 628.

2.—Clarke v. Russell, 7 Cranch's Rep. 89.

3.—2 Ves. Sen. Rep. 157.

4.—2 P. Wms. 203.

5.—2 Ves. Jun. Rep. 287.

6.—16 Ves. Rep. 512; see also Oliver v. Court, 8 Price's Excheq. Rep. 127.

7.—14 Ves. Rep. 273; Griffiths v. Robins, 3 Madd. Rep. 191.

8.—Whelan v. Whelan, 3 Cowen's Rep. 537.

9.—Pothier, Traité de Donations, s. 1.

10.—Smith v. M'Iver, 9 Wheat. Rep. 532.

Wheaton, who are his heirs-at-law, but who had not been joined in the present suit. They were equally interested with the other plaintiffs, and should, therefore, have been joined. Their interests are also affected by the decree. It is not too late to take advantage of this objection.[1]

3. The bill contained multifarious matters which ought not to be joined. Each of the defendants claimed to have the legal estate in him, in opposition to each other. There was no privity between them as to their respective interests; and before the plaintiffs could have any interest in vacating the deeds of the defendant, Handy, the deed of the defendant, Caleb Wheaton, must be removed. The establishment of their right against one defendant was a prerequisite to their calling upon the other to answer.

4. The main object of the bill, and that attained by the decree, was to enforce specifically a parol agreement alleged to have been made between the two defendants, denied by the defendant, Handy, and not proved by any competent testimony. The contract proved is wholly different from that alleged. Such a 114*] contract as is *alleged, and now attempted to be enforced, is deficient in mutuality.[2] It also virtually admits the sanity and competency of the grantor, Comfort Wheaton, which is now made the ground for setting aside the deeds.

5. If, however, he was in the state of mind in which the bill represents him, the plaintiffs, by their agent, participated in the fraud, and therefore have no right to call upon a court of equity to interfere to relieve them from the web in which they have entangled themselves.[3]

6. The plaintiffs are barred by lapse of time.

7. The decree sanctions an attempt to establish a contract concerning lands, and a trust in real estate, by parol evidence. The proof of a trust lies on the party who alleges it.[4] In this case, the conveyances are absolute on the face of them, and the evidence of a trust is wholly aliunde. To warrant the court in decreeing the execution of a parol declaration of trust, the evidence should be plain and unambiguous.[5] The taking the conveyance was not in part performance. The act of part performance must be such as the party would not have done with any other view than in execution of the alleged agreement.[6] This secret trust, and the allegation of part performance, are both de- 115*] nied by the answer, *and this settles the question.[7] The secret trust cannot be proved by parol testimony, especially where it is made with a stranger to the estate without consideration.[8]

8. The bill does not distinctly allege the incompetency of Comfort Wheaton, and the imposition said to have been practised on him, so as to put these facts in issue. The decree must conform to the allegata. Some substantial ground must be stated. Old age alone is not sufficient.[9]

9. If these facts had been ever so distinctly put in issue, they have not been proved. Where fraud is alleged, it must be fully proved, and will not be presumed.[10] The presumption of law is in favor of a party executing an instrument.[11] The question is confined to the state of mind at the time of executing the instrument.[12] Two witnesses deposing sanæ menti, are to be credited before a hundred proving insanity.[13] The law will not measure a man's understanding, and a partial diminution of intellect is not sufficient to invalidate the deeds; nor is there any such thing as an equitable incapacity, where there is a *legal capac- [*116 ity.[14] Fraud of this description is equally cognizable at law, and in equity; and the Court of Chancery will not set aside a will of lands on that ground, without directing an issue.[15]

10. The decree is inconsistent both with the allegations in the bill, and with itself. It is a bill with a double aspect. It charges incompetency in the grantor, and prays that the estate may be exonerated; it also charges a trust, and prays an account, and general relief. The decree declares that the grantor was incompetent, and his conveyance invalid, and yet does not exonerate the estate from them. A deed cannot be set aside partially on the ground of fraud. If set aside at all, it must be in toto.[16] The decree proceeds on the ground of imposition, and grants a relief which could only apply to the pretended trust, which necessarily implies capacity in the grantor. It does not pass on the conveyance from the administrator of Comfort Wheaton, to the defendant, Caleb Wheaton. So long as the legal estate remains in him under that deed, the right of the plaintiffs is a nonentity.

11. The master's report is erroneous on several grounds, and ought to have been set aside. (1) Because, in taking the account, he refused to receive the testimony of the defendant, Handy, when it was competent and credible. (2) The *master required evidence of [*117 the consideration of a promissory note, when the signature was sufficiently proved.[17] (3) He held, also, that where a party charges himself with a certain sum, and at the same time discharges himself, it shall be evidence against him, but not for him.[18] The other exceptions to the master's report were also minutely discussed; but it is not thought necessary to state them, as they are enumerated, and fully examined, in the judgment of this court.

12. The final decree is erroneous in several particulars. (1) In directing a sale of the

1.—Coop. Eq. Pl. 33; Pr. Reg. 299; Bart. Eq. 31, n. 1; Hinde's Ch. 2; 1 Vern. Rep. 100; 5 Wheat. Rep. 313; 9 Wheat. Rep. 842.

2.—Newl. Contr. 152.

3.—14 Ves. Rep. 288.

4.—Prevost v. Gratz, 1 Peters' Rep. C. C. 364; S. C. 6 Wheat. Rep. 494.

5.—Wharton's Dig. 580.

6.—4 Ves. Jun. Rep. 108.

7.—6 Ves. Rep. 39.

8.—2 Johns. Ch. 405; 7 Cranch's Rep. 176; 11 Mass. Rep. 342; 13 Mass. Rep. 443; 4 East's Rep. 577, n; 1 Eden's Rep. 515; 1 Cox's Rep. 15.

9.—1 Ves. Jun. 19, 20; 4 Dessauss. 518.

10.—Cas. temp. Talb. 116; 1 Madd. Ch. 208.

11.—5 Johns. Rep. 158; 3 Bac. Abr. 527, 540.

12.—13 Ves. Rep. 88; 8 Mass. Rep. 371.

13.—Co. Litt. 246, b. note 1.

14.—1 Madd. Ch. 223, 224.

15.—3 Bac. Abr. 321; 2 Atk. Rep. 424; 3 Atk. Rep. 17; 2 Ves. Jun. 287; 1 Madd. Ch. 206.

16.—2 Ves. Jun. Rep. 408; 3 Atk. Rep. 281.

17.—Mandeville v. Welch, 5 Wheat. Rep. 282.

18.—Ambl. Rep. 589; 1 Ves. Jun. Rep. 546.

property under the circumstances. (2) Because it purports to bind, and does affect the interest of those who are not parties. (3) Because it wholly omits to provide for the defendant, Handy, as tenant by the curtesy. (4) Because it does not, unless by implication, determine all the matters in issue, and which ought to have been decided.

Mr. Wheaton, for the plaintiff below, in reply as to the want of proper parties, argued that, as by the local law, one coparcener could maintain an action at law for his share of the real estate, the same rule of proceeding would be adopted in equity. Under the peculiar circumstances of the case, the court below had considered the defendant, Caleb Wheaton, as legal owner under the administration sale, suf- [*118] ficiently representing all *the parties who could claim any beneficial interest; and he (as in effect a plaintiff) submitted to any decree the court could make in favor of the plaintiffs. Besides, the nature of the jurisdiction of the courts of the Union, which was derived from the character of the parties as citizens of different states, would prevent their insisting upon parties who were not absolutely necessary to the determination of the merits of the cause as between the parties before the court.[1] But, in this case, the court might apply the analogous rule, as to next of kin suing for distributive shares of personal property, one of whom may sue, and the rest may come in under the decree.[2]

Upon the merits, he insisted that the question as to the capacity of the grantor was not a question of absolute insanity. All the cases show that the court will interfere wherever a peculiar relation has been abused to influence or impose upon a person of weak mind. A commission of lunacy is not, by the modern practice of the Court of Chancery, confined to cases of strict insanity, but is applied to cases of imbecility of mind, to the extent of incapacity, from any cause, as disease, age or habitual intoxication.[3] This principle is fully developed by Lord Erskine in ex-parte Cranmer.[4] It was [*119] not, therefore, necessary *to show that the grantor was absolutely non compos mentis in a strict legal sense, still less was it necessary to prove that he was incapable at the precise moment the deeds were executed.

As to the defects in the pleadings, and the other informalities in the proceedings, it was said that the court would look with an indulgent eye upon the pleadings and practice in equity causes in those states, where, no state court of chancery existing, the forms of proceeding were less familiar to practitioners. But it was insisted that the bill contained a sufficient allegation of the incapacity of Comfort Wheaton to execute the deeds in question, to put that fact distinctly in issue, and it had been met responsively by the answer of the defendant, Handy, explicitly denying it.

Mr. Chief Justice **Marshall** delivered the opinion of the court, and after stating the case, proceeded as follows:

The counsel for Asa Handy contend that the bill seeks to set up a parol trust, which is denied in the answer, and that the decree is founded on a supposed incompetency of Comfort Wheaton to convey his property. The decree, therefore, is not supported by the allegations of the bill.

They also contend that the decree is not sustained by the proofs in the cause.

That the bill alleges the conveyances of the 9th of May to have been received for the benefit of the family, is unquestionable; but this is not *incompatible with the incompe- [*120] tency of Comfort Wheaton to execute them. Deeds may be obtained from a weak man for the purpose of preserving his estate for himself and family, and of protecting him from the impositions to which he might be exposed; and there is nothing to restrain one of the heirs, who may think himself aggrieved, from bringing the whole case before a court of equity. If, indeed, it were true in fact, that the bill does not allege this incompetency so as to put it in issue, the objection would be conclusive; for it is well settled that the decree must conform to the allegations of the parties. But we think this bill is not justly exposed to this objection. It states the general correct conduct of Comfort Wheaton during the life of his wife; that, soon after her decease, he was visited by a paralytic stroke, which was followed by a total change in his conduct. He was addicted to intoxication, and to many vicious habits, in the course of which fears were excited in his family that he would waste all his property, or convey it to his profligate companions. They consulted together, and with their friends; and the first proposition was, to apply to the court for a guardian to manage his affairs, according to the law of Rhode Island in such cases. It was, however, finally agreed that Asa Handy should obtain deeds for his property, and hold it for the use of Comfort Wheaton during his life, and of his heirs after his death. The bill then proceeds to state that the said Asa Handy, knowing the premises, did induce the said Comfort, "he being in the state and condition *of body [*121] and mind aforesaid," for the nominal consideration of $2,178, to make the conveyances in the bill mentioned.

Although a more direct and positive allegation that Comfort Wheaton was incapable of transacting business, would have been more satisfactory than the detail of circumstances from which the conclusion is drawn, yet, we think that the averment of his incompetency is sufficiently explicit to make it a question in the cause. The defendant has met this charge, and we cannot doubt that this answer is sufficiently responsive to the bill to give him all the benefit which the rules of equity allow to an answer in such circumstances.

We proceed, then, to look into the proofs in the cause, and to inquire whether the testimony establishes the incompetency of Comfort Wheaton when these deeds were executed.

We have examined with attention the immense mass of contradictory evidence which the record contains. A number of persons, and, among others, the witnesses to the deeds, express the opinion that he was capable of managing his affairs, and of disposing of his property. This evidence, however, is met by such

1.—Russell v. Clark, 7 Cranch's Rep. 98.
2.—Coop. Eq. 39, 40.
3.—Ridgway v. Darwin, 8 Ves. Rep. 65.
4.—12 Ves Rep. 445.

a mass of opposing testimony as can scarcely be resisted. Among the numerous witnesses who testify to the imbecility of his mind, are many who had been long and intimate acquaintances. All his physicians concur in stating, in strong and decided terms, the weakness of his mind, 122*] as well as *his body, which they ascribe chiefly to the character of his disease. One of them, Doctor Barrows, attended him about the time these deeds were executed. He says: "With regard to the state of his mind, at all times when I saw him within the said period (from the 1st of March to the 25th of November, 1809), I can say that he appeared to me wholly incapacitated to transact any money business, or to have the care of any concerns whatever. It is my opinion that the decay of his mental faculties was such as to induce that state of fatuity which would unfit him for all the purposes relative to the affairs of life, except obeying the various calls of nature." Some of the witnesses add to their opinion of his imbecility, some circumstances on which the opinion is founded, which cannot fail to make a deep impression on the mind. Ziba Olney says that he was acquainted with Comfort Wheaton for the last five years of his life, who, for the last fifteen months of them, resided in his family. "That during the whole of these times he appeared to be childish, and incapable of transacting any business. The reasons of this opinion are, that he would frequently repeat the same questions, and would, several times in the same day, ask what day of the week it was. At short intervals he would talk rationally, and then would break off from conversation to singing, and from that to crying. That he would frequently go out in the night and day, naked, except his shirt. That he would frequently break out in profane language, and at other 123*] times preach." Several other *witnesses describe the situation and conduct of this afflicted old gentleman, in a manner to add great weight to their opinion that his faculties were prostrated. Many even of those witnesses who depose to his competency, declare that the public opinion and language of his neighborhood was, that his mind was deplorably impaired; and the conduct and declarations of his family, including the defendant, Asa Handy himself, show a settled conviction that Comfort Wheaton was incapable of managing his affairs.

There is evidence of the consultations in which Handy participated, previous to the deeds of the 9th of May, for putting the old gentleman and his estate under guardianship; and there is also evidence of similar consultation respecting the propriety of procuring a conveyance of his property, in order to save it for himself and his family. This may not be admissible as proof of a trust; but it is strong evidence of a conviction that the person from whom the deed was to be obtained was unfit for the management of his own affairs. Among other testimony to this point, Abner Daggett deposes that Asa Handy asked him if he had a notion of buying his father Wheaton's lot. The witness answered that he had had some conversation with Wheaton about it; upon which Handy said, Wheaton was no more capable of selling his estate than a child. The witness was deterred from purchasing, though he wished to acquire the lot, by the fear of subsequent controversy.

The great and sudden revolution in the whole *conduct of Comfort Wheaton, imme-[*124 diately after the first paralytic stroke, viewed in connection with his advanced age, is a strong circumstance in corroboration of the opinion that his mind was diseased. A sober, prudent, reflecting and moral man, between seventy and eighty years of age, mingles with profligate people, to whom he devotes himself, and becomes suddenly intemperate, immoral, and childishly whimsical and indiscreet, so that his nearest friends think it necessary to put it out of his power to ruin himself.

The terms on which this old gentleman stood with his family, are not entirely unworthy of consideration. But two of his children, Caleb, and Mary, the wife of the defendant Asa, lived near him. From causes, some of which may be discerned in the record, he was on ill terms with Caleb. One of the witnesses deposes that he said, on one occasion: "You know, Asa, I made you the deeds to spite Caleb." There is other testimony to the same effect. The necessary consequence of this quarrel with Caleb was, to subject him, in an increased degree, to the influence of Mary Handy and her husband, and exposes the deeds conveying all his property to them to an increased degree of suspicion.

The inadequacy of the consideration, as stated in the bonds referred to in the answer, furnishes an additional argument against these deeds. It was chiefly the support of Comfort Wheaton for the residue of his life. This proved to be five years, which was a longer time than his age and state of health, at the time of the transaction, rendered probable; *but[*125 which was certainly not a full consideration for the property.

These various circumstances add so much weight to the opinions of those who depose to the incompetence of Comfort Wheaton, that the mind cannot withhold its assent from that conclusion. An issue, indeed, might have been directed; but we do not think it a case in which this course ought to have been pursued. The degree of weakness or of imposition, which ought to induce a court of chancery to set aside a conveyance, is proper for the consideration of the court itself; and there seems to be no reason for the intervention of a jury, unless the case be one in which the court would be satisfied with the verdict however it might be found. A verdict affirming the capacity of Comfort Wheaton to execute these deeds on the 9th of May, 1805, could not, we think, have been satisfactory to the court; and it was, consequently, not necessary to refer the question of competency to a jury.

If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case, is among its best settled principles. The cases cited in the argument, which we will not repeat, place this beyond the possibility of question. It was, therefore, proper to set aside the deeds, and to direct the defend-

126*] ant, *Handy, to account for the money he had received under them.

But, although that defendant ought not to be permitted to benefit himself by his own improper act, it is not reasonable that he should be burthened with the debts of Comfort Wheaton, and the expenses of his maintenance. These are proper charges on the estate itself. So are improvements and repairs which enhanced the rents, and the value of the estate. As a defendant in equity, Asa Handy has certainly a right to retain them, and to receive credit for them in the account which was directed by the Circuit Court.

There is, we think, no error in the manner in which the account was directed to be taken.

The parties were heard before the master, who, after a very laborious and comprehensive examination of their accounts, has made a voluminous report, to which both parties have excepted.

It may be observed, generally, that it is not the province of a court to investigate items of an account. The report of the master is received as true, when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies. Were it otherwise; were the court to look into the immense mass of testimony laid before the commissioner, the reference to him would 127*] be of little *avail. Such testimony, indeed, need not be reported farther than it is relied on to support, explain, or oppose, a particular exception.

1. The first exception made by Handy is, that only the sum of $5,448.26 were allowed him by the commissioner, instead of $101,167.30, the amount of his claim. This is a general exception, which comprehends, it is supposed, the particular alleged errors enumerated in the subsequent exceptions.

2. The second exception is, that the master did not admit his whole account on his own oath.

The conduct observed by the master on this point, is thus specially stated by himself: "I admitted" said Asa, "to make oath to all charges, whether for money, specific articles or services, which, from the circumstances of the parties, or the nature of the charge itself, could not, in my opinion, be proved by vouchers, or other legal evidence."

This rule, adopted by the master, is, in our opinion, one to which Handy could make no just objection. There can be no propriety in admitting the party as a witness to support items in an account, which, from their character, admit of full proof. Of this description are the items which constitute his third exception. It is the demand of testimony to support his charges for repairs and improvements. These repairs and improvements are susceptible of complete proof; and, as there could be no 128*] difficulty in procuring *it, the commissioner did right in requiring it. The fourth exception is to the rejection of his oath to discharge himself from rents, which, as he alleged, he had not received.

The commissioner has made considerable deductions from the total amount of rent, if calculated for the whole time, but has rejected the oath of Handy, because he admitted that he had kept ledgers in which his receipts of rents were regularly entered, which were still in his possession, but which he refused to produce. The decision of the master on this point was so obviously right that it need only be stated to be approved.

5. The fifth exception is, that the master has not allowed for repairs and improvements according to the measurement of Nathan Parks, which was on oath, but according to the estimate of John Newman, which was not founded on actual measurement, but made principally by the eye.

The master reports that, "in addition to the evidence produced by the parties, I appointed John Newman, an experienced and skillful measurer of carpenters' work, to go on the premises, together with the said Handy and myself, and to measure and estimate all such repairs, and alterations, and buildings, as said Handy, being under oath, should point out as being made and executed by him." The estimate of the said Newman, with his deposition, are referred to, and annexed to the report.

Newman deposes that his estimate is founded *on actual measurement, except parts [*129 of the roof of one building, which he took from the measurement of Nathan Parks. and of another, in which he was guided by the statement made by Handy himself of the length of the rafters, which accorded with his own estimate.

That a measurement thus made and proved, was entitled to more respect than the ex-parte measurement of Parks, cannot be doubted.

6. An exception is also taken to the report, because it disallows the charge made by Handy of a note, which he says was proved.

This exception, it is presumed, was not taken before the master, as he does not notice it, and it is too vague to be regarded. Neither the note, nor the ground on which payment is claimed, nor its amount, nor the reasons of its rejection, are stated; nor is there any reference to the evidence in support of it. Nothing is stated to induce a suspicion that the disallowance of it was improper. Yet the court, from its solicitude to discover whatever the record might contain on this subject, has looked through the report. Nothing is said, so far as we can perceive, respecting a note, except in the affidavit of Ziba Olney, who states that Asa Handy became the indorser of some note for Appleby, which was settled in some way in the board of Comfort Wheaton, on which note, he believes, Handy was sued. If this is the note to which the exception alludes, the claim is absorbed in the allowance made him for the board of Comfort Wheaton. But, whether it be the note or not, *the exception [*130 is totally unsupported, and cannot be sustained.

7. A seventh exception is, a charge of money alleged to have been received of Doctor Bowen, although he discharged himself therefrom on oath, in payments of different sums under twenty dollars each.

This is the application to a particular item of the principle contained in the second ex-

ception, and is disposed of with that exception.

8, 9. The eighth exception is a repetition of the objection to the manner in which Handy is charged with repairs, the master's report respecting which has been already stated to be satisfactory; and the ninth is a repetition of the claim to sustain his accounts on his own oath.

10. The tenth exception is to the requisition made on him to produce his ledger, in which entries had been made of the rents he had received; a requisition to which he objects, because it contained transactions anterior to the entries of rent.

The validity of this objection cannot be admitted. The ledger might be inspected in the presence of the defendant, Handy, and there could be no propriety in commencing the examination with prior transactions.

11. The eleventh exception respects the calculation of interest. The commissioner had made what are denominated rests in the account, instead of calculating interest on each minute item. This mode of calculating receipts and expenditures, in accounts consisting of 131*] numerous small *items, is recommended by convenience, and has been generally adopted. It seems to have been properly adopted in this case.

12. The twelfth and last exception is a repetition of the often repeated, and as often rejected claim, to be admitted to swear to his whole account.

The original plaintiffs except (1) to the allowance made to the said Asa Handy for buildings which were erected on the lot after the death of Comfort Wheaton, which are said to be no advantage to it.

But there is no proof, and no reason to believe, that these buildings were not a real advantage to the property, and did not increase the rent and the value. This exception, therefore, was properly overruled.

2. The second exception is to the admission of the said Handy's oath, in cases in which he refused to produce his books, and the books of Comfort Wheaton.

No example of this admission is given, nor is there any proof in support of the exception. The rule by which the master was governed has been already stated and approved.

3. The third exception is a repetition of the objection to the admission of items in the account of Handy, on his own oath; and is answered by a reference to that part of the report which relates to this subject, and which has been already stated.

The fourth, fifth, sixth, and seventh exceptions are totally unsupported by evidence, and, consequently, cannot be sustained.

132*] *We think the Circuit Court did right in confirming the report of the commissioner.

Upon the return of this report, the Circuit Court directed the estates to be sold, and the money due to the said Asa Handy to be paid, in the first instance, and that one-fifth of the residue should be paid to each of the plaintiffs, that being the distributive share of each under the law of Rhode Island. The decree proceeds to authorize the heirs who were not made parties to come in and receive their distributive shares, on paying their proportion of the costs and charges of suit.

The objection to this decree is, that the children of Mary Handy, and the children of Daniel Wheaton, are not parties to the suit.

It has been supposed that it is not necessary, in Rhode Island, to make all the heirs parties, because, by the laws of that state, parceners can sue separately for their respective portions of the estate of their ancestor. This law would undoubtedly be regarded, in a suit brought on the common law side of the Circuit Court. Its influence on a suit in equity is not so certain. But, however this may be, we are satisfied that a sale ought not to have been ordered, unless all the heirs had been before the court as plaintiffs or defendants. Although the legal estate may be in Caleb Wheaton under the deed made by the administrator, yet he acknowledges himself to be a trustee for the heirs, having purchased for their benefit. They have, therefore, a vested equitable interest in the property, of which they *ought not to be deprived [*133 without being heard. They may choose to come to a partition, and to redeem their shares by paying their proportion of the money with which the estate is charged. The bill does not state that the heirs who are not made parties are unwilling to become so, or cannot be made defendants by the service of process. We think, then, that there is error in proceeding to decree a sale, without bringing all those heirs before the court who can be brought before it; and for this error the decree must be reversed, and the cause sent back, with liberty to the plaintiffs to amend their bill by making proper parties. If all the heirs cannot be brought before the court, the undivided interest of those who do appear, is to be sold, and the lien of Asa Handy is to remain on the part or parts unsold, to secure the payment of so much of the money due to him as those parts may be justly chargeable with.

Decree.—These causes came on to be heard, etc. On consideration whereof, this court is of opinion that there is no error in the interlocutory decree, nor in so much of the final decree as approves and confirms the report made by the master; but there is error in so much thereof as directs a sale of the premises therein mentioned, all the heirs who are shown to be interested in the said premises not being made parties, and it not being shown or alleged that they could not be made parties. So much of the decree, therefore, as directed a sale of the premises in the *bill mentioned, is reversed and [*134 annulled, and the residue thereof is affirmed; and the cause is remanded to the said Circuit Court, with liberty to the plaintiffs to make all proper parties, that the whole may be sold if all the heirs can be made parties, otherwise the shares of such as are made parties. Each party to pay his own costs in this court.

[Feudal And Constitutional Law. Assignment By The Husband Of A Chose In Action Belonging To The Wife.]

HENRY CASSELL, Administrator of Louisa Browning,
v.
CHARLES CARROLL, of Carrollton.

The title and claim of Charles Lord Baltimore, his heirs and representatives, to the quit-rents reserved by the proprietary of the late province (now state) of Maryland, was extinguished by the agreement between the heirs, devisees and personal representatives of the said Lord Baltimore, and of his son and heir Frederick Lord Baltimore, made in 1780, and confirmed by an act of the British Parliament in 1781.

It seems, that a bona fide assignment, for a valuable consideration, made by a husband, of a debt actually and presently due to his wife, devests, in equity, the title of the wife.

But, however this may be in general, the agreement made in 1780, including the quit-rents then actually due (if at all) to Louisa Browning, the daughter of Charles Lord Baltimore, and assigning them to Henry Harford, the devisee of Frederick Lord Baltimore, having been entered into in England, by the husband of Louisa Browning and her committee (she being a lunatic), and the consideration having actually gone beneficially for her use, 135*] and the *whole transaction having been between British subjects, under the direction of the High Court of Chancery, and confirmed by an act of parliament, transferred a complete legal and equitable title to the assignee.

ERROR to the Circuit Court of Maryland.

This was an action of debt, brought by the plaintiff in error in the court below, for the recovery of certain quit-rents alleged to be due from the defendant to the plaintiff's intestate. The special verdict found by the jury stated the following facts:

The jury find, by their verdict, that Charles the First, in the eighth year if his reign, granted to Cæcelius Calvert, Baron of Baltimore, his heirs and assigns, forever, in fee-simple, the province (now state) of Maryland, by a charter dated the eighth of June, 1633. Cæcelius Calvert died in 1675, and left Charles, afterwards Baron of Baltimore, his son and heir, who entered into the said province, and was seized thereof. The said Charles, in 1711, granted, according to the laws of the province, to Charles Carroll, Esq., father of the defendant, a patent for a tract of land containing ten thousand acres, " to have and to hold the same unto him, the said Charles Carroll, his heirs and assigns, forever; to be holden of us and our heirs, as of our manor of Baltimore, in free and common socage by fealty only for all manner of services, yielding and paying therefor, yearly, unto us and our heirs, at our receipt at the city of St. Mary's, at the two most usual feasts in the year, viz., at the feast of the annunciation of the Blessed Virgin Mary, and 136*] *St. Michael the arch-angel, from and after the second day of April, which shall be in the year of our Lord 1723, the rent of one hundred pounds sterling in silver and gold."

The defendant inherited the said tract of land from his father, and is now seized and possessed of the same. On the 31st day of December, 1698, the said Charles Lord Baltimore executed a deed, by which he settled the province of Maryland on himself; remainder on his son Benedict for life; remainder on the heirs male of the body of the said Benedict; remainder to the said Charles in fee. There were trusts created in the said deed, all of which are determined. The said Benedict died in 1714, and Charles, his father, 1715. The said Benedict left issue male Charles his heir, afterwards Lord Baltimore, and proprietor of Maryland. Benedict left other sons, all of whom died without issue.

The last mentioned Charles entered into the province of Maryland, and was seized thereof, as the law requires; and, on the 11th day of July, 1730, executed a deed to trustees, to the use of the said Charles and his assigns for life, remainder to the use of the first and other sons of the said Charles in tail male successively; remainder to the use of the said Charles in fee. There were other trusts created in the deed, but they were all determined at the death of Mary, the wife of the said Charles, which took place in 1769.

In 1692, an act was passed by the legislature of Maryland, which declares that no manor, land, *tenements or hereditaments [*137 whatsoever, within the province, shall pass from one to another, except the deed or conveyance be acknowledged before certain magistrates, and enrolled or recorded. This act was in force when the indenture of the 31st of December, 1698, was executed, but the said indenture was not acknowledged or recorded. The legislature of Maryland, in 1715, ch. 47, passed an act which requires deeds, and leases for more than seven years, to be acknowledged and recorded within six months from their date. It also declares all deeds, not acknowledged and recorded, according to the provisions of the act of 1692, to be void. The deed of the 11th of July, 1730, was neither acknowledged nor recorded.

The last mentioned Charles Lord Baltimore had issue only one son, named Frederick, and two daughters, one named Louisa (who is the plaintiff's intestate) and the other named Caroline. The said Charles Lord Baltimore, being seized of the province of Maryland as aforesaid, made his will in 1750, and devised the province of Maryland to trustees, for the use of his son Frederick, and his assigns, for life; remainder to the use of the sons lawfully begotten of the body of the said Frederick, successively in tail male; remainder to the daughters of the said Frederick; "and, in default of such issue, then to the use and behoof of Louisa, my eldest daughter, her heirs and assigns, forever." Charles Lord Baltimore died seized the 23d day of April, 1751. The *said Frederick [*138 Lord Baltimore died without lawful issue, on the 4th day of September, 1771.

Louisa, the plaintiff's intestate, was married to John Browning, on the 15th day of May, 1762, and remained covert baron of the said John until 1792, when he died. The said Louisa was a lunatic from the year 1780 till the day of her death, which took place in November, 1821. She has never been in the state of Maryland since the death of her father. Letters of administration were regularly granted to the plaintiff on the 17th day of April, 1823.

Frederick, the son of Charles Lord Baltimore, entered into the province of Maryland, and was seized thereof as the law requires. On the 1st day of July, 1761, the said Frederick,

and Cæcelius Calvert, his uncle, executed a deed of bargain and sale to Thomas Bennett and William Sharp, of the province of Maryland, and its appurtenances, for the purpose of docking the entail of the province. On the 8th of April, 1767, the said Frederick executed a deed of lease and release of Anne Arundel manor, and all other manors held by the lord proprietary in the province, to Bennett Allen, and recoveries were afterwards suffered of the said manors, in pursuance of the said deed of lease and release. On the 4th day of March, 1771, Frederick Lord Baltimore made his will, and devised the province of Maryland, and all its appurtenances, to Henry Harford.

That upon the death of the said last-mentioned Frederick, Baron of Baltimore, Henry 139*] Harford, *the devisee named in his will, was a minor, and a ward, under the guardianship of the Court of Chancery in Engand, and so continued until 1779. That the said Henry Harford, as devisee as aforesaid, was recognized and acknowledged by the provincial government of Maryland, as the lawful proprietor under the charter, and by his guardians, with the knowledge and consent of the British government, entered into the possession of the government of the province of Maryland, and received the rents and revenues thereof as proprietor, until the beginning of the disturbances which separated the United States of America from the British government. That those disturbances began in 1774, at which time the people of the province of Maryland took the government of the said province into their own hands, and ousted the officers of the proprietor; and the government of the said province so continued in the hands of the people until the declaration of independence, the 4th of July, 1776. That no quit-rents, nor any revenues which fell due in the said province after the year 1773, were paid to the proprietor or his officers; that, after the revolutionary war, the British government paid to the said Henry Harford £60,000, as a compensation for his losses in Maryland by the revolution; and paid to the above-mentioned John Browning, and to Robert Eden, who married the above-mentioned Caroline, £10,000 each, as a compensation for their losses in the said province, by the said revolution. That 140*] suits in the Chancery Court of *England were instituted in 1772, by the said Browning and wife, and the said Eden and wife, against the said Harford, to recover the province and revenues of the said province of Maryland, which suits continued until 1782, when the said bills were dismissed by the complainants.

In 1780, the legislature of Maryland passed an act, which declares that "the citizens of Maryland, from the declaration of independence, and forever, be, and they are hereby declared to be, exonerated and discharged from the payment of the aforesaid quit-rents, and that the same shall be forever abolished and discontinued."

In 1780, an agreement was entered into in England, by deed, between Henry Harford of the first part, John Browning, the husband of Louisa Browning, and Sir Robert Eden and Caroline, his wife (the said Louisa and Caroline being the heirs-at-law of Frederick Lord Baltimore), of the second part; Sir Cecil Wray, the committee of the real and personal estate of the said Louisa (she being a lunatic) of the third part, and Hugh Hammersley and Peter Prevost, two of the executors named in the will of Frederick Lord Baltimore, of the fourth part, all the said parties being British subjects. The agreement makes an absolute cession of the province, and revenues, etc., from the time of the decease of Lord Frederick, to Henry Harford and his heirs, upon the payment (among other things) of £10,000 to John Browning and Louisa, his wife, and £10,000 to Sir Robert Eden and Caroline, his wife, in the manner stipulated in the agreement. *It also provided in the event of the [*141 restoration of Henry Harford to the possession of the province and its revenues, growing, or in arrear, for an additional sum of £10,000, for the benefit of each of said ladies, payable out of the same. The agreement further stipulated for an application to the British parliament for an act to confirm the same, and to vest in Henry Harford and his heirs, the title to the province, and its revenues, with a provision that the agreement should be void unless the royal assent should be given to the act within three years. The act, accordingly, passed, and was assented to by the King within the period prescribed. It vests the title to the province, and its revenues, and quit-rents, etc., absolutely in Henry Harford and his heirs, subject only to the payment of the sums before mentioned, and some others not material to be stated.

Upon this special verdict, a judgment was entered in the court below pro forma, by consent, for the defendant, and the cause was brought, by writ of error, to this court.

The cause was argued by Mr. Webster and Mr. Raymond for the plaintiff, and by the Attorney-General and Mr. Taney for the defendant.

It has not been thought proper to report the arguments of counsel, at large, involving a great variety of feudal and constitutional learning, which the court did not think it necessary to examine, as the cause was determined upon the single point of the effect of the agreement made *in 1780, and con- [*142 firmed by act of Parliament in 1781.

On the part of the plaintiff, it was contended,

1. That the deeds of 1698 and 1730 were void under the acts of assembly of 1692 and 1715, referred to in the special verdict; and that, consequently, Charles Lord Baltimore, the testator of the plaintiff's intestate, was tenant in fee-simple of the province of Maryland, at the time of his death in 1751.

2. If those deeds were not void, then the said testator was tenant in tail under the deeds, with reversion in fee, which reversion was a devisable interest, and was well devised to the plaintiff's intestate.[1]

3. Payment of rent to Henry Harford, or his agents, did not discharge the defendant from his liability to pay the plaintiff.

4. The act of the legislature of Maryland of 1780, which professes to abolish the quit-rents from and after the declaration of independence,

1.—Calvert's Lessee v. Eden, 2 Harr. & M'Henry's Rep. 279, 337; opinion of Sir F. Hargrave, S. C. Ib. 341.

is void, on the general principle of the law of nations, that a division of an empire does not affect vested rights of property, and by the special provisions of the treaty of peace of 1783, and the treaty of 1794, between the United States and Great Britain. The original charter to the first Lord Baltimore, distinguished between his public and his private character, and meant to confer upon him bene- [*143 ficial rights of property independent of his political character as the ruler of the province. At all events, the act of 1780 could not affect, retrospectively, the quit-rents which were then actually due, and had accrued from the death of Frederick Lord Baltimore in 1771, until May, 1780, when the act was passed.[1]

5. That the agreement of 1780, alleged to have been confirmed by act of parliament in 1781, is no bar to the plaintiff's right of action.

Upon this last point (which was the only one determined by the court), it was argued for the plaintiff, that the agreement contemplated a restoration of Henry Harford to the possession of the province, and the payment of large sums of money consequent on that event, and that this being an essential part of the contract, which became incapable of execution by the result of the war, the agreement could not legally be enforced. It was also contended that it was not competent for John Browning, the husband, as such, to convey the title to these quit-rents belonging to Louisa Browning, his wife, so as to bar her, in case of survivorship, from the right of recovery,[2] and that, she being a lunatic, no act done by her committee could in any manner affect her rights. A mere intention to reduce into possession the wife's [*144 choses in action, has been held insufficient to bar the widow of her right to them.[3] So, a general assignment in bankruptcy has not the effect of reducing into possession a legacy of stock in trust for the bankrupt's wife, whose right by survivorship will be established against the assignees.[4] And a transfer of stock into the wife's name, to which she became entitled as a distributive share of personal estate during the marriage, will not be considered as a payment or transfer to her husband, so as to defeat her right by survivorship.[5] Supposing, therefore, the husband had agreed to transfer this specific claim, it would only operate as an equitable assignment; the assignee must sue in the name of the husband; and if he did not recover during the life-time of the husband, the right would survive to the wife. But in no point of view could it be considered as a legal defense, or be pleaded in bar of this action.

On the part of the defendants, it was insisted,

1. That as soon as Maryland became a sovereign and independent state, the quit-rents which fell due after the declaration of independence, were due to the state, and not to the representative of Lord Baltimore. They belonged to him in his public political character as lord proprietary, and not in his in- [*145 dividual private capacity.[6]

2. That Henry Harford, being acknowledged by the province of Maryland, and by the King of Great Britain, as the proprietor of Maryland, was, by such acknowledgment, the lawful proprietor, and entitled to the quit-rents until Maryland became an independent state.[7]

3. If the province was private property, and entailable and devisable, that the entail was barred by Frederick Lord Baltimore, and the devise to Henry Harford was good.

4. If Henry Harford was not lawful proprietor, he was proprietor de facto, and, as such, payment to him would discharge the tenants.

5. That the treaties with Great Britain have no application to rents falling due subsequent to the declaration of independence. At all events, the act of assembly of 1780 effectually confiscated the quit-rents due before that time, and so devested the title of whoever might be entitled to them, as to extinguish all claim to those quit-rents.[8]

6. That the agreement of 1780, confirmed by act of parliament in 1781, bars the plaintiff's right of action.

Upon this last point, it was argued for the defendant, that John Browning, the [*146 husband, had a right to bind all the rights of Louisa Browning, the wife, with respect to such debts as were then actually due and payable, and therefore had a right to transfer, for a valuable consideration, the quit-rents, actually and presently due. The cases cited on the other side did not shake this principle. The case of Blount v. Bestland[9] was not the case of a sale for a valuable consideration, but of a bequest by a husband to his own children, of a legacy due to the wife, which he had not reduced to possession. Mitford v. Mitford[10] was the case of a general assignment of all his effects by a bankrupt husband, and the court determined that it did not pass a legacy which he had not reduced into possession. But the argument manifestly admitted that a particular assignment of the specific legacy for a valuable consideration would have produced the effect. The case of Hornsby v. Lee,[11] was the sale of a wife's reversionary, not a present interest. So that the power of the husband over the wife's present debts, immediately recoverable, remained untouched by these decisions. But, in the present case, the wife was a ward of chancery, and was represented by her committee in the transaction, which was advantageous for her, the benefit of which she had received, and now actually enjoys. The compromise was confirmed by an act of parliament obtained on an application of the parties, and ought, [*147

1.—Vattel, Droit des Gens., liv. 4, c. 2, s. 22; Ware v. Hylton, 3 Dall. Rep. 199, 239; Georgia v. Brailsford, 3 Dall. Rep. 1; Terett v. Taylor, 9 Cranch's Rep. 43, 46; Orr v. Hodgson, 4 Wheat. Rep. 453; Society, etc., v. New Haven, 8 Wheat. Rep. 464.

2.—Roper, Husb. and Wife, 204, 223, 227.

3.—Blunt v. Bestland, 5 Ves. Rep. 515; Lumb v. Milnes, Id. 517.

4.—Mitford v. Mitford, 9 Ves. Rep. 87.

5.—Wildman v. Wildman, 9 Ves. Rep. 174; see also Nash v. Nash, 2 Madd. Rep. 133; Hornby v. Lee, 2 Madd. Rep. 16.

6.—2 Bl. Comm. 53, 288; Co. Litt. 244, note b; Pownall, Colonies, 48, 49; Kirk v. Smith, 9 Wheat. Rep. 241, 266, 282.

7.—1 Bl. Comm. 106, 107; Derby v. Athol, 2 Ves. Sen. Rep. 337; Penn v. Baltimore, 1 Ves. Sen. 455.

8.—Smith v. Maryland, 6 Cranch's Rep. 306.

9.—5 Ves. Rep. 515.

10.—9 Ves. Rep. 87.

11.—2 Madd. Rep. 16.

therefore, to be considered as annihilating all her claims to the subject in controversy.

Mr. Justice Story delivered the opinion of the court:

This is a case of an action of debt, brought by the plaintiff as administrator of Louisa Browning, against the defendant, for the recovery of certain quit-rents asserted to be due to the intestate, as proprietary of the province of Maryland, and accruing between the years 1771 and 1780. In the Circuit Court for Maryland district, upon the trial of the cause upon the general issue, a special verdict was found, upon which that court gave judgment pro forma for the defendant, and the cause has been brought before us for a final decision, by a writ of error.

The cause has been here argued with great ability and care. Many important and difficult points have been discussed at the bar, upon which, if we were called to pronounce a decision, we should wish for more time and consideration to mature our judgment. But, as we have all come to a conclusion upon one point, which finally disposes of the whole cause, it is deemed proper at once to put the parties in possession of our opinion, without attempting to analyze the learning which is involved in others of more complexity, and would require more extensive researches.

For the purposes of the present decision, it is assumed (without, however, meaning to inti- 148*] mate *any real opinion on the subject) that every other difficulty in respect to the title and claim of Louisa Browning to the quit-rents in controversy, is overcome, and the question of the effect of the agreement concluded between the parties in June, 1780, and subsequently confirmed by parliament in the year 1781, is that to which the court has addressed its attention. If that agreement, so confirmed and executed, as the case finds, extinguished, in point of law, the title of Louisa Browning to these quit-rents, and passed it to Henry Harford, there is an end to the present suit. And such, upon the best consideration of the case, in our judgment, was the legal effect of that agreement so confirmed and executed.

The agreement is quadripartite between Henry Harford of the first part, John Browning, the husband of Louisa Browning, and Sir Robert Eden and Caroline, his wife (the said Louisa and Caroline being the heirs-at-law of Frederick Lord Baltimore), of the second part; Sir Cecil Wray, the committee of the real and personal estate of the said Louisa, she being a lunatic, of the third part, and Hugh Hammersly and Peter Prevost, two of the executors named in the will of Lord Frederick, of the fourth part. The object of the agreement was to make a final settlement between the parties of all differences, and particularly to settle the title to the province of Maryland, and all the hereditaments and revenues connected therewith. It makes an absolute cession of 149*] the province and revenues, etc., *etc., from the decease of Lord Frederick, to Henry Harford and his heirs, upon the payment (among other things) of £10,000 to John Browning and Louisa, his wife, and £10,000 to Sir Robert Eden and Caroline, his wife, in the manner stipulated in the agreement. It further stipulates, in the event of the restoration of Henry Harford to the possession of the province and its revenues, growing or in arrear, for an additional sum of £10,000, for the benefit of each of these ladies, payable out of the same; but as that event never occurred, it is unnecessary to dwell further upon it. The other sums were duly and regularly paid. The agreement further stipulated for an application to be made to the British parliament for an act to confirm the same, and to vest in Henry Harford and his heirs, the title to the province, and its revenues, etc.; with a provision, that the agreement should be void unless the royal assent should be given to the act within three years. The act passed, and was assented to by the King within the period prescribed. It vests the title to the province, and its revenues, and quit-rents, etc., absolutely in Henry Harford in fee, subject only to the payment of the sums before mentioned, and some others not material to this cause.

What is there, then, to prevent the agreement and act from having full effect? The parties were all British subjects resident within the realm; the act of parliament was passed upon their own application and agreement; all persons in interest were fully represented, so far as by *law they were capable of [*150 being represented; the conditions stipulated have been complied with; the confirmation was absolute; and the intention was, to extinguish, at law, as well as in equity, every claim of Louisa Browning to the quit-rents now in controversy.

It has been argued that the agreement contemplated a restoration of Henry Harford to the possession of the province, and the payment of large sums consequent thereon; and that, this being a material ingredient in the contract, which became incapable of execution, the agreement ought not to be enforced, or held obligatory. It would be a sufficient answer to this objection, that the parties, at the time of the execution of the agreement, knew perfectly well that the province had assumed independence, and that the chance of restoration depended upon the issue of the war then waged between the United States and Great Britain. The acted upon that state of things, and provided for the payment of these additional sums, only in the event of an unsuccessful struggle on the part of the province. The stipulation, therefore, has not failed, in point of consideration, from the misconduct of either party; but the event, in which alone it was to have any effect, never has occurred. The payment was conditional, and the condition has never arisen upon which alone the contract could act.

But there is another answer presented by the very terms of the agreement itself. It is, that the parties expressly agreed that the title to the *province, etc., should vest absolute- [*151 ly upon the payment of the first £10,000; and, of course, the other provisions were to rest in covenant only between the parties, and were not to be construed to defeat or devest that title. The act of parliament treats it in that way, and vests the title in Henry Harford in fee, conclusively.

It has been further argued that it was not

competent for John Browning, the husband, as such, to convey the title to these quit-rents belonging to his wife, so as to bar her, in case of survivorship, from the right of recovery; and that, she being a lunatic, no act done by her committee could in any manner touch her rights.

It is to be recollected that the quit-rents, as claimed, were debts then actually due (if at all) to Louisa Browning. They were not future, contingent, or reversionary interests vested in her. How far, in respect to such interests, the husband, or the committee of a lunatic, is by law authorized by a conveyance or assignment to dispose of her rights, is a question which we are not called upon to decide, and upon which we give no opinion. The case here, is of choses in action actually due to the wife. There can be no question that he was entitled to receive them to his own use, or to extinguish them by a release. What, then, is there to prevent him from disposing of them by assignment, at least in equity?

It does not appear to us that it has ever yet been decided that a bona fide assignment for a valuable consideration, made by a husband to a third person, of a debt actually and presently 152*] *due to his wife, does not devest, in equity, the title of the wife. So far as authorities have gone, they seem to proceed upon a different and opposite doctrine. The case of Lumb v. Milnes, 5 Ves. Rep. 517, and Mitford v. Mitford, 9 Ves. Rep. 87, are distinguishable. They were cases of a general assignment under the bankrupt laws, which are not supposed to do more than place the assignees in the same situation as the bankrupt himself. The case of Hornby v. Lee, 2 Madd. Rep., 16 turned upon another distinction that the interest was not a present, but a reversionary interest. But, without deciding any general principle, we think that under the particular circumstances of this case, where the consideration has actually gone beneficially for the wife, and the whole transaction has been under the direction of a court of chancery, and been confirmed by parliament, the assignment was, to all intents and purposes, valid to assign the rents. If, in ordinary circumstances, such an assignment would pass an equitable title only, we think the act of parliament makes it, to all intents and purposes, a legal title and assignment. Without dwelling upon the known principles of the paramount and omnipotent authority over private rights and authorities, which is often attributed to parliament, it may be justly said that it is competent for the legislature, upon the application, and with the consent of all the parties in interest, to give a legal and conclusive effect to their own agreements, and to pass that at law, which the parties, in the most *unreserved manner, [*153 intended to pass. A title so passed, and so confirmed, by authorities perfectly competent to make it, ought, under such circumstances, to be recognized as valid in the tribunals of every other country.

This is a summary exposition of the views of the court upon this subject; and it at once disposes of the whole matter in controversy. The judgment of the Circuit Court is therefore affirmed with costs.[1]

1.—Mr. Justice Duvall, being a landholder in Maryland, did not sit in this cause.*

*The editor has supposed that it would gratify the curiosity of the learned reader to be presented with the following note (with which the editor has been favored by his friend Mr. Taney) of an argument of the Court of King's Bench, in 1775, upon a case sent from the Court of Chancery, in the suit brought by Sir Robert Eden et al. v. Henry Harford, to recover possession of the province of Maryland and its revenues, in which the learning respecting the nature of the dominion and proprietary interest of Lord Baltimore in the province, was very elaborately discussed:

"TRINITY TERM, 15 Geo. III. B. R., Tuesday, 27th June, 1775.

Harford v. Browning.

"Mr. Serjeant Hill, for Mrs. Browning and Mrs. Eden.

"He first stated the case, and when he had finished this, Lord Mansfield asked in what shape the cause came before the court, and for whom Mr. Serjeant Hill was to argue. The Serjeant answered that the case came from Chancery to know whether the last lord had a right to devise; and that, if he could not, it was the same to Master Harford whether the property went to Mrs. Browning and Mrs. Eden, the last lord's sisters, as co-heirs of the first grantee of Maryland, or to Mrs. Browning alone, as devisee of her father. Lord Mansfield then observed that there would have been no question if the estate had been 154*] situated in England, and *that the ground of the doubt was its being a seigniory and proprietary government in America.

Mr. Serjeant Hill proceeded in his argument to the following effect:

"The general question is, whether the province, and proprietorship, and port duties of Maryland, are well devised by the will of the last Lord Baltimore; and to show that they could not pass, I shall submit two general points.

"1. That the property is so high in its nature, and, in other respects, so peculiar, as not to be devisable.

"That the subsisting entails were not well barred by the last Lord Baltimore, either because he did not do the proper and necessary acts for barring, or because such entails were not capable of being barred in any way.

"I apprehend that the proprietorship of Maryland is not alienable without the license of the crown, and much less devisable.

"The design of the Maryland charter was to erect a province in the district called Maryland, to establish a form of government similar to our own, and to place Cæcil Lord Baltimore, and his heirs, at the head of it. The highest powers are conferred, and, perhaps, the crown's right to grant some of them may be doubtful; but it is not necessary to this case to determine which could, and which could not, be granted. The charter gives royal jurisdiction, and a royal seigniory. Of the first kind are the powers of enacting laws with the consent of the assembly, of erecting courts, of appointing magistrates, of punishing criminals, and of levying men, and all the powers of war and peace. Of the second kind is the power of making subinfeudations. The charter reserves a tenure of the King as of the castle of Windsor; for the law would otherwise have created a tenure in capite. The King cannot grant without reserving a tenure, for he cannot change the principles of the constitution, one of which is, that there must be a tenure. The King constituted Lord Baltimore the lord and proprietor of the whole province. There is no instance before of the grant of a proprietorship. But though there was not before any such sovereignty in name, yet, in specie there was such a property, and the counties palatine of Chester and Durham resembled it. From the high nature of these powers and jurisdictions, I argue that the province could not be alienated without license of the *crown, nor [*155 could it be a subject of the statute of wills. At the time of that statute, no such high property existed in the empire. The 32d of Henry VIII. in giving the power of devising, mentions manors, lands, tenements and hereditaments. It begins

[Promissory Note. Pleadings.]

THE PRESIDENT, DIRECTORS and COMPANY of THE BANK OF THE UNITED STATES.

v.

SMITH

On a demurrer to evidence, the judgment of the court stands in the place of the verdict of the jury; and the defendant may take advantage of any defects in the declaration, by motion in arrest of judgment, or by writ of error.

It seems that, as against the maker of a promissory note, or against the acceptor of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary.

But, as against the indorser of a bill or note, such an averment and proof is, in general, necessary.

Where the bill or note is made payable at a 172*] particular bank, and the *bank itself is the holder, such averment and proof may be dispensed with: and all that is necessary is, for the bank to examine the account of the maker with them, in order to ascertain whether he has any funds in their hands.

On a demurrer to evidence, the court is substituted in the place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence, is to be considered as admitted.

The practice of demurring to evidence is to be discouraged, and courts will be extremely liberal in their inferences where the party takes the question of fact from the appropriate tribunal.

Proof necessary to support an action against the indorser of a bill or note.

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by Mr. Lear for the plaintiffs,[1] and by Mr. Taylor for the defendant.[2]

Mr. Justice Thompson delivered the judgment of the court:

This case comes before the court on a writ of error to the Circuit Court for the District of Columbia, and the questions presented for consideration grow out of a demurrer to the evidence, and out of exceptions taken to the declaration.

The action is by the plaintiffs, as indorsees, *against the defendant, as indorser of [*173 a promissory note drawn by William Young. The note is made payable at the office of discount and deposit of the Bank of the United States, in the city of Washington. And the questions which have been raised and argued relate, in the first place, to the sufficiency of the averment in the declaration of a demand of payment of the drawer of the note; and, second, to the sufficiency of the evidence to sustain the plaitniffs' right of recovery. It is alleged, however, on the part of the plaintiffs, that this court cannot look beyond the demurrer, to the evidence, and inquire into defects in the declaration. This position cannot be sustained. The doctrine of the King's Bench, in England, in the case of Cort v. Birkbeck, Dougl. Rep., 208, that, upon a demurrer to evidence, the party cannot take advantage of any objections of the pleadings, does not ap-

1.—He cited 2 H. Bl. 509; 3 Mass. Rep. 403; 8 Mass. Rep. 524; 12 Mass. Rep. 403; 8 Mass. Rep. 480; 1 Wheat. Rep. 378; Dougl. Rep. 132, 218; 1 Johns. Rep. 241; 5 Johns. Rep. 1; 2 Wash. Rep. 258.

2.—He cited 2 Brod. & Bingh. 165; 17 Johns. Rep. 248; Chitty on Bills, 321.

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with manors, and though hereditaments, which is the last word, would, singly, have been sufficient to have extended to this property, yet, coupled with the former words, it is not so. The 13 Eliz. cap. 10, s. 3, begins with enumerating deans, etc. and then adds, all others having spiritual or ecclesiastical promotions; but bishops and archbishops, being higher than deans, are not included. So, the statute of wills, beginning with manors, shall not extend to a higher dominion, such as proprietary government. Dependent kingdoms are not devisable without the consent of the superior prince. Dominion is not the subject of testamentary disposition; and Craig says that all feudists agree in this. Nor are things given for the support of dominion, such as the port duties here, in their nature devisable. With us the King cannot devise the lands and revenues allotted for the support of his royal dignity. This, indeed, has not been the subject of judicial decision; and in The Banker's case, Lord Somers, though he reversed the judgment of the Court of Exchequer, avoided this point; but our Kings never attempted to exercise such a power. See 5 Mod. Rep. 46, and Lord Somers' argument in The Banker's case. The 9 and 10 Wm. III. cap. 23, which gave a revenue to King

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NOTE.—As against maker of note, or acceptor of bill, no proof of demand is necessary, but is against indorser.

In general, no demand of payment of a note is necessary in order to sustain an action against the maker. His undertaking is unconditional. Brent v. Bk. of Metr., 1 Pet. 89; Haxtun v. Smith, 3 Wend. 13.

Where a note is payable at a bank, it is not necessary to make a personal demand upon the maker or acceptor elsewhere. It is his duty to be at the bank within reasonable hours to pay the same. Bk. of U. S. v. Smith, 11 Wheat. 171; Fullerton v. Bk. of U. S. 1 Pet. 604; Bk. of U. S. v. Carneal, 2 Pet. 543; Covington v. Comstock, 14 Pet. 43; Hildeburn v. Turner, 5 How. 69; Bk. of Met. v. Brent, 2 Cranch, C. C. 530.

As against the maker of a note, or acceptor of a bill, payable at a specified place, it is not necessary for the holder to make a demand at such place, as a condition precedent to bringing the action, and, therefore, it is not necessary to aver such demand in the complaint, or prove it at the trial. As against them, an action is sufficient demand. If the maker or acceptor was at the place designated, ready to pay, and offered to pay the money, he may plead it as a tender in bar of damages and costs, by bringing the money into court. Foden v. Sharp, 4 John. 183; Wolcott v. Van Santboord, 17 John. 248; Fairchild v. Ogdensburgh R. Co. 1 E. P. Smith, N. Y. 337; Wallace v. McConnell, 13 Pet. 136; Caldwell v. Cassidy, 8 Cow. 271; Haxtun v. Bishop, 3 Wend. 13; Brabston v. Gibson, 9 How. 263; Green v. Youngs, 7 Barb. 652; Silver v. Henderson, 3 McLean, 165; Kendall v. Badger, 1 McAll. 523; Brown v. Pratt, 2 Cranch, C. C. 253; Beverly v. Beverly, 2 Cranch C. C. 470; Smith v. Johnson, 2 Cranch, C. C. 645; Bk. of U. S. v. Bussard, 3 Cranch, C. C. 173; Caldwell v. Cassidy, 8 Cow. 271; Troy City Bank v. Grant, Hill & D. Supp. N. Y. 119.

The acceptor of a bill stands in same relation to the drawee as the maker of a note does to the payee; and the acceptor is the principal debtor. In the case of a bill, precisely like the maker of a note. The place of payment is of no more importance in the one case than in the other. Wallace v. McConnell, 13 Pet. 136.

No demand before suit necessary against maker of a note payable "at either of the banks of Boston." Brown v. Noyes, 1 Wood. & M. 75, 85.

As to presentation of bills for acceptance, see note to Brown v. Barry, 3 Dall. 365.

As to time of presentment of note or bill, and of notice of protest, see note, Fenwick v. Sears, 1 Cranch, 259.

As to time of demand and notice, and manner of giving notice of protest, see note to Russard v. Levering, 6 Cranch, 102.

ply. By a demurrer to the evidence, the court in which the cause is tried is substituted in the place of the jury. And the only question is, whether the evidence is sufficient to maintain the issue. And the judgment of the court upon such evidence will stand in the place of the verdict of the jury. And after that, the defendant may take advantage of defects in the declaration, by motion in arrest of judgment, or by writ of error. But, the present case being brought here on writ of error, the whole record is under the consideration of the court; and the defendant, having the judgment of the court below in his favor, may avail himself of 174*] all defects in the declaration *that are not deemed to be cured by the verdict.

The objection to the declaration is, that it does not contain an averment that a demand of payment of the maker of the note was made at the place where it was made payable.

It is a general rule in pleading, that where any fact is necessary to be proved on the trial, in order to sustain the plaintiffs' right of recovery, the declaration must contain an averment substantially of such fact, in order to let in the proof. But the declaration need not contain any averment which it is not necessary to prove. For the purpose, therefore, of determining whether the declaration in this case is substantially defective, for want of an express averment that demand of payment of the maker was made at the office of discount and deposit of the Bank of the United States, in the city of Washington, it is proper to inquire whether proof of that fact was indispensably necessary to entitle the plaintiffs to recover.

Whether, where the suit is against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, it is necessary to aver a demand of payment at such place, and, upon the trial, to prove such demand, is a question upon which conflicting opinions have been entertained in the courts in Westminster Hall. But that question may, perhaps, be considered at rest in England, by the decision in the late case of Rowe v. Young, 2 Brod. & Bingh. 165 in the House of Lords. It was *there held, that if a bill of ex-[*175 change be accepted payable at a particular place, the declaration in an action on such bill against the acceptor, must aver presentment at that place, and the averment must be proved. A contrary opinion has been entertained by courts in this country, that a demand on the maker of a note, or the acceptor of a bill payable at a specific place, need not be averred in the declaration, or proved on the trial. That it is not a condition precedent to the plaintiffs' right of recovery. As matter of practice, application will generally be made at the place appointed, if it is believed that funds have been there placed to meet the note or bill. But, if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment at the place appointed, it is matter of defense to be set up by plea, and proof. (4 Johns. Rep., 183; 17 Johns. Rep. 248.)

This question, however, does not necessarily arise in the case now before the court, and we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think that, as against the maker or acceptor of such a note or bill, no averment, or proof of demand of payment at the place designated, would be necessary.

William for his life, recites to be for his household and family expenses; and now, by the civil list act of Queen Ann, the alienation of the crown revenue is expressly provided against. But, even before the civil list act, there is no instance of a devise of the royal revenues. In the present case, it could not be intended that the port duties should be alienable. The port duties were created for the benefit of the subject, and they, and the proprietorship, were intended to go together. But, I insist further, that the lands themselves are not alienable. Anciently, when the King made a duke, and gave possession to him, they were so annexed to the dignity as not to be transferrable without a preceding act of parliament. See Godb. 397. In Dyer, fol. 2, a. there is a case very analogous to the present; for there it is said, that if the King creates a duke and gives him £20 a year for the maintenance of his dignity, he cannot give it to another, because it is not incident to his dignity. Many things, of a special nature, are unalienable. 156*] Dignities *are so, because they are personal, and in the blood. Offices of trust are not assignable unless by the original terms of the grant, or by prescription, which supposes such a grant. Ministerial offices are, indeed, assignable, and the power of appointing a deputy is incident where the office is assignable, but not vice versa. See Bro. Abr. tit. Office, pl. 108. The office of forester is of such a trust that it cannot be granted over without license. 4 Inst. 315. The Register and Fitzherbert, there cited, warrant Lord Coke in his doctrine. Earldoms are not alienable. The case about the office of Great Chamberlain in Sir W. Jones, 96, and Collins' Baronies, contain much learning on this subject, which applies strongly here. Doddridge, who was with the majority of the judges, states everything which made against his own opinion.

"Lord Mansfield: The case is very well reported both in Sir W. Jones, and in Collins; but there is a great difference between offices and territories.

"Mr. Serjeant Hill: The judges who held the office alienable, only held it partly so, that is, that it might be settled so as to keep it in the male line; because males were more fit for the office than women. But they agreed that, though the office was granted in fee, it could not be disposed of from the blood of the first grantee. In the present case, it is observable that the charter makes a difference in the use of the word 'assigns.' That word is used in granting the land, but is omitted where the charter gives the power of calling assemblies, and enacting laws, of appointing judges, and of pardoning crimes. Therefore, these powers, at least, were not intended to be alienable.

"2. If the whole of the property, or any part, is disposable by will, it must be so on this ground, that all the statutes and laws of England in force at the time of the settlement of Maryland, attached on the province, though subsequent statutes will not extend to it without express words. Then I have a right to assume that the property is entailable; for the statute De Donis was an existing law at the time of the grant and settlement of the province, as well as the statute of wills, and so was the statute of uses. Now, the property was entailed, and, upon the supposition that the entail was within the statute De Donis, I argue that the entail was *not well barred by the [*157 last Lord Baltimore, and that this gives a title to his sister, Mrs. Browning, all the entails being now spent for want of issue male, and she being the devisee of the reversioner in fee, by the will of her father.

"Lord Baltimore's mode of barring was by lease and release, a conveyance the weakest of all in its operation. Before Machell & Clarke, it was understood that such a conveyance, by tenant in tail, would only pass an estate during his life; and, even according to that case, the estate it passes is voidable on his death by entry of the issue in tail. See Machell v. Clarke, 3 Lord Raym. Rep. 678; 2 Salk. Rep. 619; 7 Mod. Rep. 18, and Com. Rep. 119. As against those in remainder, it still passes only an estate during the life of a tenant in tail. But a feoffment, without warranty, would have been a discontinuance, and, with warranty, when it becomes collateral, it

But, when recourse is had to the indorser of a promissory note, as in the present case, very different considerations arise. He is not the original and real debtor, but only surety. His undertaking is not general, like that of the maker, but conditional, that if, upon due dili-
176*] gence having *been used against the maker, payment is not received, then the indorser becomes liable to pay. This due diligence is a condition precedent, and an indispensable part of the plaintiffs' title, and right of recovery, against the indorser. And when, in the body of the note, a place of payment is designated, the indorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. And whenever a note is made payable at a bank, and the bank itself is not the holder, an averment, and proof of the demand at the place appointed in the note, are indispensable. In the present case, the bank at which the note is made payable is the holder, and the question arises, whether, in such case, an averment and proof of a formal demand are necessary. If no such proof could be required, the averment would be immaterial, and the want of it could not be taken advantage of upon a writ of error.

In the case of Saunderson et al. v. Judge, 2 H. Bl. Rep. 509, the plaintiffs, at whose house the note was made payable, being themselves the holders of the note, it was held to be a sufficient demand for them to turn to their books and see the maker's account with them, and it was deemed a sufficient refusal to find that the maker had no effects in their hands. So, in the case of The Berkshire Bank v. Jones, 6 Mass. Rep. 524, decided in the Supreme Judicial Court of Massachusetts, Chief Justice Parsons, *in delivering the opinion of [*177 the court, said that, "the plaintiffs being the holders of the note, we must presume it was in their bank, and there it was made payable. They were not bound to look up the maker, or to demand payment of him at any other place. The defendant, by his indorsement, guarantied, that on the day of payment the maker would be at the bank and pay the note, and if he did not pay it there, he agreed he would be answerable for it without previous notice of the default of the maker." The rule here laid down has received the sanction of that court in subsequent cases (12 Mass. Rep. 404; 14 Mass. Rep. 556), and is founded in good sense and practical convenience, without in any manner prejudicing the rights of the maker, or the indorser of the note. The indorser, knowing that the maker has bound himself to pay the note at a place appointed, has a right to expect that he will provide funds at that place to take up the note; and he will be more likely to be exonerated from his liability, by having the demand made there, than upon the maker personally. But, if the bank where the note is made payable is the holder, and the maker neglects to appear there when the note falls due, a formal demand is impracticable by the default of the maker. All that can in fitness be done, or ought to be required, is, that the books of the bank should be examined, to ascertain whether the maker had any funds in their hands; and if not, there was a default, which gave to the holder a right to look to the *indorser for payment. And even this [*178 examination of the books was not required in

would have become a bar at this day; for the statute of Ann doth not take away the effect of collateral warranty when it is by a tenant in tail in possession. See 4 and 5 Ann, c. 16. Therefore, I say that this was one mode by which Lord Baltimore might have barred the entail; because, if he had made a feoffment with warranty, the warranty would have been collateral to Mrs. Browning.

"But there was another mode of barring which might have been used. The province of Maryland is a fief holden of the King as of the castle of Windsor, for so the tenure is reserved. As, in the grant, is not similitudinary, but is the same as ut in pleading that one was seised ut de feodo, which, says Lord Coke, is to be understood positively that the party was seised in fee. Co. Litt. 17, 6. The tenure, then, being as of the castle of Windsor, the province is to be considered in the same way as other lands originally holden of the castle, and, like other fiefs, is to be impleadable within the manor. A castle, or honor, is only a superior kind of manor. To every manor a court baron is necessarily incident, and, therefore, it is so to every castle. The jurisdiction of a court baron is well known. Without the King's writ, it holds plea of personal actions where the demand doth not amount to 40s. With the King's writ of right, it may hold plea of land. Writs of right are of two kinds, patent and close. If the writ is brought in the Lord's Court, it is directed to him, and is patent. If he holds no court, or waives, or the tenure is immediately of the King, it is brought in the King's Court, is directed to the
158*] sheriff, and is close. Magna *Charta, c. 24, provides against the abuse of the writ of right in the latter case, by declaring, that præcipe in capite shall not issue where the land is not holden in capite. But the practice is otherwise, and the writ of right has been usually brought in the Common Pleas in all these cases. Another writ of right close lies for lands in ancient demesne. This writ is well known, and recoveries are suffered upon it in the courts of ancient demesne. See Fitzh. Nat. Br. and Booth on Real Actions.

The general writ of right patent lies in the Court of the Manor, in all cases where the tenure is of the subject, or of the King, as of an honor; and where the estate lies, makes no difference. 4 Inst. 219, and Fitzh. Abr. Jurisdiction, pl. 61, there cited. If a man holds lands as of an honor, the bailiff may execute the process as of the court of the honor wherever the lands lie. In the case of Fitzh. Abr. it was objected, that the officers of the county palatine of Chester could not execute writs in a foreign county; but it was adjudged otherwise, because the lands were within a manor holden of the principality of Chester.

"There are many precedents of recoveries on writs of right patent. One is in N. Bendl. p. 4, pl. 4, on a writ of right patent directed to the bailiff of the castle of Rising. According to this ancient principle, that wherever a fief lies it is impleadable in the manor of which it is holden, the province of Maryland might have been impleaded in the Court of the Castle of Windsor, for it is clearly holden of the castle, and there is a court baron necessarily incident. True it is, that if the tenant pleads a foreign plea, or the mise is joined on the mere right to be tried by the Grand Assize, the cause must be removed into the Common Pleas. But, I insist that a writ of right patent might have been brought in the Court of the Castle of Windsor, and that a common recovery might have been suffered; because, then, neither foreign plea, nor joining of the mise, on the mere right by the grand assize is necessary. The precedent cited from N. Bendl, is in point, and conformable to the principles I am arguing upon. The writ of right patent was for a manor holden of Rising Castle, and was directed to the bailiffs of the castle. It appears clearly that there was a recovery in the Court of the Castle Rising. There was a plaint by the demandant, the tenant vouched to warranty, and the vouchee making default, judgment was given for demandant. Afterwards, a writ of false judgment was brought in the Common Pleas by the *vouchee, and [*159 the error was, that the writ of right patent should have been directed to the suitors; but the court

the cases cited from the Massachusetts Reports. The maker was deemed in default by not appearing at the bank to take up his note when it fell due. We should incline, however, to think that the books of the bank ought to be examined, to ascertain whether the maker had any balance standing to his credit; for, if he had, the bank would have a right to apply it to the payment of the note; and no default would be incurred by the maker, which would give a right of action against the indorser.

The declaration in this case does contain an averment that the note was presented to the maker, that he refused to pay it, and that notice of the non-payment was given to the indorser. Whether this averment is broad enough to admit all the proof necessary to sustain the action against the indorser, is the question which arises upon the declaration. If, by reason that the bank where the note was made payable was the holder, no personal presentment or demand of the maker could be required, the averment, so far as it asserts such presentment, is surplusage, and no proof was necessary to support it. What, then, in such case, is a presentment of the note? It would be an idle ceremony to require the bank to take the note from its files, and lay it upon the counter, or make any other public exhibition of it. All that could be required is, that the note be there, ready to be delivered up if payment [*179] should be offered. When the note is held by a third person, it is practicable, and there is a fitness in requiring the holder to inquire at the bank for the maker, and whether he has provided any funds there to pay the note. But when the bank itself is the holder, it would be impracticable for it to make such inquiry in any other manner than by ascertaining that the note was there, and examining the books to see if the maker had any funds in the bank. If the note was there, it was a presentment, and if the maker had no funds in the bank, it was a refusal of payment, according to the legal acceptation of these terms under such circumstances.

The evidence upon the trial was introduced under this averment without objection, and if that is sufficient to entitle the plaintiff to recover, the court ought not readily to yield to technical objections, where the defendant has had the full benefit of whatever defense he had to make. Under this state of the case we think the exception taken to the declaration cannot prevail. And the next inquiry is, whether the evidence to which the defendant demurred was sufficient to sustain the action.

By this demurrer, the defendant has taken the questions of fact from the jury, where they properly belonged, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of adjudged cases on this subject is very strong to show that the court will be extremely liberal in their inferences, where the party, by demurring, [*180] will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice. If the objection to the sufficiency of the evidence is made by way of motion for a nonsuit, it might be removed by testimony within the immediate command of the plaintiff. The deficiency very often arises from mere inadvertence, and omission to make inquiries, which the witnesses examined could probably answer.

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held that the bailiffs were the proper persons, and the judgment was affirmed. See Mod. 1. Another instance of a like proceeding in the Court Baron of the Manor of Wolverhampton, is in Robbins' Ent. 323. There, false judgment was brought on this error, that the lands were not mentioned to be within the manor; but the judgment was affirmed. In Rastell there are several instances of writs of false judgment on judgments in writs of right close in courts of ancient demesne. Rast. Entr. 221, b. Also, Booth states the manner of proceeding in the Court Baron on the writ of right patent, where the cause is not removed. Booth on Real Actions, 89. If, then, a recovery might be had on a writ of right in the Court Baron, when the proceeding is adverse, much more might a common recovery be suffered. Errors in common recoveries are aided by the statutes of jeofails, and no objection is fatal to them but such as might be pleaded to the jurisdiction of the court where they are suffered. But how could such an objection hold in this case? Every plea to the jurisdiction must state that there is another court in which the cause may be tried, and which that court is. Therefore, if want of jurisdiction is objected to the Court Baron of Windsor Castle, it should be stated where else the province of Maryland can be impleaded; for fines have been levied in the Court of Common Pleas here, of shares of a proprietorship in America. The only proprietorships at present are Pennsylvania and Maryland; but Carolina was once a proprietorship, and whilst it was so, fines were levied here of shares in it. The first grant of Carolina was to eight persons, and the word "assigns" was used throughout. Scire facias was brought to repeal the letters patent; but no judgment was ever given, for the proprietors were well advised, and agreed to surrender, and an act was made to confirm the agreement. See 2 Geo. II. c. 34. Though the proprietors were seized in fee, yet this act recites, that from the nature of the estates proposed to be surrendered, great difficulties might arise as to the manner of conveying. In the present case, like difficulties induced the advisers of the last Lord Baltimore to recommend the applying to parliament; but no act was obtained.

"Lord Mansfield: He was stopped by the difficulty of proceeding.

*"Mr. Serjeant Hill: The last thing I [*180] have to submit is, that if no recovery could be suffered, and feoffment with warranty would not have been sufficient, then the entail was not barrable in any way, and the province of Maryland was in the same condition as land here, before the introduction of common recoveries, and of barring by fine under the statute of Hen. VII. Like an executory devise, the entail is not barrable, because a recovery cannot be suffered. See the case of Scatterwood v. Edge, 12 Mod. Rep. 278. The words of Lord Hardwicke, in 2 Ves. Rep. 353, are very applicable. In speaking of the limitations in the act of parliament, which made the Isle of Man unalienable, he says that if they were considered on the foot of the statute De Donis, and they were estates tail, there was no want of a restrictive clause; for, before Taltarum's case, which established the doctrine of recoveries, and the 4 of Hen. VII. of fines, these, by the statute De Donis, were unalienable, and of Man there could be neither fine nor recovery? Here, I say, that the property is not entailable; but, if it is, it must be because within the statute De Donis, and, if that statute operates upon Maryland, and no recovery could be suffered, there was a perpetuity. It is absurd to say that there must be the means of making property alienable because it is within that statute; for the statute was made to restrain alienation. A recovery might have been sufficient to bar; but the conveyance by lease and release is too mild in its operation, and on such a conveyance by tenant in tail, the old use reverts to the releasor.

"The capability of losing in an action is a very different thing from the power of alienation. What is the objection to a perpetuity in such a case as this? Can any useful end be attained by

In order to determine whether the evidence was sufficient to support the action, it is proper to state what proof was necessary.

The plaintiffs, to entitle them to recover, were bound to show that they were the indorsees and holders of the note; that the note was at the bank, where it was made payable at the time it fell due; that the maker had no funds there to pay the note; and that due notice of the default of the maker was given to the defendant.

The indorsement of the note to the plaintiffs, and that it was discounted in the office of discount and deposit of the Bank of the United States at Washington, where it was made payable, was fully proved. And the jury would have had a right to presume that the note was then at the bank where it was discounted; and the bank being the holder and owner of the note, the presumption, at least prima facie, is, that it remained in the bank, to be delivered up when paid. This establishes the two first points; and, to show that the maker had no 181*] funds in the bank, *the book-keeper was examined as a witness, who swore, that on the 19th day of July, 1817, when the note fell due, there was no balance to the credit of the drawer, or either of the indorsers, on the books of the bank. And the remaining question is, whether due notice of the default of the maker was given to the defendant The only objection to the sufficiency of the evidence on this point is, that the notice of non-payment was left at the post-office in the city of Washington, addressed to the defendant at Alexandria, without any evidence that that was his place of residence. The testimony on this point is that of Michael Nourse, a notary public, who swore, that on the date the note fell due, he presented it at the store of the defendant, and demanded payment of his clerk, who replied that Mr. Young was not within, and he would not pay it. And that, on the same day, he put in the post-office notice of non-payment, addressed to the defendant at Alexandria. If the defendant's place of residence was Alexandria, it is not denied but that due and regular notice was given him. The notary was a sworn officer, offically employed to demand payment of this note, and it is no more than reasonable to presume that he was instructed to take all necessary steps to charge the indorsers. This must have been the object in view in demanding payment of the maker. And it is fair, also, to presume that he made inquiry for the residence of the defendant before he addressed a letter to him; for it is absurd to suppose he would direct to him at that *place, without some knowledge or in- [*182 formation that he lived there, this being the usual and ordinary course of such transactions, and with which the notary was, no doubt, acquainted. The jury would, undoubtedly, have been warranted to infer, from this evidence, that the defendant's residence was in Alexandria. If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For, a single question to the witness would have put at rest that point, one way or the other, if the least intimation had been given of the objection. It was, manifestly, taken for granted by all parties, that the defendant lived at Alexandria. And if a party will, upon the trial, remain silent, and not suggest an inquiry, which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given, that would not be against reason and probability; and the court, upon a demurrer to the evidence,

making a sovereignty alienable? The cases of copy-holds are not authorities in point, for they depend on custom. Here Mr. Serjeant Hill cited many authorities to confirm and illustrate some of the doctrine he had advanced in the previous part of his argument. He cited Co. Litt. 108, a; Dy. 44 a, and Bro. Abr. Tenure, 94 to show the difference between tenure ut de corona, and ut de honore, and that it was in the King's option to reserve either; Co. Litt. 17 a, and 1 Lev. 222, to prove the word ut, affirmative and not similitudinary; Co. Litt. 5a; 2 Inst. 31, and the Register, to prove a castle contains a manor; and 4 Inst. 26; Hob. 170, and 2 Bro. Abr. 45, to prove that a court Baron is incident to a manor, and that they are inseparable. For, the distinction 161*] *between writs of right patent, and writs of right close, and the causes of removal, and that where the former lie, they may be preferred to the latter, he cited Fitzh. Nat. Br. 1 to 9, and 11 to 14; Old Nat. Br. Fitz. Abr. tit. Droit, pl. 45; Magna Charta, cap. 24 and Bro. Abr. To show that it was immaterial where the land happened to lie, he cited Fitzh. Abr. tit. Jurisdiction, pl. 61 and 4 Inst. 219. He then observed that the King might make a new island arising out of the sea part of a county, and for this he cited Collis. on Sew. 45, and asked why he could not make a province part of an honor. He also cited from 1 Str. Rep. 177, the case of The King v. The City of Norwich (which was the case of an information against the latter for not repairing some bridges), to show that the King may enlarge, contract or vary the bounds of a county, for the purpose of jurisdiction. He next mentioned, a second time, that fines had been levied of shares of the Carolina proprietorship; and added, that error on a fine of land in America had been brought in B. R., and that it might be proper to search, in order to know what was done.

"Lord Mansfield: Fines, and recoveries of plantations in America, with a viz. to bring them within a parish here, were frequent in the Court of Common Pleas, till provincial laws were made to provide other modes of barring. But I do not know of any instance of such fines or recoveries in the case of a seigniory.

"Mr. Serjeant Hill: In 1 Ventr. Rep. 258, Lord Hale says that the writ of right close (for lands in ancient demesne) is not to be resembled to another præcipe, and that being directed ballivis manerii, mention of the manor, without naming the will in which the lands lie, is sufficient. So, here, mention of the castle of Windsor in the writ of right patent, without a viz. to bring Maryland within England, would have been sufficient. Lord Chief Justice North, in 2 Mod. Rep. 49, observes that it had been long a dispute whether a fine of lands in lieu conus was good; that in King James' time it was settled to be so, and that, by the same reason, a recovery shall be good; for they are both amicable suits and common assurances, and as they grow more in practice the judges have extended them further. He adds, that a common recovery may be of an advowson, and that no reasons are to be drawn from *the visne, or [*162 execution of the writ of seisin, because it is not an adverse proceeding, but by agreement. This is material, for common recoveries of advowsons were anciently in writs of right; and though writs of entry are now used, they are improper for an advowson, and they are only allowed because common recoveries are by agreement. The observation about the writ of seisin answers the reason in 1 Ventr. Rep. 59, why an ejectment of lands in Jamaica will not lie here, and shows that it is not applicable to the present case. That where one jurisdiction is pleaded to, another must be shown, I cite Barker v. Dormer, 1 Show. Rep. 191; and that a seigniory out of England may be impleaded in the courts here, I cite 4 Inst. 213; Bro. Abr. Jurisdiction, 101; Lien, 75; Trial, 58; Fitzh. Abr. Assize. 282; Vaugh. Rep. 405. As to suing for ancient demesne lands, I cite 1 Salk. Rep. 56, and 1 Lord Raym. Rep. 43.

"Upon the whole, the property in question is

will draw the same conclusions that the jury might have drawn.

We are, accordingly, of opinion that the evidence was sufficient to entitle the plaintiffs to recover; that the judgment of the court below must be reversed, and the cause sent back, with directions to enter judgment for the plaintiffs, upon the demurrer to evidence, for the amount of the note, and interest.

Judgment.—This cause came on, etc. On consideration whereof, it is ordered and adjudged that the judgment of the said Circuit 183*] *Court, on the demurrer to evidence in the said cause, be reversed. And it is further ordered and adjudged that the said cause be remanded to the said Circuit Court, with instructions that judgment be entered there on said demurrer, for the plaintiffs in the cause; and, further, that the court there do render judgment on the contingent verdict found for the plaintiffs, according to the tenor thereof, with costs, etc.[1]

[*Surety. Construction of Statute.] [*184

THE UNITED STATES
v.
VANZANDT.

The case of The United States v. Kirkpatrick, 9 Wheat. Rep. 720, revised, its authority confirmed, and applied to the present case.

An omission of the proper officer to recall a delinquent paymaster under the injunctions of the 4th section of the act of the 24th of April, 1816, c. 69, does not discharge his surety.

The provisions requiring the delinquent paymaster to be recalled, and a new appointment to be made in his place, are merely directory, and intended for the security of the government; but form no part of the contract with the surety.

The statute not removing from office the delinquent paymaster, ipso facto, but only making it the duty of the proper officer to remove him, the circumstances of new funds being placed in his hands after his delinquency, does not discharge the surety.

THIS cause was argued by the Attorney-General and Mr. Swann for the plaintiffs,[2] and by Mr. Jones and Mr. Key for the defendant.

Mr. Justice Washington delivered the opinion of the court:

This was an action of debt brought in the

1.—The demurrer to evidence is an unusual and antiquated practice, which this court, and other courts, have recently endeavored to discourage, as inconvenient, and calculated to suppress the truth and justice of the cause. It is allowed or denied by the court where the cause is tried, in the exercise of sound discretion, under all the circumstances of the case; and it seems that the exercise of this discretion cannot be made the foundation of a writ of error. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows that it ought never to be admitted, where the party demurring refuses to admit the facts which the other side attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions. Young v. Black, 7 Cranch's Rep. 565; see also, Powling et al. v. The United States, 4 Cranch's Rep. 219; Phil. Evid. 216, 217; Bull. N. P. c. 4, p. 313.

2.—They cited The United States v. Kirkpatrick, 9 Wheat. Rep. 720.

neither alienable nor devisable, or, at least, the seigniory is not so. If the property is both alienable and devisable, then I insist that it is entailable, and that the entail is not barred.

"The supposed necessity of barring by lease and release, doth not exist; for,

"(1) There might have been a feoffment with warranty, and, (2) the province being holden of Windsor Castle, is impleaded in the Court Baron there, and a common recovery might have been suffered there. Besides the authorities already cited, to show that the bailiffs of that court were officers competent to hold plea of the province in a writ of right patent, there is one in Aston's Entr. 375. If a recovery could not be suffered in the Court of the Castle of Windsor, it might have been suffered on a præcipe quod reddat in the Court of Common Pleas; and the property not being in England was no objection to a recovery, either in the Common Pleas, or the Court of Windsor Castle. If it is denied that a recovery could be suffered in either of these courts, it must be shown what court has the proper jurisdiction, or the objection cannot be taken. If a recovery could not be suffered anywhere, then I insist that the entail of the property made it unalienable, 163*] *and that it descended as a perpetuity; of Lord Hardwicke in 2 Ves. Rep. 353, and of and that it might so descend, I cite the authority Jenkins in his Centuries, 250 and 257.

"Mr. Serjeant Hill concluded with citing a case about the writ of right patent in 6 Co. Litt. 11.

"Mr. Kenyon for Master Harford: The principal questions in this case, arise on the grant by the crown of the province of Maryland in the 8 Charles I. and the settlements made of it in 1730 and 1761. The grant by the crown being by letters patent under the great seal of England, the law of England is therefore the rule by which the property must be adjudged upon. It has been truly observed by the court, that no points could arise if the property was in England. If the property was situate here, it would be alienable, devisable and entailable, and the entail might be barred by common recovery. But the property lies in America, and thence arise the difficulties.

"The questions referred to this court concern both the province and the port duties, and their value is great. But the great value and extent of the property will not make any difference in deciding upon it, though its situation will. The province of Maryland was settled by Englishmen, and these carried the law of England with them. In 2 P. Wms. 75, it is said to have been adjudged by the Privy Council, that if a new country is found out and settled by English subjects, they carry their laws with them, though subsequent acts of parliament, without naming, will not bind the plantation. The like doctrine is laid down in Penn v. Baltimore, 2 Ves. Rep. 349, with more precision; for, there it is said, that an English colony carries with them all the laws of England in being at the time of planting it, which are adapted to the situation; but that no statute, made afterwards, binds without naming them. Now, both the statute De Donis, and that of wills, were before the settlement of Maryland, and both have words sufficient to comprehend the proprietorship, the word "tenement" being used in the former, and "hereditament" in the latter. Therefore both statutes must extend to the property in question, unless it can be shown that there is something incongruous in applying them to Maryland. But they are necessary and convenient laws for Maryland, nor is the law of descents more so. It is objected, that these statutes may extend to lands granted to the lord proprietor *in the way of subinfeudation, but that [*164 they ought not to be applied to the seigniory and proprietorship. But no reason is given for the distinction, except saying that the proprietorship is a transcendent property, and hath regalities and high powers annexed to it. Is an assignee or devisee less likely to be fit and able to govern it than the descendants of the first grantee, who may be infants? Higher property than this hath been the subject of wills; for kingdoms have been devised. Constantine devised an empire, and so did Charlemagne; and the same was done in our own country by Henry VIII. under an act of parliament. It is said that the property is not alienable, because it is annexed to an office of trust. But lands to which offices are annexed, may pass together with the office. When the champion of

Circuit Court for the District of Columbia, upon a paymaster's official bond, against the defendant in error, one of the sureties in that bond. The condition of the bond, as set out upon oyer, is in the following words, viz.: "That whereas the above bounden John Hall 185*] is appointed paymaster *of the rifle regiment in the army of the United States; now, if the said J. Hall shall well and truly execute, and faithfully discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster aforesaid, and he, his heirs, etc., shall regularly account when thereunto required, for all moneys received by him from time to time, as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose, and, moreover, pay into their treasury such balance as, on final settlement of the said J. Hall's accounts, shall be found justly due from him to the United States, then," etc.

To the declaration filed in this action, the defendant pleads that the said John Hall did well and truly observe and discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster in the rifle regiment of the army of the United States, and did pay into the treasury such balance as, on settlement, was found due, and hath observed, kept and fulfilled every matter and thing in the condition of the said bond which, according to the said condition, ought to have been observed and kept.

The breach set out in the replication is, that the said J. Hall did not pay to the United States the sum of ———— which was due and in arrear, on a certain day, and which he ought then to have paid according to the condition of his bond.

*Upon the trial of the issue formed [*186 on the matter stated in the replication, a bill of exceptions was taken to the opinion of the court, by the United States, which states that to support the issue on the part of the United States, they gave in evidence a certified copy of the bond aforesaid, together with the account of the United States against the said J. Hall settled at the treasury department, and duly certified according to law, whereby it appeared that a balance of $29,266.06 was due to the United States by the said J. Hall, as paymaster of the rifle regiment of the army of the United States. Whereupon the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, they should believe that John Hall, named in the condition of the bond, had neglected and failed to make any report to the Paymaster-General once in two months, showing the disposition of the funds previously transmitted, with estimates for the next payment of the said regiment, and had also neglected and failed, either to transmit such estimates, or to render his vouchers to the Paymaster-General for settlement of his accounts, more than six months after receiving funds, and was not recalled for such default and neglect, but additional funds were placed in his hands, notwithstanding his known defaults and neglects in the instances aforesaid, then the defendant is not chargeable for any failure of the said J. Hall to account for such additional funds so placed in his hands after his said defaults and neglects, in respect of the

England passes his manor, his office passes with it. The province of Maryland may be resembled to a large manor. The jurisdictions of some manors were anciently as extensive, both in criminal and civil matters, as the jurisdiction of the lord of Maryland. The power of making by-laws to regulate commons, and other subjects, relative to the tenants, is incident to many manors.

"But the question doth not depend merely on arguments of analogy. The proprietorship is granted in free and common socage, and it was intended to be alienable. The word "assigns" is used in the letters patent, and, in some places, is applied to the seigniory itself. The first grantee would not have accepted the grant on other terms. We should consider, not the present value of the property, but its value when the grant was made; and then Maryland was a desert, and it is not to be supposed that the first grantee would have been at the expense of settling it, if it had not been made alienable. Besides, the usage since the grant is an argument in favor of its being alienable. Both Maryland and Pennsylvania have been constantly subjects of entails and settlements, and this practice ought to weigh something. Another strong argument arises from the preamble of the statute 2 Geo. II., c. 34, about the shares of the Carolina proprietorship. In deriving titles to the several shares, wills are mentioned. This shows that it was deemed to be within the statute of wills. The preamble also recites a cause in chancery about an agreement to sell the share of one Dawson, and a decree by the lords for a specific performance, on an appeal. The preamble further recites various grants to show title in those with 165*] whom the crown was contracting *for the surrender of their shares. All this shows that parliament thought a proprietorship in America alienable like other property.

"Lord Mansfield: In Dawson's case, the question between the parties was not about the power of alienating.

"Mr. Kenyon: The statute of 7 and 8 Wm. III., c. 22, s. 16, is also of consequence, for it restrains all persons, and their assigns, claiming any right or propriety, in any islands or tracts of land on the continent of America, by charter, or letters patent, from selling to any but natural born subjects. This act supposes a proprietorship to be alienable.

"Lord Mansfield: The clause in the act of William is odd. Without such a restriction, aliens were incapable of purchasing.

"Mr. Kenyon: In Penn v. Lord Baltimore the question of alienation actually occurred; and though it was not necessary to decide upon it, yet Lord Hardwicke seems indirectly to have given an opinion that the proprietorship of Maryland was alienable. See 1 Ves. Rep. 448.

"Lord Mansfield: The question before Lord Hardwicke was on the effect of an agreement between the Penn and Baltimore families, about the limits of Maryland and Pennsylvania, it being contended that Lord Baltimore had not power to dismember his province, though he might make subinfeudations; but the question was determined without deciding anything on the power of alienating the whole province.

"Mr. Kenyon: I cite the case for the sake of Lord Hardwicke's dictum, and not as an adjudication. Thus, I am in possession of the opinion of the legislature, and of the House of Lords, and of Lord Hardwicke, as authorities to show that the property is as alienable as other property. It remains to show that the entail was well barred by Lord Baltimore, so as to enable him to dispose by will; and this Mr. Sergeant Hill makes the great point. The question is as to the whole province and seigniory, and not as to any particular parts or subinfeudations. If it had arisen on the *latter, the forms required by the provincial [*166 laws might have been complied with. But no court within the province can hold plea of the seigniory itself. See Vaugh. Rep. 404. If no court can be found in Maryland for a common recovery, some other court must be found, or there must be some mode of barring the entail without a recovery. When this cause was before the chancellor, Mr. Sergeant Hill said that a recovery might have been suffered before the King in council; but that ground is now deserted.

"Lord Mansfield: If anything had been done for barring there, it could only have been a proceeding having analogy to common recovery, the council being the proper place for adverse pro-

187*] funds *previously received, were known as aforesaid. The court gave the instruction as prayed; and a verdict being found for the defendant, a writ of error was sued out to the judgment rendered thereon.

The counsel for the plaintiffs in error have rested their cause entirely upon the decision of this court in the case of The United States v. Kirkpatrick, 9 Wheat. Rep. 720, and as we do not feel disposed to dissent from the opinion given in that case, it becomes material, in the first place, to inquire whether the two cases are the same in principle or not. If they are, it will avoid the necessity of any general reasoning upon the point decided in this cause by the court below.

The case referred to arose upon the act of Congress for the collection of the direct taxes, and internal duties. The action was founded upon the collector's bond against the sureties; and one of the questions which came up for decision was, whether the failure of the comptroller to call the collector to account at the periods prescribed by law, and the consequent injury to the sureties, did not discharge them from their responsibility upon the ground of laches? By the 28th section of the above act, the Comptroller of the Treasury is required, in case any collector should fail to collect, or to render his account, or to pay over quarterly, or sooner, if required, the moneys by him collected, immediately after such delinquency, to issue a warrant of distress against the delin-
188*] quent collector, to be *levied on his personal estate, and, in case that should prove insufficient to satisfy the warrant, then upon his real estate. The decision of this court was, (1) that laches is not imputable to the government, and (2) that the provisions of the law requiring settlements by its officers to be made at short periods, are designed for the security and protection of the government, and to regulate the conduct of those officers; that they are merely directory to the officers, and form no part of the contract with the surety.

The correctness of these principles is admitted by the counsel for the defendant; but they insist that they are inapplicable to the case of a surety in a paymaster's bond, because, by the 4th section of the act "for organizing the general staff, and making further provision for the army of the United States," if the paymaster fail to render his vouchers to the Paymaster-General for settlement of his accounts, for more than six months after his having received funds, the injunction of the act is imperative, "that he shall be recalled, and another appointed in his place."

It is contended by the defendant's counsel that this section leaves no discretion in the proper officer of the government to continue the paymaster in office after his delinquency, but that he ceases thereafter to be paymaster, and the responsibility of his sureties is terminated.

It must be conceded that the injunction on the proper officer of the government to recall the delinquent paymaster, is expressed in very strong *language. But whether the [*189 omission to perform the act, amounts, under every possible circumstance, to a breach of official duty, may admit of some doubt. May it not be excused in a case where the paymaster has been prevented from rendering his vouchers at the periods mentioned in the act, by causes acknowledged by the government to have been beyond his control? And, if it may, it would seem that the ground of excuse could not properly be made a subject of judicial inquiry in an action against the surety. It may further be remarked, that if it had been the policy and intention of the legislature, that the act of delinquency should be inexorably fol-

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ceedings about the title to Maryland. The jurisdiction over all the seigniories of the provinces in America, has resided in the Privy Council from the time of Elizabeth.

"Mr. Kenyon: Two places for suffering a recovery have been mentioned—the Court of Common Pleas, and the Court of the Castle of Windsor. As to the former, it is said that fines have been levied of lands in America, with a viz. to bring them within England. But the plea for land is local, and it is impossible by a viz. to transfer the place to England; and two or three precedents are not sufficient for this purpose. As to the Court of the Castle of Windsor, I admit, that one manor holden of another may be pleaded for in the principal manor; but I do not know of any instances in which there can be such a plea, except the cases of copy-hold, and of lands in ancient demesne. Besides, how is seisin to be given of Maryland by a court baron in England? It is said that a recovery may be on a writ of right in the Court Baron of Windsor Castle; but, if such a court exists (which I do not admit), it is allowed, that joining the mise carries the cause to the Common Pleas, and the moment the suit comes there it fails, for that court cannot give seisin; and this deficiency, according to the case of the Isle of Man, in 2 Ves. Rep. 353, would make the recovery ineffectual. It is said that Maryland might have been annexed to a county in England; but the answer is, that it is not so annexed. Further; it doth not appear that a court baron is incident to the castle of Windsor. Such a court may belong to the honor of Windsor; but Maryland is holden
167*] of the castle, and *the castle and honor are distinct. A castle may be part of an honor or manor. Fitzh. N. B., 6 d. I am told that the only court belonging to the castle is for personal actions.

"If the entail was not barrable by common recovery, it is to be considered whether an alienation by some other common assurance is not sufficient. The mode by lease and release is found fault with; but this conveyance is founded on the statute of uses, and, since that statute, it passes the fee as well as any other. As to feoffment with warranty, in general, it would have failed; and I am not sure that it would have had the proper effect, in the case which hath happened, because here the warranty would have descended both on Mrs. Browning and Mrs. Eden, as heirs of their brother; and, on the supposition that the property is entailable, to prevent perpetuities, the entail must be barrable in some way. In general, the power of barring by common recoveries is incident to entails; and if that mode had not been adopted, the other modes would have been found out. Where common recoveries cannot be suffered, alienation is sufficient; and whether it be by feoffment, or lease and release, the effect ought to be the same. In the case of copy-holds, where there is a custom for entailing, and no custom for a common recovery, a surrender is equivalent to a recovery. This point was adjudged by three judges against one, in Carr v. Singer, 2 Ves. Rep. 603, and the doctrine was approved of by Lord Hardwicke in a subsequent case. See Moor v. Moor, 2 Ves. Rep. 601, which case, though given by the reporters before Carr and Singer's, is subsequent in point of time. These authorities alone are sufficient; but the same principles in favor of alienation are to be met with in ancient books. In Willion v. Berkley, Plowd. Rep. 244, Judge Weston argues on the principle that every estate tail is barrable; and, in Mary Portington's case, 10 Co. Litt., 40 a, Lord Coke mentions that Lord Dyer, in a case before the Lords in Parliament, reproved one of the counsel for finding fault with common recoveries. But besides the cases of copy-holds, I have another authority to show that complying with the law of England, as nearly as circumstances will allow of, is sufficient. I have in my hand the report of a

lowed by a removal from office, it might not be unreasonable to presume that such a consequence would have been distinctly announced. It is not, however, the intention of the court to express any opinion upon this point, because, whatever may be the duty of the proper officer of the government in this respect, it must, we think, be admitted that until the paymaster is recalled, he continues in office. The act authorizes, perhaps requires, his recall, but it does not displace him. The officer whose duty it may be to recall him, acts upon his own responsibility to the government by declining to do so; but, until he acts otherwise, the paymaster is authorized, notwithstanding his delinquency, to receive and to disburse the funds which may be placed in his hands.

The attempt to distinguish this from Kirkpatrick's case, is made upon the ground that 190*] *was purely a case of laches, whereas, in this, an unauthorized act was done by the government in confiding funds to the disposal of a public defaulter, whom the government was bound by law to have dismissed from office. But will it be contended that the obligation to dismiss this officer was more imperative than that imposed upon the comptroller to call the collector of direct taxes to account at the periods prescribed by law, and in cases of delinquency, to pursue the summary remedy which the same law provided for the safety of the public, and, consequentially, for that of the surety? The neglect in the one case, and in the other, imputes laches to the officer whose duty it was to perform the acts which the law required; but, in a legal point of view, the rights of the government cannot be affected by these laches. The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety. If, then, the paymaster continues in office, notwithstanding the omission of the proper officer to recall him on the ground of his defaults, the act of placing funds in his hands to be disbursed according to law is not one of which the surety can complain, since the public interest requires that the troops should be paid, which can be done only by the officer appointed for that purpose. If the neglect of the officers of government, from which the surety suffers, does not discharge him from his responsibility *in either case, it is not [*191 perceived how the placing funds in the hands of the paymaster, who continues in office, can have that effect, seeing that the latter circumstance is the necessary consequence of the former. If the law displaced the officer upon the ground of delinquency, the placing funds in his hands, after his removal from office, could not possibly be upon the responsibility of the surety, inasmuch as his undertaking was for the faithful discharge of the duties of his principal as paymaster, and, consequently, he is not bound for his acts after he has ceased to hold that office. The whole argument of the counsel for the defendant proceeded upon the assumption that the office terminated, ipso facto, as soon as the delinquency occurred, which, we have endeavored to show, presents an incorrect view of the subject.

Whether, admitting that the surety could claim to be discharged from his responsibility, upon the ground assumed by his counsel, such a defense could be set up on the proceedings in this cause, is a question upon which the court avoids expressing an opinion, because it is rendered unnecessary by that which has been pronounced, and because it was not argued at the bar.

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committee of the Privy Council in the case of Governor Wentworth, who was complained of on various charges. One of these was, that he had set aside grants of land, in the American province of which he was governor, without office, accord-168*] ing to the forms of the law of *England; and the Lords of the Committee of the Privy Council, one of whom was Sir Eardly Wilmot, say, in their report, that in some of the American provinces they have not courts so correspondent to those in England as to admit of the same forms, and that, in such cases, if a mode of doing the same thing cy pres is adopted, it ought to be good ex necessitate. See p. 10 of the report. This doctrine is applicable to the present case. The property is entailable, but a common recovery cannot be suffered for want of a proper court, and therefore, ex necessitate, alienation being the only mode of barring the case will admit of, ought to be adjudged sufficient.

"But, if the property is not within the statute De Donis, and yet should be within the statute of wills, it may be material to consider what consequences will follow. Then, under the settlement of 1733, the last Lord Baltimore had a fee-simple conditional, and if a possibility of reverter is not grantable, as Lord Hardwicke holds in Stafford v. Buckley, 2 Ves. Rep. 180, then the possibility of reverter, in this case, did not pass to Mrs. Browning by the will of the father of the last Lord Baltimore, but descended on him, and, for want of an intervening estate, the former merged in the latter. During the life of the father of Lord Frederick, they were distinct; but, after the father's death, they met in the son, and this union gave him the whole fee.

"Lord Mansfield: A possibility of reverter is certainly not grantable.

"Mr. Kenyon: As to the Isle of Man, there is an annotation by Lord Hale in the new edition of Coke upon Littleton, now publishing, which explains the reason why the statutes De Donis of uses, and of wills, do not extend to Man, in a way not applicable to Maryland. Man was a dominion belonging to the King of England before those statutes; and Lord Hale says it was ruled that those statutes do not extend there, because Man was not parcel of the realm of England, and is not specially named. But the grant and settlement of Maryland are subsequent to those statutes. See 20 b. of the new edition of Co. Litt. (*)

"Lord Mansfield: It will be very proper to consider the case of *the Isle of Man in 4 [*169 Inst. and 2 Anderson. Both Maryland and Man are dominions held of the crown of England; and the grant of Man to the Derby family was prior to the statute De Donis, and yet the judges held that it did not extend to it, any more than the statute of uses and wills, which were subsequent. The case of The Duke of Athol and The Bishop of Man should also be considered. Lord Hardwicke took great pains in giving his opinion in that case. He gave me a corrected note of his opinion, and another to The Duke of Athol.

"Mr. Sergeant Hill, in reply: It is agreed, that if the property was in England, the case would be clear against the devisee of Lord Baltimore for want of a recovery; and it has not been shown that a recovery was impossible. The distinction between the land and port duties has not been answered. They were separated by King William. He seized the former, but did not touch the latter. The distinction between sovereignty and mere land is solid. The case from 2 P. Wms. 75, was cited to prove that subjects of the King of England carry over our laws with them into a new settlement; which I do not controvert. A manor is not to be compared with the seigniory of Maryland. The principal powers given to the proprietor of Maryland do not belong to the lord of a manor.

*Hargr. & Butlr. ed.

The opinion of the court is, that there is error in the judgment of the court below, and that the same ought to be reversed.

Judgment reversed.

192*] [*Construction of Statute.]

OTIS, Plaintiff in Error,

v.

WALTER, Defendant in Error.

Under the embargo act of the 25th of April, 1808, c. 170 (LXVI.), s. 11, the collector is protected in the honest exercise of his discretion in detaining the vessel, and securing both vessel and cargo, until an actual termination of the voyage.

Whether the voyage has terminated, is a question of fact, and if the voyage be colorably, but not really terminated, the collector may detain the vessel, if he has honest suspicions.

ERROR to the Supreme Judicial Court of the state of Massachusetts.

This is the same cause which was formerly before this court.[1]

It was argued at this term by the Attorney-General and Mr. Blake for the plaintiff in error, and by Mr. Webster and Mr. Read for the defendant in error.

Mr. Justice Johnson delivered the opinion of the court:

This cause is brought up, by writ of error, from the Supreme Judicial Court of Massachusetts, for the purpose of reviewing a judgment of that court, given in favor of the defendant here, upon an action of trover instituted in that state, *to recover damages [*193 for the alleged conversion of sundry articles composing the cargo of the sloop Ten Sisters. Otis, in the capacity of collector of the district of Barnstable, had, in the year 1808, seized and detained the vessel and cargo under the provisions of the embargo act of the 25th of April in that year.

This is the third time that this cause has been brought to the notice of this court. In the two former instances, it came up upon bills of exceptions, and in both the decisions of that court were reversed, and a venire facias de novo awarded. In the present instance, a special verdict has been taken, and as the law was settled in the two former decisions, that until the termination of the voyage the collector was protected in the honest exercise of an unlimited discretion in detaining the vessel, and, by necessary consequence, in resorting to the ordinary and necessary means of securing and preserving both vessel and cargo, this verdict seems to be drawn up with a view to bring up the single question, whether, in the sense of the laws of Congress, and of the decisions of this court, this voyage was not, in effect, terminated before the seizure.

The special verdict finds that the vessel cleared out "for the port of Yarmouth." It is

1.—Vide ante, S. C., Vol. II., p. 18; Vol. VI., p. 583.

"The word 'assigns' is necessary to make offices of trust transferrable; and the reason for omitting it in some parts of the Maryland charter, was to make some parts of the property unalienable. It is omitted in the grant of the seigniory. It is said that kingdoms are devisable; but there is no instance of the devise of a dependent kingdom. I say this on the authority of Craig. Henry the VIII., and Elizabeth, had acts of parliament.

"Lord Mansfield: By the feudal law, land was not devisable; much less a kingdom; though William the Conqueror claimed England under a will.

"Mr. Serjeant Hill: It is said that recoveries on writs of right in manor courts, have only been in the case of copy-holds, and of lands in ancient demesne. But, in the cases I cited from Benloe and Robinson, of recoveries in the Courts of Baron Ris-170*] ing and Wolverhampton, *the recoveries were of freehold land, and the words secundum consuetudinem manerii, which are used where the recovery is of copy-hold, or ancient demesne, are not mentioned. The argument from the entails of copy-holds, which are barrable by surrenders, supposes that there is no custom to warrant another mode; but the argument of necessity fails here, for there is another mode. I give the same answer to the cy pres doctrine in the report to the Privy Council in Governor Wentworth's case.

"Lord Mansfield: The questions in this case are new, and of great difficulty. I have often considered them. I do not know of any litigated case before the present, in which the question has been, whether a seigniory like that of Maryland can be aliened or devised. Both the Baltimore and Penn families have made their proprietorships the subjects of settlements and entails. As to the statute of William and Mary, it is strange that it should restrain from selling lands or proprieties to aliens; because, before that statute, they were incapable of purchasing. But, still, the words of the statute, which mention any right or propriety in any island or tract of land in America, by charter, or letters patent furnish some argument in the case of Penn and Baltimore, the question of alienation could not arise. There the suit was about an agreement as to the bounds of two provinces; and it is certain, that a province cannot be dismembered by aliening one part so as to be holden of another province. Something might be incidentally said as to the point of alienation, but there could be no solemn adjudication, for the case did not require it. The jurisdictions and powers granted by the Maryland charter, are larger than those in any other. Doubts may arise as to the principality, from the nature of the property. Taking in execution, and other consequences of its being subject to alienation, may furnish strong reasons of policy against the power of alienating. The law being settled as to the principality, a secondary question will be, whether the lands or port duties can be severed from it. The rule of applying to America all the laws of England, in force at the time of settling a colony, is subject to many qualifications. The statute of charitable uses doth not extend to Antigua. There may be a difference, too, between the seigniory and proprietorship of Maryland, and other estates here. The seigniory and proprietorship passed under the great seal, and that carries the law of England. Another *thing quite new, is the question as to bar- [*171 ring the entail. The history of barring entails in the provinces is material. If there had not been provincial laws to regulate the barring of entails, it might have been proper to have supported the mode of barring by fines and recoveries in England. The necessity of the case might, perhaps, have justified it. But the provincial laws do not apply to the seigniory and proprietorship of Maryland. The question as to them is entirely new, and of great difficulty. The pains taken to show that a recovery might have been suffered in the Court of the Castle of Windsor, proves the force of the argument of necessity as to barring by alienation. The case of descendible freeholds, the entails of which are barred in that way, may have influence on the present case.

"The case was ordered to stand for argument a second time next Michaelmas term; and Lord Mansfield said that, probably, several arguments would be necessary."

true, the captain, in the oath attached to his manifest, makes use of the mere indefinite expression "bound for Yarmouth." But, when we come to examine the sense in which he made this oath, by referring to his instruc-
194*] tions, which are also *found by the verdict, we find it restricted to a voyage to Bass River, where it was to terminate by landing his cargo, and storing it in a particular warehouse. This, then, was the point of his destination, call it port, harbor, place, or what we will. And, as the collector uses the definite, instead of the indefinite article, before port, in the clearance, the fair inference is, that the clearance was for Bass River, under the designation of "the port of Yarmouth."

We are far, however, from intending to intimate that if the captain's oath as to his destination could not be modified and explained by reference to his instructions, it might be permitted to enlarge the meaning of the word port as used in the clearance, so as to embrace the township of Yarmouth. In those times, when it behooved every public officer to be on the alert against the multiplied evasions of the system of that day, it is not to be supposed that the definite language of the clearance was adopted without an object. The captain appears to have acted as if he had received a clearance on a general voyage to Yarmouth, whereas, it is obvious that the collector of Ipswich acted under a sense of the impropriety of giving a clearance that would leave the terminus of the voyage so void of precision. We consider the definite article as having been used for a definite purpose, and to preclude the general privilege of sailing to any point in the town or township of Yarmouth, at which a landing might have been affected.

It is obvious, indeed, from the whole tenor
195*] of *the verdict, that the mouth of Bass River is understood more emphatically to be the port of Yarmouth than any other place in the township of Yarmouth. In one place it finds, "that the harbor or port of Barnstable is about three miles from the harbor of Yarmouth;" in another, that a long point of land intervenes between "Yarmouth harbor or Bass River harbor, and Hyanis or Barnstable harbor;" in both instances drawing an express discrimination between Yarmouth harbor, to which the vessel was bound (taking the term to be the synonym of port), and Hyanis, or Barnstable harbor, in which she was seized.

Everything proves that Bass River harbor was the original destination of the vessel. In this sense, it cannot be denied that Bass River harbor was the port to which, in the language of the law, she was "ostensibly bound." No one contends that when at her anchorage in Hyanis Bay, where she was seized, she could be considered as arrived at Bass River harbor. It was ten miles from this harbor—a peninsula intervening—and, as the verdict finds, the vessel had gone to Hyanis Bay after being compelled, by head winds, to pass Bass River.

But, it is contended, that as her clearance was not specified to Bass River harbor, but to the port of Yarmouth, an arrival at Gage's wharf would as well have satisfied the exigencies of her case; that, in fact, she had arrived there when anchored where she was seized, and that, having then a right to demand her permit to land, and *having demanded it, [*196 the circumstances make out a termination of the voyage as effectually as if she had put in to Bass River.

We have already stated, we think, sufficient reasons for not admitting that the clearance could be satisfied by a destination to Gage's wharf. Yet, it cannot be denied that there is one part of the special verdict that does throw some obscurity over this part of the case. It is that in which the jury finds in these words: "That, in the practice of the custom-house for Barnstable, and of the owners and masters of vessels belonging to Barnstable district, Yarmouth and Barnstable are considered one and the same port; and that Gage's wharf, at the head of Lewis' Bay, is a place in Yarmouth, at which vessels bound to that port frequently unload, and that no difference is made in the custom-house between Yarmouth and Barnstable, or Hyanis, as to the entry of vessels that have arrived at either place."

If, in this passage of the verdict, the jury meant to find that a vessel arriving in Hyanis Roads, an open roadstead, not locked in by any head lands that could make a port of it, had, in fact, arrived at Gage's wharf, or Bass River, they should have been explicit; and, absurd and repugnant to the geography of the country and the common sense of mankind as the fact would have been, we must have submitted to it, or refused to act upon it. As it is, we can only draw such inferences as the finding will sanction. And we are free to confess that we cannot understand what is meant by a practice of the custom-house *and ship-masters [*197 of Barnstable, which confounds the open roadstead of Hyanis with the harbor of Bass River, or even the landing place at Gage's wharf, the one ten, the other three miles off. We can very readily conceive why the landing place at Gage's wharf should be indifferently called Falmouth or Barnstable, since it is in the town by one name, and the landing place of the port or bay of the other name, the line crossing the bay but a few feet from the wharf. To arrive, therefore, at Barnstable harbor, or Lewis' Bay or Hyanis Roads, which seem to be somehow confounded in this verdict, and to arrive at the township of Yarmouth, at Gage's wharf, may be considered as one and the same thing. And yet the inference from that fact may be directly the reverse of that insisted on for the defendant in error. For the finding is clear and positive, which distinguishes between Barnstable harbor and Yarmouth harbor; and if, then, Barnstable harbor be identified with the landing-place as Gage's wharf, the conclusion is unavoidable that the port of Yarmouth cannot mean the landing place at Gage's wharf. Indeed, it is impossible to arrive at the conclusion that the destination of this vessel was indifferently to Gage's wharf or Bass River without permitting a mere inference, and that, too, from equivocal terms, to conflict with a positive finding of the jury couched in the most explicit terms. And even when advanced that far, it would still remain for the defendant here to maintain that a vessel at anchor in Hyanis Road had completed her *voyage to Gage's wharf: a proposi- [*198 tion as wide of the fact with reference to the topography of the country as it is of the in-

tendment of law or the finding of the jury. For the words of the special verdict are, "that the vessel when seized lay at anchor in the harbor or port of Barnstable, above half a mile from the shore or beach, and about three miles from the harbor of Yarmouth." That the jury did not intend to confound Gage's wharf with the harbor of Yarmouth is distinctly shown by the words that follow the above, declaring Gage's wharf to be six miles and a half from where the vessel was seized. Whether the jury were right or wrong in fixing these distances, the inference we deduce from it is still the same, to wit, that the harbor of Yarmouth and Gage's wharf could not be one, no more than the port of Barnstable and the harbor of Yarmouth. The vessel lay in the former, three miles distant from the latter, and six and a half from Gage's wharf.

Upon the whole, we can discover nothing in this case to induce us to alter the opinion entertained in the two former, that the vessel had not reached the terminus of her voyage, that she was in itinere, and therefore liable to seizure. On the subject of the argument deduced from the demand of the permit to land, we think this also was fully answered and disposed of in the former decisions of this court in the same suit. We are therefore of opinion that the act on which the collector relies, justified the seizure; that there is error in the judgment of the court of Massachusetts; that 199*] *it must be reversed, and a judgment entered for the plaintiff here, the defendant in the original suit.

Judgment accordingly.

[Statute of Frauds. Evidence.]

HINDE'S LESSEE v. LONGWORTH.

Question as to the sufficiency of a certificate of acknowledgment of a deed at lands in Ohio.

In examining the admissibility of testimony in the court above, the party excepting is to be confined to the specific objection taken at the trial.

Where a voluntary deed is impeached as fraudulent, evidence of judgments against the grantor is admissible as proof (among other facts) that he was indebted at the time of making the deed, although the grantee was not a party to the suits on which the judgments were obtained.

A voluntary deed is void as to antecedent, but not as to subsequent creditors.

ERROR to the Circuit Court of Ohio.

This was an action of ejectment brought by the plaintiff in error, to recover the possession of the premises in the cause, described as in lot No. 107 in the town of Cincinnati. It appeared in evidence at the trial, that on the 28th of March, 1799, Thomas Doyle, Sen., under whom both parties derived title, was seized and possessed of the lot in question. The lessor of the plaintiff claimed under a deed 200*] of that date from Thomas *Doyle, Sen., to his son Thomas; and the defendant set up a title under a judgment against Doyle the elder, at the suit of John Graff, entered at the August term, 1799, of the Court of Common Pleas for the county of Hamilton. At the trial, three bills of exceptions were taken by the lessor of the plaintiff.

The first bill of exceptions stated that the plaintiff in support of his action offered in evidence the deed from Doyle, Sen., to his son, to the reading of which in evidence the defendant objected, and the court rejected it, as not being properly acknowledged. The certificate of acknowledgment was as follows: "Hamilton, ss.: Personally before me, Thomas Gibson, one of the justices of the Court of Common Pleas for said county, the above-named Thomas Doyle and —— Doyle, his wife, who, being examined separate and apart, acknowledged the foregoing deed to be her hand and seal, free act and deed, for the uses and purposes mentioned." Thomas Doyle only had signed the deed. His wife was not named as a party to the conveyance except in the conclusion of the deed, as follows:

"In witness whereof the said Thomas Doyle and — Doyle, his wife, who hereby relinquishes her right of dower in the premises, have hereto set their hands and affixed their seals, the day and year first above written." A seal was affixed to the deed, but no signature of the wife.

In the second bill of exceptions, the counsel for the plaintiff stated that he claimed title under the same deed mentioned in the first exception *by virtue of which Doyle the [*201 younger became seized of the premises in question, which had descended to the wife of the lessor of the plaintiff, to which facts he adduced proof to the jury. The bill of exceptions then proceeds to state that the defendant, in order to prove that the deed was made with intent to defraud creditors, having read certain depositions to establish that fact, offered in evidence the records of two judgments recovered against Doyle the elder, one at the suit of John Graff, at the August term, 1799, of the Court of Common Pleas for the county of Hamilton, for upwards of $900; and the other in favor of Edward Shoemaker, at the October term, 1800, of the same court, for $590. To which testimony the plaintiff objected, as incompetent evidence, upon the ground that the proceedings in said suits had taken place between other persons than himself and Doyle, Jun., and to which he was not a party. The objection was overruled by the court, and the testimony admitted.

The third bill of exceptions stated that after the admission of the evidence aforesaid (the judgment records), and in order to repel the presumption of fraud in Doyle the elder, and to show that he had no intention to defraud creditors by making the said deed, but to prove that Doyle the younger, then an infant, was the creditor of his father, the plaintiff offered in evidence the depositions of certain witnesses. The bill of exceptions then proceeded to state that the depositions were offered to rebut the evidence *of fraud in fact, [*202 and the evidence of a fraudulent intent in the grantor; but the court declared their opinion to be that the last-mentioned evidence offered for rebutting the charge of fraud was inadmissible, and rejected the whole of the evidence so offered.

Upon these exceptions, a verdict and judgment having been entered for the defendant in the court below, the cause was brought by writ of error to this court.

The cause was argued by Mr. Scott for the plaintiff, and by Mr. Webster and Mr. Hammond for the defendant.

On the part of the plaintiff, it was contended,

1. That the court below erred in rejecting the evidence stated in the first bill of exceptions, of the acknowledgment of the deed from Doyle, Sen.[1]

2. That there was error in admitting the evidence offered by the defendant, as stated in the second bill of exceptions, to impeach the deed for fraud. It was not fraudulent at common law prior to the statute 13 Eliz., c. 5,[2] and that statute had never been adopted in Ohio.[3]

203*] *3. The evidence stated in the third bill of exceptions was erroneously rejected, even supposing the statute 13 Eliz., c. 5, to be in force in the states which formed the territory north-west of the river Ohio. The statute 27 Eliz., c. 4, is construed more strongly in favor of purchasers, than that of 13 Eliz. c. 5, in favor of creditors. A mere voluntary conveyance, under the last-mentioned statute, is only presumptive evidence of an intention to defraud creditors, and may be rebutted by countervailing testimony.[4] The authorities make a distinction between a conveyance to a stranger, and a conveyance to a child, for maintenance and advancement. The latter is not considered as voluntary.[5] It is necessary to prove that the grantor was indebted at the time of making the conveyance.[6] A voluntary settlement by a trader, who afterwards becomes bankrupt, is good against all subsequent creditors under the statute of Eliz., although it is void under the bankrupt laws.[7] Besides, there was, in this case, evidence that the grantee was the creditor of the grantor, his father; so that, though he was then an infant, 204*] the conveyance was not *voluntary, but for a valuable consideration.[8] If it should be objected, that the evidence offered was contrary to the consideration expressed in the deed, the answer is, that the party may aver and prove a consideration different from that expressed in the conveyance, if it be consistent with that expressed.[9] And courts will uphold settlements made upon fair and bona fide inducements, by every reasonable presumption in their favor.[10]

On the part of the defendant, it was insisted,

That the statutes of frauds had been practically adopted in Ohio, by the Governor and judges, under the provision of the ordinance of Congress of 1787.[11] To adopt them by reference, without reciting them at large, has been the usual mode of adopting and publishing the English statutes which formed parts of the "laws of the original states." The common law itself is in force only by virtue of the same adoption. The statutes of frauds having been heretofore generally acted upon, and considered as in force, the validity of their adoption and promulgation having never been doubted, ought not now to be drawn in question. The construction of the statute as to voluntary conveyances has been settled by this court. It applies as well to cases where the conveyance was made in contemplation *of creating a debt, immediately after- [*205 wards contracted, as of debts actually existing at the time.[12] But here, copies of the accounts, upon which the judgments were recovered, are spread upon the record, by which it appears that the causes of action on the part of the creditors of the grantor arose before the date of the deed. The deed itself distinctly stating the consideration upon which it was made, proof of a different consideration was inadmissible.[13] If the deed was not properly acknowledged and recorded, it was not notice to the party claiming against it.[14] The records of the judgments were admissible in evidence to impeach the validity of the deed, as showing, among other facts, that the grantor was indebted at the time it was executed. The maxim of res inter alios acta could not be applicable to this testimony, any more than to other evidence of the grantor being indebted at the time.

Mr. Justice **Thompson** delivered the opinion of the court:

The premises in question in this cause are described as in lot No. 107 in the town of Cincinnati; and it is admitted on the record that on the 28th day of March, 1799, Thomas Doyle, Sen., was seized and in possession of this lot. Both *parties derive title under him. [*206 The lessor of the plaintiff claims under a deed of the date above mentioned, from Thomas Doyle, Sen., to his son Thomas. And the defendant sets up a title under a judgment against Doyle the elder, in favor of John Graff, entered in August, 1799. Upon the trial, the validity of the deed from Doyle the elder to his son was the main subject of inquiry. Three bills of exception were taken on the part of the lessor of the plaintiff, and a verdict entered by consent for the defendant, and the case is brought here by writ of error to the Circuit Court for the district of Ohio.

1. The first bill of exceptions relates to the acknowledgment of the deed from Doyle the elder to his son. This was deemed by the court insufficient, and the deed rejected. In the second bill of exceptions, however, the counsel for the plaintiff stated again that he claimed title under the same deed mentioned in the first exception, by virtue of which Doyle

1.—Co. Litt. 9 b; 3 Atk. Rep. 409; 2 Atk. Rep. 465; Print. Dec. 184; Dougl. Rep. 384; Ambl. Rep. 194; 2 Burr. Rep. 193; 6 East's Rep. 486; 9 Mass. Rep. 218; 15 Johns. Rep. 109, 111.

2.—Roberts on frauds, 12-15 and note (c); Id. 37; 116, 574; 1 Co. Rep. 93 b; Dyer, 192 b. and 167 b; 10 Co. Rep. 56; 2 P. Wms. 154, 157, 220; Roberts on Frauds, 37 and note (p.)

3.—Ordin. Cong. 1787, s. 1; Laws of United States, Vol. I., p. 476; 2 Rev. Code, 302.

4.—1 Lev. Rep. 150, 237; 1 Ventr. Rep. 293; 1 Ch. Cas. 99, 216; 2 Burr. Rep. 1072; Roberts on Frauds, 30, 191.

5.—Fonbl. Eq. 127, n. 1; Sugd. Vend. 420; 1 P. Wms. 112.

6.—1 Atk. Rep. 94; 1 Ves. Sen. Rep. 10; 2 Bro. Ch. Rep. 90.

7.—8 Ves. Rep. 199; 1 Swanst. Rep. 106; Brownl. Rep. 189; 5 Ves. Rep. 384; Newl. on Contr. 385; 11 Mass. Rep. 421; 9 Mass. Rep. 390; Ambl. Rep. 596; 3 Dessaus. S. C. Rep. 1.

8.—Co. Litt. 2 b; 2 Lev. Rep. 217.

9.—Phill. Evid. 425, 426, and the authorities there cited.

10.—Roberts on Frauds, 80, 149; 2 P. Wms. 245; Cas. Temp. Talb. 64; 1 Atk. Rep. 188.

11.—Ohio Land Laws, 322.

12.—Sexton v. Wheaton, 8 Wheat. Rep. 242.

13.—2 P. Wms. 203; 7 Johns. Rep. 341; 1 Ves. Sen. Rep. 128; 1 Johns. Ch. Rep. 341.

14.—2 Binn. Rep. 44, 51; 4 Wheat. Rep. 486.

the younger became seized in fee of the premises in question, and which had descended to the wife of the lessor of the plaintiff, to which facts he adduced proof, which was submitted to the jury, and to which proof no objection appears to have been made on the part of the defendant. What that proof was is not stated, but we must presume it to have been enough to prove the due execution of the deed, both because it does not appear to have been objected to, and because the defendant went into evidence to show the deed was fraudulent and void, which would have been altogether ir-
207*] relevant *if the deed had not been sufficiently proved to be submitted to the jury. This might supersede the necessity of this court expressing any opinion upon the sufficiency of the acknowledgment of the deed; because, admitting the court below erred in rejecting it in the first instance, still, as it was afterwards, in the progress of the cause, duly proved, the judgment would not be reversed on account of that error if this was the only question in the cause.

We notice this point only to correct what we consider a misapprehension of the plaintiff's counsel as to the practice in cases of this kind. But, as this cause must be sent back to another trial, it is deemed advisable to express an opinion upon the sufficiency of this acknowledgment, the certificate of which is as follows: "Hamilton, ss.: Personally before me, Thomas Gibson, one of the justices of the Court of Common Pleas for said county, the above-named Thomas Doyle, and ——— Doyle, his wife, who, being examined separate and apart, acknowledged the foregoing deed to be her hand and seal, free act and deed, for the uses and purposes mentioned." The question is, whether this can be taken for acknowledgment of Thomas Doyle. He only has signed the deed. His wife is not named as a party in any manner, except in the conclusion, which is as follows: "In witness whereof, the said Thomas Doyle, and — Doyle, his wife, who hereby relinquishes her right of dower in the premises, have hereto severally set their hands, and affixed their seals, the day and
208*] year first *above written." A seal is affixed to the deed, but no signature.

The certificate is insufficient unless it contains enough to show, with all reasonable certainty, that, in point of fact, Thomas Doyle did appear before the officer and acknowledge the deed. And this, we think, it does not show. It does not even state expressly that Thomas Doyle appeared before the officer; but if that is to be inferred, the purpose for which he appeared is not stated, so that nothing can be inferred from the mere fact of appearance. It does not set forth that he, in point of fact, did acknowledge the deed, or did any one act that might by possibility be construed into an acknowledgment. The certificate does state that the wife did acknowledge the deed, which, if true, necessarily implies that she appeared before the magistrate, although that fact is not stated. The form of the certificate is adapted to the acknowledgment of the wife. It states that being examined separate and apart, she acknowledged the deed to be her hand and seal, free act and deed. The relinquishment of dower, and the affixing of the seal, show that she was intended to be made a party; and if the court was at liberty to conjecture, or indulge any intendment about the real fact, it would be as reasonable, if not more so, to infer that the wife did appear, and make the acknowledgment certified, and by mistake omitted to sign the deed, than that the husband acknowledged it. But the certificate of acknowledgment ought not to be left in such uncertainty. It is ex-parte proof *of [*209 the deed; and it ought to appear with all reasonable certainty that the requisites of the law had been complied with. The deed was therefore properly rejected in the first instance.

2. The second bill of exceptions necessarily presupposes that the deed was in evidence before the jury. For it states that the defendant, in order to prove that the deed was made with intent to defraud creditors, and therefore void, having read some depositions to prove that fact, offered in evidence the records of two judgments recovered against Doyle the elder; one in favor of John Graff, on the first Tuesday in August, 1799, for upwards of $900, and the other in favor of Edward Shoemaker, in October term, 1800, for about $500. To the admission of which the plaintiff's counsel objected as incompetent evidence, on the ground that these were proceedings inter alios, to which Doyle the younger was in no wise a party. The objection was overruled, and the evidence admitted.

It will be perceived that the objection to the evidence was specifically placed on the ground that Doyle the younger was not a party to the judgments. And it may well be questioned, whether, when the purpose for which the evidence is offered is specifically avowed, the court will look at it in any other point of view, or inquire whether it might not be proper for some other purpose. As a general rule, we think the party ought to be confined, in examining the admissibility *of evidence, to [*210 the specific objection taken to it. The attention of the court is called to the testimony in that point of view only; and to admit an inquiry afterwards, whether the evidence might not have been admissible for some other purpose, would be sanctioning a course of practice calculated to mislead.

It is unnecessary, however, in this case, to put the question on that ground, for the evidence was admissible in whatever light the objection is taken.

The consideration expressed in the deed from Doyle the elder to his son, is natural love and affection, and the judgments were introduced to show that the grantor was in debt at the time of giving the deed, which, as was contended, would render it void as against creditors. This was therefore, necessarily, an inquiry into matters to which the grantee in the deed was not a party. It was certainly competent for the defendant to show that the grantor was indebted at the time he made the conveyance; this was a necessary step towards establishing the fraud; and if these judgments conduced to prove that fact, they could not be shut out as incompetent evidence. The extent and effect of the evidence was matter for the jury. If the evidence ought to have been excluded because Doyle the younger was not a party to the judgments, the same objection would have

tain against the proof of his being in debt to others in any manner whatever; that would have been equally an inquiry into matters to which the grantee in the deed was not a 211*] party. There *was, therefore, no objection to the evidence on this ground.

The judgments appear to have been entered some short time after the date of the deed, and it is said that a voluntary deed is void only as to antecedent, and not subsequent creditors, unless made with a fraudulent intent; and this appears to be the doctrine of this court, as laid down in Sexton v. Wheaton (8 Wheat. Rep., 242), after a review of the leading authorities on this question. But copies of the accounts upon which the judgments were founded are spread upon the record, by which it appears that the cause of action arose before the date of the deed. If these accounts did not properly form a part of the record, according to the course and practice of the court where the judgments were entered, a specific objection should have been made to their being received in evidence, which would have led to the inquiry whether they properly formed a part of the record; but, as the question is now presented to this court, we cannot say that these accounts are to be stricken out of the record. They may be looked to for the purpose of showing that Doyle the elder was in debt at the date of the deed; but, whether to an extent which would avoid the deed, must depend on circumstances which are not to be inquired into by this court. There was no error, therefore, in the admission of the evidence.

3. The third exception arises on the rejection of certain depositions offered in evidence on the part of the plaintiff. The introductory part of 212*] *the bill of exceptions sets out "that after the admission of the evidence aforesaid (the judgment records), and in order to repel the presumption of fraud in Doyle the elder, and that he had no intention to defraud creditors by making the said deed, but to prove that Doyle the younger was the creditor of his father, the evidence was offered.

The concluding part of the bill of exceptions alleges that the depositions were offered to rebut the evidence of fraud in fact, and the evidence of a fraudulent intent in the grantor, Doyle the elder. But the court declared their opinion to be, that the last-mentioned evidence, offered for rebutting the charge of fraud, was inadmissible, and rejected the whole of the said evidence so offered.

Looking, then, as we must, to the whole bill of exceptions, to collect its true meaning and import, we must understand the evidence to have been offered for the double purpose of showing that Doyle the younger was a creditor of his father, and that by reason thereof, although the consideration in the deed purported to be natural love and affection, it could not be considered as given with intention to defraud creditors; and also to rebut the evidence of fraud in fact, and to show the character and situation of Doyle the elder in point of property, at the time he executed the deed in question.

If the testimony offered was admissible for either of the purposes above stated, the court erred in rejecting it.

213*] *That the evidence was proper for the latter purpose, cannot be questioned. The charge against the grantor was, that he was guilty of fraud in fact in making the deed to his son; that it was done for the express purpose of defrauding his creditors; and it was proper evidence, therefore, to rebut this allegation, to show that the grantor had the means of paying his debts independent of the property conveyed to his son. Whether the evidence would have made out that fact to the satisfaction of the jury, is not for this court to inquire. If it conduced to make out that fact, it should have been submitted to the consideration of the jury. A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances; but the mere fact of being in debt to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side. The evidence offered to show that Doyle the elder was indebted to his son to an amount equal to the value of the property conveyed to him, was declared also to be for the purpose of repelling the presumption *of fraud in [*214 fact, and to show that there could have been no such intention to defraud his creditors, by putting his property out of their reach, without receiving any real and adequate consideration for it. Doyle the elder might have sold the land to his son, or to a stranger, for a valuable consideration, and given a good title for the same, although his debts might have been double in amount to the value of his property, unless his creditors had acquired a lien upon it. It would have been no fraud in judgment of law against his creditors, for him to have paid one, and left the others unpaid. Had the evidence been offered for the purpose of showing that the deed was given, for a valuable consideration, and in satisfaction of the debt due from the father to the son, and not for the consideration of love and affection, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a valuable for a good consideration, and a violation of the well-settled rule of law, that parol evidence is inadmissible to annul, or substantially vary, a written agreement.

But that was not the object for which the evidence was offered, or the effect it was intended it should have. It could not, in any respect, vary or alter the deed, or give to it a different construction or operation between the parties to it. The defendant had attempted to invalidate the deed by going into proof of circumstances out of the instrument itself and unconnected with it, and which circumstances, it was contended, *showed a fraudulent intention [*215 in the grantor, in conveying the lot in question to his son. And the evidence of the father's being indebted to the son, was to meet, and repel, the presumption of fraud which was attempted to be raised against the deed by reason of such extrinsic circumstances. The evidence which has been admitted to show the fraud, and that which was offered to rebut it, related

to collateral and independent facts unconnected with the deed, and could not, therefore, in any manner, vary or alter its terms.

The third exception was, accordingly, well taken. The judgment of the court below must therefore be reversed, and the cause remanded, with directions to issue a venire de novo.

[Local Law.]

LITTLEPAGE v. FOWLER et al.

The following entry is invalid, for want of that certainty and precision which the local laws and decisions require: "January 27, 1783, J. C. L. enters 20,000 acres of land on twenty treasury warrants, No. 8859, etc., beginning at the mouth of a creek falling into the main fork of Licking, on the north side, below some cedar cliffs, and about 35 mile above the Upper Blue Licks, and running from said beginning up the north side of Licking, and bounding with the same as far as will amount to ten miles when reduced to a straight line; thence extending from each end of said reduced line, a northerly course at right angles to the same for quantity."

216*] *THIS cause was argued by Mr. Bibb for the appellant,[1] and by Mr. Talbot for the respondent.[2]

Mr. Justice Johnson delivered the opinion of the court:

This cause comes up by appeal from the Circuit Court of Kentucky, in which the appellant filed his bill to compel the defendants to convey to him 20,000 acres of land in right of a prior entry. The defendants, having obtained the prior patent, relied upon their prior legal rights; and on the hearing below the bill was dismissed. The entry on which the complainants relied was in these words:

"January 27, 1783. John Carter Littlepage enters 20,000 acres of land on twenty treasury warrants, No. 8859, etc., beginning at the mouth of a creek falling into the main fork of Licking, on the north side below some cedar 217*] cliffs, and *about thirty-five miles above the Upper Blue Lick, and running from said beginning up the north side of Licking, and bending with the same, as far as will amount to ten miles when reduced to a straight line; thence extending from each end of said reduced line in a northwardly course at right angles to the same for quantity."

The only question in the cause is, whether this entry contains that legal precision which the land laws of Kentucky require to make an entry a valid appropriation of the land. For the defendants, it is contended that it is vague, and calculated either to mislead a subsequent locator, or impose upon him an unreasonable labor in the effort to identify it.

On this subject the rule of the law of that state, and the rule of reason, is, that the objects called for to designate the land appropriated should be specific; and, if not notorious in themselves, that they should be so indicated with reference to those which are notorious, as to enable a subsequent locator to discover and identify them by using ordinary diligence.

The locative calls in this cause are, a creek emptying into the main fork of Licking on the north side, below some cedar cliffs. It is not pretended that these objects have the attribute of notoriety, and, in order to lead to their discovery, the subsequent locator is referred to the main branch of Licking River, and the Upper Blue Lick, which are notorious, and to the position and distance of the beginning point of the entry, with reference to the lick and the river.

*A subsequent locator, then, having [*218 this entry in his hand, and proposing to appropriate the adjacent residuum, proceeds to the lick as his starting point; when there, he knows that the land lies above him with reference to the river, upon the river bank, and, in the language of the entry, "about thirty-five miles above the Upper Blue Lick."

The first question which then occurs, to him, is that which has constituted the principal subject of argument in this cause. Upon what principle is the distance here called for to be computed? For the appellant, it is contended that he should pursue the meanders of the river, or the most practicable route by land; for the appellee, that he must apply the mathematical principle to the entry, and take the shortest line that can be drawn between the two points; and both contend that they are sustained by adjudicated cases.

We have examined those causes, and are satisfied that neither party is supported in his doctrine as a universal principle; but that the courts of Kentucky, with that good sense which uniformly distinguishes their efforts to extricate themselves from that chaos of rights in which political relations, and inveterate practice, had involved them, have left each case to be governed by its own merits, wherever distance has been resorted to as the means of identifying a locative call. And certainly the sense in which the enterer uses the reference to distance, is the only general rule that can govern a court in construing *an entry. That [*219 sense may be gathered from his language, or inferred from the habits of men, and the state of the country; but, as he is responsible for the sufficiency of his entry, it would be unfair to impose an arbitrary and unusual meaning upon the language of unlettered men, exploring a country covered with thickets, and replete with dangers.

For these reasons, the straight line, as the means of ascertaining a locative call, has certainly been rejected as a general rule. Such was the case in Hite v. Graham et al. 2 Bibb, Rep. 155, 145; M'Kee v. Bodley, 2 Bibb.

1.—He cited Pannel v. Johnson, 2 Wheat. Rep. 211; Hite v. Graham, 2 Bibb, Rep. 143; White v. Wilson, 3 Bibb, Rep. 542; Whitaker v. Hall, 1 Bibb. Rep. 79; Bodley v. Taylor, 5 Cranch's Rep. 224; M'Gee v. Thompson, 1 Bibb. Rep. 132; Marshall v. Currie, 4 Cranch's Rep. 176, 177; Bush v. Todd, 1 Bibb, Rep. 64; Whitaker v. Hale, Id. 73; Roberts v. Huff, Hardin's Rep. 382; Taylor v. Kincaid, Id. 82; Bowman v. Mellin, 3 Bibb, Rep. 153.

2.—He cited Hite v. Graham, 2 Bibb, Rep. 144; M'Gee v. Bodley, 2 Bibb, Rep. 482; Whitaker v. Hale, 1 Bibb. Rep. 79; Craig v. Hawkins, 1 Bibb. Rep. 53; Smith v. Walton, 3 Bibb, Rep. 153; Carland v. Rowland, Id. 127; Webb v. Bedford, 2 Bibb, Rep. 259; Greenup v. Lyne, Id. 37; Mercer v. Irvins, Id. 471; Landrum v. Hite, 1 Marsh. Kentucky Rep. 419; Bartas v. Calhoun, 2 Marsh. Kentucky Rep. 169.

Rep. 482; Whitaker v. Hale et al. 1 Bibb, Rep. 79. As the method of surveying an entry, however, the meanders of a river are always reduced to a straight line, and to this class of cases are all those quoted for the appellee to be referred. Craig v. Hawkins' Heirs, 1 Bibb, Rep. 53, and many others. Yet, in the case of M'Kee v. Bodley, before cited, both the direction and admeasurement of a straight line are resorted to for the purpose of verifying a call lying on the side of a road. And the reason is obvious; in that case, the shortness of the line, as well as the phraseology of the entry, rendered it admissible that the enterer referred to distance as ascertained by direct measurement.

One general rule is never departed from, to wit, that when distance is indicated by a road, it shall be held to mean by the meanders of the road. Whitaker v. Hale, supra and passim. So, also, where there is no road or trace, the 220*] most *usual route, if there be proved such a route to exist, seems to be the rule. So it is laid down in Hite v. Graham et al. in which, also, the general rule as to the sense in which the language of entries is to be received, is explicitly declared to be "according to the popular acceptation at the time when the entry was made." And, although, in the case of White v. Wilson, 3 Bibb, Rep. 542, a learned judge is reported to have said "that there seems to be a diversity of opinion as to the most natural construction of a locative call in an entry where a given distance, up or down a water-course, is specified," we cannot but think, that the same rules which govern the cases on the subject of distances by land, have been distinctly and rationally applied to distances called for with reference to water-courses.

Distances on the Ohio are invariably measured according to its meanders. Hite v. Graham, 2 Bibb, Rep. 143; Johnson v. Pannel's Heirs, 2 Wheat. Rep. 207. Nor is there anything arbitrary in the rule, nor leading to a result so indefinite as the supposed distinction between great and small water-courses. Their navigable character furnishes the rule by identifying them with highways, and thus the popular acceptation of terms still furnishes the distinction. This is very obvious from the case of Hite v. Graham, in which the court say, "as the Ohio is the usual way of passing from one point on it to another, and was, at an early day, the great highway of coming to that part of this country," etc. And, in the same case, 221*] speaking of the Little *Sandy, the court observes, "this call, like that for distance on the Ohio, is not explicit as to computing it. But this stream, though like the Ohio navigable, is not like it impassable, except occasionally; and a person, in passing from one point of it to another, is not necessarily confined to the winding of the stream. A direct line, however, would be impracticable to travel and use, put it out of the question as being a way in which a call of this kind would ever be understood by anyone." And thus, in the case of Bowman v. Melton, 2 Bibb, Rep. 153, where the call was for thirteen or fourteen miles up a small stream, the court observed, "it, indeed, is not probable that the distance along the meanders of the water-course was intended, because it is believed that it never was usual to travel with the meanders of a small stream to ascertain the distance of one object from another; nor is it probable that the distance by a direct line was intended, because it would extend beyond the head of the water-course. But it is rather to be presumed that reputed distance was meant."

Since, then, all the testimony goes to establish that Licking, above the Upper Blue Lick, is not a navigable stream, at least not so as to be resorted to as a highway, especially for ascending navigation, it follows that the inquiries of a subsequent locater, who wished to appropriate the residuum adjacent to this entry, or of the surveyor who had a warrant to survey it, would be for a creek entering into Licking on the *north side, at a distance from [*222 the lick of about thirty-five miles, by some practicable route. The answer to this inquiry, as appears from the evidence, would direct him immediate to the fork of Licking. For Morrow, one of the witnesses, swears that he could reach that point by traveling in a practicable route about thirty-five or forty miles (p. 486 of the record), and in a direct line it is ascertained to be about thirty miles. Nor would the call for the cedar cliffs be wanting here, for it is worthy of remark, that the call is not for a cliff adjoining, or near to, or in sight of, the mouth of the creek, but merely for a cliff at an indefinite distance above the mouth of the creek. Whereas all the witnesses who are examined to identify the mouth of Foxe's creek, where this entry is claimed to lie, answer under the impression that the cliff is to be immediately above or adjoining the mouth of the creek. In this particular, there is much reason to believe that Foxe's creek stands alone on the north side of Licking; but the call is vague and indefinite on this point, since it is answered, if the creek is below the cliffs at any reasonable distance.

We will now suppose the locator dissatisfied, or in doubt, with regard to the object thus found, and, returning to the lick, resolved to renew his researches. The idea of finding the mouth of Foxe's creek, by following a direct line, is out of the case, since no course is furnished him by the entry on which to pursue his researches for this object. He must, then, either renew his inquiries *for some [*223 other creek of the description called for, or, adopting the meanders of the river as his guide, pursue his way up its margin.

In answer to his inquiries, it is obvious that any creek lying between the north fork of Licking and Foxe's creek would be recommended to his examination in preference to Foxe's; because the latter must be farther removed from the distance of thirty-five miles than any one lying above it. If, then, the enterer intended to appropriate his land at the mouth of Foxe's creek, it is obvious that his call for distance is calculated to mislead, not to direct, a subsequent locator.

But, as there is no evidence in the cause, of any road, trace or explored route, leading from the lick to the mouth of any of these creeks, let us suppose the explorer at liberty to take the course contended for in behalf of the appellant, and to thread his way up the meanders of the river. When he reaches the mouth of Foxe's creek, he finds himself short of the distance called for by more than one-third of the

whole, that is to say, by eleven miles. Does the cause afford any ground, or the cases any principle, which will authorize his stopping there?

The call is for a creek "about thirty-five miles" above the lick. We are not disposed to restrict the appellant to the rigid rule formerly laid down by the courts, by which the word "about" was rejected, and the entry limited to the number called for. In surveying entries, there is little doubt that this is the rule; but in 224*] *measuring distances, a more liberal rule is laid down in the more modern case of Jones v. Plummer, of which we are disposed to allow the party the full benefit. 2 Littel. 162. It is in these words: "According to repeated decisions of this court under the word 'about,' the subsequent adventurer might be required to stop a little short of, or extend the search a little beyond the distance called for."

But, according to the principle of this rule, if he might stop eleven miles short, he may advance eleven miles beyond the distance called for; and two and twenty miles' search, or even the half of it, on the margin of such a stream, or any stream, would be too much to require of a subsequent locator.

Had the object called for had any claim to the attribute of notoriety, it might have had some greater claim to indulgence, on the principle of Taylor v. Kincaid, Hardin, Rep. 82, or, had there been proved a known and received computation of distance attributed to the object, it might have been considered with reference to the principle in Bowman v. Mellin, 3 Bibb, Rep. 153.

But there is no evidence of any received estimation of distance from the lick to the mouth of this creek; nor is there the least evidence that it took the name of "Foxe's" prior to the entry. On the contrary—and this furnishes another legal objection to this entry—there is evidence that at that time, and a year before,[1] 225*] it bore the name *of Indian Creek, and there is on the record a copy of an entry[2] made upon it by that name, in the same year, and only seven months junior to the entry of the appellants. Indeed, the time and incident that gave it the name it now bears, are positively proven to be cotemporaneous with the survey.

And, finally, if resort be had to the means of testing the identity of the call admitted in M'Kee v. Bodley, to wit, course and distance in a right line, we find the test entirely fatal to the call in this instance. The course is not given, and the distance is not one-third of that called for. And we farther find that there are at least two streams on the same river which answer the call, when subjected to this test, infinitely better; to wit, that now called the north fork, but which was formerly known as an undistinguished creek, and Warwick's creek or run, the former near thirty-five miles, and the latter twenty-seven and a half on a direct line from the lick.

On no principle, therefore, can this entry be supported, and the decree below must be affirmed with costs.

Decree accordingly.

1.—John M'Intire's deposition.

2.—Shephard's entry.

[*Local Law.] [*226

TAYLOR'S DEVISEE v. OWING et al.

An entry, calling for the land to lie on the east side of Slate Creek, a south-west branch of the main fork of Licking, "beginning where a buffalo road crosseth said creek at the mouth of a branch emptying into said creek at the north-east side, it being the place of beginning for S. M.'s entry of 20,000 acres," is defective in certainty and precision; and its defects are not aided by the reference to S. M.'s entry for "20,000 acres, lying on the west side of Slate Creek, south-west branch of the main fork of Licking Creek, beginning where the buffalo road crosses Slate Creek, at the mouth of a branch, emptying in on the east side thereof; there are several cabins," etc., "to include a large quantity of fallen timber," etc.

THIS cause was argued by Mr. Talbot for the appellant, and by Mr. Trimble for the respondents.

Mr. Chief Justice Marshall delivered the opinion of the court:

The appellant filed a bill in the Circuit Court of the United States for the district of Kentucky, praying a conveyance of a tract of land for which the defendants had obtained elder patents, and which the plaintiff claimed in virtue of a prior entry, which was made on the 6th of January, 1783, and is in these words: "James Taylor enters 12,000 acres of land on ten treasury warrants, No., etc.; to be laid off in one or more surveys, lying on the east side of Slate *Creek, of south-west branch [*227 of the main fork of Licking; beginning where a buffalo road crosseth said creek at the mouth of a branch emptying into said creek on the north-east side, it being the place of beginning for Samuel Meredith's entry of 20,000 acres; running from thence with said Meredith's line down Slate Creek, binding with the same the distance of three miles when reduced to a straight line from the beginning to his lower corner; thence continuing down the east side of Slate Creek, binding with the same as far as will amount to three miles when reduced to a straight line from Meredith's lower corner; thence extending from each end of this reduced line of six miles a north-east course, and continuing said course until a line at right angles to the same shall include the quantity of vacant land, exclusive of all legal prior claims."

The entry of Meredith was made on the 30th of November, 1822, and is in these words: "Samuel Meredith enters 20,000 acres, lying on the west side of Slate Creek, south-west branch of the main fork of Licking Creek; beginning where the buffalo road crosses Slate Creek, at the mouth of a branch emptying in on the east side thereof; there is several cabins on said ———, running from the beginning down Slate Creek, and binding thereon as far as will amount to three miles when reduced to a straight line; then from the beginning running up Slate Creek, and binding thereon as far as will amount to three miles when reduced to a straight line from the beginning, to include a large quantity of fallen *timber; and [*228 then to extend from the upper and lower end of these lines on the bank of Slate Creek, a west course, until a line running due south and north shall include the quantity of vacant land required to be laid off in one or more surveys."

The defendant contends that this entry is in-

valid, because it does not describe the land it seeks to appropriate with such certainty as to enable a subsequent purchaser to avoid it, and to locate the adjacent residuum.

The land is to lie on the east side of Slate Creek, a south-west branch of the main fork of Licking. Slate Creek was well known by this name, but it is a stream of considerable extent, and the law requires that the particular part of it on which Taylor's land is placed, should be designated so specially and precisely that a subsequent locator, using due diligence, and possessing ordinary intelligence, might appropriate the adjoining vacant lands. The plaintiff contends that this certainty is to be found in the description of Taylor's place of beginning. It is in these words: "Beginning where a buffalo road crosseth said creek, at the mouth of a branch emptying into said creek on the north-east side, it being the place of beginning for Samuel Meredith's entry of 20,000 acres."

It is the plain dictate of good sense, which is supported by the whole current of decisions in Kentucky, that an entry, to satisfy the law, must describe the place with sufficient accuracy to be found and known by others, and in terms [*229 which *will not fit other places equally well with that intended to be appropriated.

The particular descriptive words, or, in the technical language of the country, the locative calls of the entry, are a buffalo road crossing Slate Creek at the mouth of a branch emptying into the creek on the north-east side, and Meredith's beginning. The plaintiff contends that these words describe the mouth of Little Slate Creek.

Little Slate is a creek which empties into Slate on its north-east side, some say 30 or 40, others 50 or 60 miles, by the meanders of that stream above its mouth. The whole length of Slate is not mentioned by the witnesses, but it is sufficiently apparent that its source is a considerable distance above its mouth. Two creeks, Little Slate, and Mile Creek, Roe's run, and several branches, empty into it on the north-east side, and it is crossed by numerous buffalo traces, some of which are not far from the mouths of four streams, though no one is so near as that just below the mouth of Little Slate. The crossing place near that creek is stated to be ten or twelve yards below its mouth, by some of the witnesses, and by others to be rather more.

The objections made to this entry are not only that it is vague, but that it is calculated to mislead. It calls for a buffalo road crossing the creek at the mouth of a branch emptying into it on the east side. This trace is said to be so small as not to be generally denominated a road. The traces made by buffaloes are stated [*230 to be *of various dimensions, from three to ten or twelve feet wide, and sometimes wider. This near the mouth of Little Slate is about a foot wide, and is nearly lost in the bottom. It is represented by some of the witnesses rather as a deer path than a buffalo road. These traces have been called, by the inhabitants, roads, traces and paths. Some of the witnesses say that these names are used indiscriminately; others, that they designate larger or smaller routes; the word "road" being applied to a large trace, and "path" to a small one; that the trace at the mouth of Little Slate would never have been spoken of as a road.

Although the distinction between a road and a path is common throughout our country, yet the court must have supposed that it was not taken in Kentucky in reference to the traces of buffaloes, had the witnesses concurred in making this declaration. But they have not concurred in it. Many of them aver that the distinction is as applicable to tracts of this description as to others, and is in as common use. The court, therefore, cannot avoid supposing that a subsequent locater, finding this small path near the mouth of Little Slate, and understanding that there were considerable roads near the mouths of other streams, would think that this could not be the road required by Taylor's entry.

There is a still more important variance in the character of the stream itself. The entry calls for a branch, and Little Slate is a considerable creek. It could scarcely be mistaken for what *is denominated a branch; and a subse- [*231 quent locator, intending to lay his warrant at this place, could not reasonably suppose that it was already appropriated by an entry professing to begin at the mouth of a branch. In argument, the counsel for the plaintiff has sought to get over this difficulty by varying the language of his entry. He treats the question as if the entry had called for a branch of Slate Creek, and shows that Little Slate fits this call. The argument would have been strong had the language of the entry sustained it; but the words are, "the mouth of a branch emptying into Slate." The difference between "a branch of Slate," and "a branch emptying into Slate," is obvious.

There is still a farther difficulty which the plaintiff must encounter in this part of his case. It is alleged that Little Slate was the notorious name of the stream when Taylor's entry was made. It is well settled in Kentucky, that if objects called for in an entry are distinguished by a known name, it is a serious defect to call for them by a name which they possess in common with other similar objects, instead of their appropriate name. If, then, the fact be, that when Taylor's entry was made, Little Slate had its appropriate name, the locator ought to have used that name, and his substituting in its place the general call for "a branch emptying into Slate on the north-east side," constitutes a serious objection to the entry, which would require the aid of other words describing the place with greater certainty.

*The testimony on this point is not [*232 perfectly clear. Elias Folin says that, so early as 1775, he was one of a company that made improvements on that stream, and they called it Slate.

George Balla was also one of a company of improvers who encamped on Little Slate in 1776, and knew it then by that name. He knew it by the same name in 1783.

Isaac Clinkerhead knew Little Slate by that name in 1784, and thinks he heard it so called in 1782.

Ralph Morgan says that Little Slate was well known by that name in 1782.

William Williams has frequently heard hunters speak of Little Slate as a place of notoriety,

previous to November, 1782, when Meredith's entry was made.

John Lix was with a company of hunters on Little Slate in 1776, when John Clarke gave the stream the name of Little Slate, and he has never known it by any other.

George Balla knew Slate, and Little Slate, by those names, in 1776.

Joseph M'Intire knew those streams by their present names in 1782.

These witnesses certainly prove that Little Slate was known by that name very extensively in 1782 and 1783, when the entries of Meredith and Taylor were made. It had, undoubtedly, acquired that name completely in 1786. A shade of doubt is cast on the general notoriety of this name, by the circumstances that several witnesses who speak of the stream as known to 233*] them at *this early period, and who distinguish it by its proper name, do not say that they then knew it by that name.

James M'Millan became acquainted with Little Slate in 1781, Joseph Young in the fall of 1783 or 1784, and Roger Clements in 1783. Neither of these witnesses say they knew it then by that name. They do not, indeed, say the contrary; but the probability is, that had they then known the stream by its present name, they would have been interrogated to the point. There is, then, much reason to believe that Little Slate had then acquired its appropriate name, and ought to have been so designated by the locator, though the proof is not conclusive.

Upon the whole, we think it very clear that Taylor's land is not described with sufficient certainty by the call, "to begin where a buffalo road crosses Slate at the mouth of a branch emptying into said creek on the north-east side." Is this defect remedied by the call for Meredith's beginning?

This reference to Meredith's entry makes a part of Taylor's, and will give the latter the advantage of any certainty of description which may be found in the former. Samuel Meredith calls to begin "where the buffalo road crosses Slate Creek at the mouth of a branch emptying in on the east side thereof; there is several cabins on said ———." The entry is to include a large quantity of fallen timber.

It will be perceived that the descriptive, or 234*] locative *calls of this entry, vary from those in Taylor's in these respects only. In describing the buffalo road, Meredith uses the article "the;" and he likewise adds to his description that there are several cabins, either on the creek or on the branch (for the word is not in the record), we suppose on the branch, and that his location will include a large quantity of fallen timber.

The objection made to Taylor's entry in consequence of the smallness of the trace crossing Slate near the mouth of Little Slate, applies with increased force to this part of Meredith's. The words, "the buffalo road," if they do not indicate a single road, would, unquestionably, lead a person in search of this entry to expect a remarkable and conspicuous road; such a road as crossed Slate near the mouth of Long branch, or Roe's run, not such a narrow path as crossed near the mouth of Little Slate.

The cabins alluded to in Meredith's entry were not found on Long branch. They were found on Roe's run and Mile Creek. The weight of testimony is, that no unusual quantity of fallen timber would be included in Meredith's survey if the beginning is at Little Slate, but would be included in it if the mouth of Roe's run be taken as the beginning. The two additional circumstances, then, the cabins and the fallen timber, are found, one of them on Little Slate and not on Long branch, which, but for that defect, would fit the description in the entry better than any other, and the other opposite Roe's run, and *not opposite [*235 Little Slate. The objection to Roe's run and Mile Creek is, that the buffalo road cannot be considered as crossing at the mouths of either of them.

Since, then, no place is shown which fits precisely the description of the entry, we must inquire whether that description is so nearly satisfied by appearances at the mouth of Little Slate as to induce the court to establish the title of the plaintiff.

The objections which have been stated to Taylor's entry are certainly not removed by calling in the aid of Meredith's. Passing by the increased strength they derive from the emphatic words, "the buffalo road," and from the absence of "a large quantity of fallen timber," we will inquire whether the appearance of cabins on Little Slate will cure the other defects of description in the entry. This circumstance was too common in that country to be itself an object of notoriety. Cabins were seen on Roe's run and Mile Creek, streams which empty into Slate on the north-east side, as well as on Little Slate. Their absence may exclude Long branch from the competition, but cannot decide in favor of Little Slate, unless other circumstances concur in its favor.

To the objections already mentioned, others may be added which appear to us to be insurmountable.

The entry is to begin on Slate Creek, where it is crossed by a buffalo road at the mouth of a branch emptying into the creek on the north-east *side. Twelve or fifteen buffalo [*236 roads cross the creek, and five or six, or more streams, empty into it on its north-east side. The creek is seventy or eighty miles in length. In what part of it is the subsequent locator to look for this road and this branch? It is not alleged that either of them possessed any notoriety which could conduct the person in search of them to any particular part of the creek. Can he be required to search from its mouth to its source? At which is he to commence? If at neither, but at the mean point between them, is he to look up or down the creek? If he should accidentally strike the creek at the mouth of Little Slate, he finds a creek instead of a branch, and a path instead of a road. The place does not suit the description in the entry. Some of the witnesses say that no other place suits it as well. Were this admitted to be true, how is he to know it until he examines the whole extent of the creek? This would be, undoubtedly, if we regard the decisions in Kentucky to impose an unreasonable burden on subsequent locators, one which the law could not intend to impose on them.

We think that the entry under which the plaintiff claims cannot be sustained, and that there was no error in dismissing his bill.

Decree affirmed with costs.

237*] [*Pleading. Practice.]

PERKINS v. HART, Executor of Hart.

When there is a special agreement open and subsisting at the time the cause of action arises, a general indebitatus assumpsit cannot be maintained.

But, if the agreement has been wholly performed, or if its further execution has been prevented by the act of the defendant, or by the consent of both parties; or if the contract has been fully performed in respect to any one distinct subject included in it, the plaintiff may recover upon a general indebitatus assumpsit.

A settled account is only prima facie evidence of its correctness, at law or in equity; it may be impeached by proof of fraud, or omission, or mistake; and if it be confined to particular items of account, concludes nothing as to other items not stated in it.

Where a case is certified to this court upon a division of opinions of the judges below, and the points reserved, upon which they were divided, are too imperfectly stated to enable this court to pronounce any opinion upon them, this court will neither award a venire de novo, nor certify any opinion to the court below upon the points reserved, but will merely certify that they are too imperfectly stated.

THIS was an action of general indebitatus assumpsit, brought to the Circuit Court of Ohio, for work and labor, care and diligence, by the plaintiff done and bestowed, as an agent and attorney, in exploring, showing, surveying and selling the lands of the defendant's testator; also, in searching of records, investigating titles, and in the payment of the taxes of the testator. The declaration contains the other general money counts. The plaintiff also filed what is styled an additional "bill of 238*] particulars" *for exploring, giving information of the situation and value, superintending law suit with Granger, attending to division with Mather's heirs, and for general superintendence of Hart's landed interest in Ohio (except for paying taxes), $3,500.

By consent of the parties the jury found a verdict for the plaintiff of $4,308.70 damages, if, upon the points reserved, the court should be of opinion that the law is for the plaintiff; but if, upon the points reserved, the court should be of opinion that the law is for the defendant, then they find for the defendant.

The opinions of the judges below being opposed, the cause was removed to this court upon a certificate of the disagreement, upon the three following points:

1. That the whole evidence, and Hart's (the testator's) letter of January 14, 1812; Perkins's (the plaintiff s) letter in reply, of February 10, 1812, and Hart's letter of March 9, 1812, in reply to Perkins, constitute a special agreement, investigating Perkins with the agency of Hart's land in the state of Ohio, open and subsisting at the time the cause of action is claimed to have arisen, which precludes Perkins from recovering in this action.

2. That the whole evidence, and the letters above cited, constitute a special agreement, defining the nature and extent of Perkins's agency, and settling the subjects upon which he was to receive compensation, and the amount of that compensation; the legal operation of which *agreement is to preclude Per- [*239 kins from claiming compensation for anything done in the execution of his agency, except according to the terms of that agreement.

3. That the plaintiff cannot recover for the two items in the bill of particulars claimed and charged to have arisen as matters of account between the parties in 1814 and 1815; because the plaintiff, on the 1st of February, 1815, and 19th of March, 1819, exhibited and stated his general account against William Hart, upon each of which a balance was due from, and paid by, the said William as a settlement upon an account stated, which precludes the plaintiff from recovering in this action for said two items claimed to have been due before the said accounts were rendered.

In the letter of Hart (the defendant's testator) of the 14th of January, 1812, he requested the plaintiff to give him his most favorable terms of agency, to appoint sub-agents to transact the business where he (the plaintiff) might deem necessary, with such compensation as he might agree upon with them. The letter then proceeded as follows: "State the amount of commissions you shall expect me to pay on account of sales that shall be collected and remitted, but no commissions to be paid by me till the collections are made. Provided sales are made by me in exchange for lands, and if I should draw on you for the amount to be paid

NOTE.—When an account stated may be impeached.

When an account is settled by the parties themselves, and there is no unfairness, and all the facts are equally well known to both sides, their adjustment is final and conclusive. Hager v. Thompson, 1 Black. 80.

The mere rendering an account does not make a stated one. Yet, if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him, then it becomes a stated account. Toland v. Sprague, 12 Pet. 300, 335.

An account rendered, and not objected to within a reasonable time, is to be regarded as admitted, by the party charged, to be prima facie correct, and as a stated account. Wiggins v. Burkham, 10 Wall. 129.

It is not necessary that an account should be signed by the parties to make it a stated account. It is enough that it has been examined and accepted by the parties. This acceptance need not be expressed. It may be implied from circumstances. Keeping it implies acceptance; and if one does not object to an account which has been furnished him within a reasonable time, he is bound by it, unless he can show its incorrectness. Lockwood v. Thorne, 11 N. Y. 1 Kern. 170; Bruen v. Hone, 2 Barb. 586; Harris v. Ely, Seld. notes, Dec. 1852; Allen v. Stevens, 1 N. Y. Leg. Obs. 359; Atwater v. Fowler, 1 Edw. 417; Phillips v. Belden, 2 Edw. 1; Dows v. Durfee, 10 Barb. 213; Murray v. Toland, 3 Johns. Ch. 569; 1 Story's Eq. Jur. s. 526; 2 Atk. 251; 2 Vern. 276; 2 Ves. 239; 6 Ala. 518; 4 Paige, 481; Davenport v. Wheeler, 7 Cow. 321.

Where a statement of account appears to have been deliberately made, and was understood to be a full and final settlement, it requires very strong and conclusive evidence of error or mistake to induce the court to open the account. The practice of opening accounts which the parties who could best understand them have themselves adjusted, should not be encouraged; and it should never be done upon a mere allegation of error supported by only probable testimony, especially when the parties to a settlement stood on an equality. Wilde v. Jenkins, 4 Paige, 481; Lockwood v. Thorne, 11 N. Y. 1 Kern. 170; Chappedelaine v. Dechenaux, 4 Cranch, 306.

Where fraud is proved it will be sufficient ground to open the whole account; but where errors or mistakes only are shown to exist in the account, it will not be opened, but the party will merely be permitted to surcharge and falsify it. Surcharging applies to the balance of the whole account, and supposes credits omitted which ought to be allowed. Falsification applies to some item of the

in lands at a price agreed upon, or otherwise, if necessary, to be left with you to be ascertained; 240*]in such case, *what should you expect to charge on sales of that nature? Please be particular in stating your terms of agency, and make them as favorable as possible." In the plaintiff's letter, in reply, of February 10th, 1812, he says: "My commission on sales made by me, the money collected and remitted, is eight per cent. When contracts are made (as is sometimes the case), purchasers make a payment, and then give up the land so as to be left, without encumbrance, to be sold again, 50 per cent. on such receipt. On these two items the commission cash, as it has been cash received. In case the agency should be closed and a settlement made, and contracts remain on hand unsettled, then, in all those contracts that should be carried into effect, five per cent. commission, received in contracts, with a conveyance of the lands covered by the contract or contracts received. On sales made in exchange for lands, etc., three per cent. commissions, to be received either in contracts here, or lands here at retail price. Always, as far as is practicable, receive commissions in that which shall be similar to that in which it is charged." The letter from the defendant's testator dated the 9th of March, 1812, in reply to the plaintiff acknowledges the receipt of the above letter, and then adds: "Your observations in regard to the note of selling new lands, are doubtless sanctioned by experience, and I am happy to commit the agency of my property to your experience and good judgment, from whence I expect to derive peculiar advantage."

241*] *The cause was argued in this court by Mr. Wright and Mr. Whittlesey for the plaintiff, and by Mr. Webster and Mr. Hammond for the defendant.

On the part of the plaintiff it was argued: (1) That where a special parol contract, or a written contract not under seal, has been entered into, the party may still recover on the common counts in a general indebitatus assumpsit.[1] In the case of The Bank of Columbia v. Patterson,[2] it was held to be inconvertibly settled, that indebitatus assumpsit will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that, in such case, it is not necessary to declare upon a special agreement. So, where a beneficial service has been rendered to the defendant, under the special agreement, but not in pursuance of its terms, the plaintiff may recover upon a quantum meruit.[3] Or where the defendant is the occasion of its non-performance; or where the contract has been rescinded by the parties, or put an end to by the defendant.[4] Or where the defendant, by his own act, defeats the performance.[5] And where the plaintiff *seeks to [*242 recover on a special contract, and the evidence offered will support a common count, supposing no special agreement, he may recover under the latter.[6]

2. The correspondence between the parties, and the other evidence in the cause, did not constitute an outstanding special agreement, such as to preclude the plaintiff from recovering in this form of action.[7]

3. The account stated did not specifically include the items stated in the bill of particulars. But a settled account, or a receipt, is only prima facie evidence, which the plaintiff may rebut by showing the true state of the accounts.[8]

On the part of the defendant, the counsel entered into a critical examination of the authorities cited on the other side to support the position that a general indebitatus assumpsit would lie in the present case; and although it was admitted that the precedents were to that effect, yet it was denied that they rested on

1.—1 Chitty's Pl. 333, and authorities there cited.
2. 7 Cranch's Rep. 303.
3.—Bull. N. P. 139; 7 Johns. Rep. 132.
4.—10 Johns. Rep. 37; 7 Term. Rep. 181; 1 N. R. 357.
5.—12 Johns. Rep. 274; 5 Johns. Rep. 87; 7 Johns. Rep. 132; 2 Mass. Rep. 415; Powell on Contr. 417.
6—1 N. R. 351; Bull. N. P. 139; Doug. Rep. 651; 5 Mass. Rep. 39, 391; 1 Mass. Rep. 355; 7 Johns. Rep. 134; 10 Johns. Rep. 37.
7.—3 Johns. Rep. 199.
8.—1 Johns. Cas. 145; 5 Johns. Rep. 72; 5 Ves. Rep. 87; 14 Johns. Rep. 212; 12 Johns. Rep. 531; 2 Term Rep. 366; 5 East's Rep. 230, 4 Johns. Rep. 377.

debits, supposing it to be wholly false, or in part erroneous. The effect of surcharging and falsifying is to leave the account in full force as a stated account, except so far as it can be impugned. Bruen v. Hone, 2 Barb. 586; 2 Ves. Sen. 565; Story's Eq. Pl. s. 801; 1 Story's Eq. Jur. s. 523; Bullock v. Boyd, 2 Edw. 293; S. C. 1 Hoffm. 294; Phillips v. Belden, 2 Edw. 1; Grover v. Hall, 3 Harr. & J. 43.

A stated account will not be opened where it appears that the plaintiff has been guilty of negligence in detecting the errors he alleges he has discovered. So held, where a bill was filed eleven years after the account stated was rendered, and seven after it was paid. Bruen v. Hone, 2 Barb. 586.

Usurious charges in a stated account, however solemnly settled, will be corrected in equity. Bullock v. Boyd, Hoffm. 294; Phillips v. Belden, 2 Edw. 1. But not after an account has been paid and kept for upwards of two years. Seymour v. Martin, 11 Barb. 80; but compare Barron v. Rhinelder, 1 Johns. Ch. 550; S. C. 17 Johns. 538.

As to the operation of accounts and bills rendered, to limit the claim of the party rendering to the amount stated, see Beebe v. Robert, 12 Wend. 413; Smith v. Tucker, 2 E. D. Smith, N. Y. 193; Williams v. Glenny, 16 N. Y. 389.

A party signing his name to an account current is not conclusive evidence of his owing the amount therein stated. The implied admission in such case may be rebutted by competent proof, as fraud, error or mistake. Miller v. Probst, Addis. (Penn.) 334; Kirkpatrick v. Turnbull, Id. 260; Nichols v. Alsop, 6 Conn. 447.

Mistakes and errors in stated accounts may be shown and corrected. Holmes v. DeCamp, 1 John. 36; Wilson v. Wilson, 14 Com. B. 5 J. Scott, 626. Thomas v. Hawkes, 8 M. & W. 140; Lockwood v. Thorne, 18 N. Y. 285, 292; Champion v. Joslyn, 44 N. Y. 653.

The parties are not precluded from giving evidence to impeach the account, unless the case is brought within the principle of an estoppel in pais, or of an obligatory agreement between them, as where upon a settlement mutual compromises are made. Lockwood v. Thorne, 18 N. Y. 285; Kock v. Bonits, 4 Daly, N. Y. 117, 120; Stanton v. Jerome, 54 N. Y. 480; Bucklin v. Chapin, 1 Lans. 443; Keane v. Brandon, 12 La. Ann. 20; Jones v. Dunn, 3 Watts. & S. 109; Hutchinson v. Market Bank, 48 Barb. 302.

Where a balance is struck by the parties, at a hearing before referees, which is reported to them and entered on their minutes, the parties are concluded by it. Clark v. Fairchild, 22 Wend. 576.

To a bill in equity for an account, where an account settled is relied on in the answer, it is conclusive, unless fraud or mistake be shown. Costin v. Baxter, 6 Ired. Eq. N. C. 197.

Where a party stated an account and sent a messenger to the other party, with his check for the

any solid or consistent ground of principle; it was asserted that they had been settled without proper examination, and a due consideration of the general analogies of the law, and 243*] were calculated to *introduce uncertainty and confusion into legal proceedings, and to encourage negligence in making contracts, and infidelity in performing them. But, it was further insisted that those authorities, even supposing them to have irrevocably settled the practice, could not be applied to the present case. Here the contract specially defined the terms upon which it was to be performed by both parties, and also the terms upon which it was to be closed. In all the cases cited, the right of action was held to accrue upon the termination of the contract. While it subsisted, it could not be pretended that a general indebitatus assumpsit could be maintained. It had, indeed, been said that the contract was terminated by the death of the testator, and the act of his executor. But no case had gone so far as to decide that an agent, whose authority terminates upon the death of his principal, may proceed against his personal representatives upon the contract of agency, as if it had been terminated by some wrongful act of the principal. The authority of the agent terminates with the death of the principal, but for services performed under the agency, the contract remains open.

2. The agreement precluded the plaintiff from claiming compensation for anything done in execution of his agency, except according to the terms of that agreement. The case cited to show the contrary does not apply.[1] Here, whatever services the plaintiff performed before 244*] 1812, *in expectation of being compensated by the agency, must be considered as satisfied by the contract of agency then made. That contract must be regarded as embracing all services performed, or to be performed, by the plaintiff, for the defendant's testator, in respect to the sale of lands. If the disputed items of account arose under the contract, they could only be recovered in a special assumpsit grounded upon the contract. If they were claimed, independent of the contract, as not being within its terms, it was insisted that the plaintiff could set up no claim to compensation for services in the agency not embraced by the contract, which settled and defined the rights of the parties.

3. The question presented by the last point reserved was, whether the plaintiff, having presented two annual accounts of his agency, embracing items of debit and credit arising under his general agency, and arising also under his special agency in the sale of lands, having stated the balance due to him upon these accounts, and received payment, could recover in a general indebitatus assumpsit for other items of account due at the time the former were exhibited, without offering any evidence of error or omission. The plea of account stated, and payment of the balance found due, is a bar to the action of assumpsit.[2] If it be a bar, it must be an absolute bar at law, and not a mere presumption, which may be rebutted by contrary evidence. The account can only be opened, surcharged *or falsified, [*245 in equity. All the authorities referred to in the principal case cited from the New York reports,[3] are from the decisions in equity; but it does not follow that a court of law, not having the same means of doing justice between the parties, will pursue the same practice. At all events, in order to permit an account to be opened, there must be evidence of mistake or fraud.[4] There was neither in this case.

Mr. Justice Washington delivered the opinion of the court, and after stating the case, proceeded as follows:

The first point reserved in the court below, and on which the judges of that court were divided in opinion, consists of two propositions: (1) That, upon the whole evidence, the three letters particularly referred to constitute a

1.—Jacobson v. Le Grange, 3 Johns. Rep. 190.

2.—Com. Dig. Pleader, 2 G. 11.

3.—Manhattan Company v. Lydig, 4 Johns. Rep. 377.

4.—2 Atk. Rep. 119; 4 Johns. Rep. 387.

balance, the party receiving the check and obtaining the money on it was held bound, though he objected at the time that the balance was too small. Davenport v. Wheeler, 7 Cow. 231.

Courts are very unwilling to open an account when the parties have adjusted it, struck a balance, and agreed upon the amount due. But if there has been any mistake, omission, accident, fraud or undue advantage, by which an account stated is in truth vitiated and the balance incorrectly stated, equity will permit it to be opened and re-examined in toto, or as to particular items, as the allegations may warrant. Brown v. Vandyke, 8 N. J. Eq. 795; Branger v. Chevalier, 4 Cal. 353; Farnam v. Brooks, 9 Pick. 212; Roberts v. Totten, 13 Atk. 609; Bruen v. Hone, 2 Barb. 586; Rembert v. Brown, 17 Ala. 667; Bankhead v. Alloway, 6 Coldw. Tenn. 56; Chatham v. Niles, 36 Conn. 403; La Trobe v. Hayward, 13 Fla. 190; Shirk's Appeal, 3 Brewst. (Penn.) 119; Kronenberger v. Bins, 56 Mo. 121; Bolifeur v. Weyman, 1 McCord (S. C.) 156; Bullock v. Boyd, Hoffm. Ch. N. Y. 294; Kelsey v. Hobby, 16 Pet. 269; Love v. White, 4 Hayw. (Tenn.) 210; Story's Eq. Pl. s. 800; Phillips v. Belden, 2 Edw. Ch. 1; Floyd v. Priester, 8 Rich. Eq. (S. C.) 248; Kock v. Bonits, 4 Daly, 117.

But will not be opened when plaintiff has been guilty of negligence in detecting errors. Bruen v. Hone, 2 Barb. 586. Nor after the lapse of twenty years. Hutchins v. Hope, 7 Gill. (Mo.) 119; Gregory v. Forrester, 1 McCord (S. C.) 332. Nor after six years. Randel v. Ely, 3 Brewst. Penn. 270; George v. Johnson, 42 N. H. 456; Ogden v. Astor, 4 Sand. N. Y. 311. Nor for mistake in law. Commissioners v. Gherky, Wright, Ohio, 493. Nor readily after defendant's books have been destroyed by fire. Bruen v. Hone, 2 Barb. 586. Nor after judgment and execution. Bloodgood v. Zeilly, 2 Caines, 124. Nor when the claims are barred by the statute of limitations. Stearns v. Page, 7 How. (U. S.) 819. Nor after great lapse of time, and death of parties. Winston v. Street, 2 Patt. & H. Va. 169; Dakin v. Demming, 6 Paige, 95; Dexter v. Arnold, 2 Sumn. 108; Atwood v. Fowler, 1 Edw. Ch. 417.

An account stated will not be opened without conclusive evidence of error or mistake, and the party seeking to open it on the ground of mistake assumes the burden of proving distinctly wherein the mistake consisted, and of furnishing the data by which it may be corrected. Towsley v. Denison, 45 Barb. 490; Chubbuck v. Vernam, 42 N. Y. 432; Burke v. Isham, 3 Alb. L. Jour. 209; S. C. 53 N. Y. 631; McIntyre v. Warren, 3 Abb. Ct. App. N. Y. 99; Herrick v. Ames, 1 Keyes, N. Y. 190; Sutphen v. Cushman, 35 Ill. 186; Dakin v. Demming, 6 Paige, 95; Kronenberger v. Bins, 56 Mo. 121.

As to when an account stated is a bar to a bill in equity to account, see note to Chappedelaine v. Dechenaux, 4 Cranch, 306.

special agreement investing the plaintiff with the agency of Hart's lands in Ohio. (2) That this special agreement was open and subsisting at the time the cause of action is claimed to have arisen, which precludes the plaintiff from recovering in this action.

It is not easy to understand what the defendant's counsel mean by the whole evidence. Upon examining the voluminous record sent up to this court, we find that an active correspondence was carried on between Perkins and Hart from the year 1803 to 1816, upon the sub-
246*] ject of Hart's *lands in Ohio, the payment of the accruing taxes on them, examining, surveying and preparing them for sale, and of other services to be performed by Perkins, in some way or other connected with those lands. If this be the evidence alluded to, there was no objection to submitting it to the court, to say whether the whole of this written evidence, or any part of it, created a special contract, investing Perkins with the agency of Hart's land.

But we find in this record evidence of a different character, such as accounts, receipts and depositions, in relation to Perkins's agency respecting Hart's lands in Ohio. If this was intended to constitute a part of the whole evidence upon which the question of law was to arise, we should be of opinion that it was fit only for the decision of the jury, and ought not to have been submitted to the court.

The disinclination which this court has always evinced, to send parties back to the court below, if, by any reasonable construction, obscure parts of the record can be explained, disposes us in the present instance to consider the verdict as referring to the written evidence, not only because it would have been improper to call upon the court to decide upon the effect of parol evidence, but because that which is spread upon this record has no apparent relevancy to the question of law which is submitted.

In the examination of the question whether there was a special agreement or not, we shall confine ourselves entirely to the three speci-
247*] fied *letters because we are of opinion, after an attentive perusal of all the others, that they furnish not the slightest ground for saying that any agreement was entered into which invested Perkins with the agency of Hart's lands. The letters addressed by Hart to Perkins, treat him as an agent empowered to perform a variety of acts in relation to the lands of the former. But it was a limited agency, created for particular purposes, and as occasions required, but founded upon no special agreement which bound Perkins to perform any specified duties, or Hart to remunerate the services he might perform otherwise than the law bound him upon the principle of a quantum meruit. The particular agency which the former was requested, from time to time, to assume, was to pay taxes, attend to law suits, examine the lands so as to enable Hart to judge of their value, and to have certain lots and townships surveyed, as preparatory to a sale of them at a future period. The taxes were annually paid, and other advances made by Perkins, upon which he charged both a commission and interest, and these, it would seem, were punctually re-imbursed when drawn for, although the charge of interest was sometimes complained of.

The preparatory steps for bringing these lands, or certain portions of them, into the market having been taken, the correspondence commenced which is particularly referred to in the first and second reserved points.

In Hart's letter of the 14th of January, 1812, he requests Perkins to give him his most favorable *terms of agency, to appoint [*248 sub-agents to do business where he, Perkins, might judge necessary, with such compensation as he might agree upon with them. The letter then proceeds as follows: "State the amount of commissions you shall expect me to pay on amount of sales that shall be collected and remitted, but no commissions to be paid by me till the collections are made. Provided sales are made by me in exchange for lands, and if I should draw on you for the amount to be paid in lands at a price agreed on, or otherwise, if necessary, to be left with you to be ascertained, in such case what should you expect to charge on sales of that nature? Please be particular in stating your terms of agency, and make them as favorable as possible."

In answer to this letter, Perkins writes, on the 10th of February, 1812, as follows: "My commission on sales made by me, the money collected and remitted, is eight per cent. When contracts are made (as is sometimes the case), purchasers make a payment, and then give up the land so as to be left without encumbrance to be sold again, 50 per cent. on such receipt. On these two items the commission cash, as it has been cash received. In case the agency should be closed and a settlement made, and contracts remain on hand unsettled, then, in all those contracts that should be carried into effect, five per cent. commission, received in contracts, with a conveyance of the lands covered by the contract or contracts received. On sales made in exchange *for [*249 lands, etc., three per cent. commission, to be received either in contracts here, or lands here, at retail price. Always, as far as practicable, receive commissions in that which shall be similar to that in which it is charged."

The letter from Hart to Perkins, dated the 9th of March in the same year, acknowledges the receipt of the above letter, and then adds: "Your observations in regard to the mode of selling new lands, are doubtless sanctioned by experience, and I am happy to commit the agency of my property to your experience and good judgment, from whence I expect to derive peculiar advantage."

These letters, we think, constitute a special agreement upon the subject of commisisons to be paid by Hart to Perkins, by way of compensation for his agency in the sale of lands. It is confined to that subject only. The first of these letters invites Perkins to state his most favorable terms of agency in the sale of Hart's lands. The answer contains those terms by stating the commissions which he should expect to receive upon sales made, and the amount collected and remitted; upon sales made, and then abandoned by the purchaser after a partial payment of the purchase money; upon sales made, but the amount not collected before the agency should be closed; and finally, upon sales made by way of ex-

change for other property. The acceptance of these terms is sufficiently expressed in Hart's reply to this letter, by which he commits 250*] *to Perkins the agency of his property, the nature of which agency is too clearly explained by reference to the two preceding letters, to leave the slightest doubt as to the meaning and extent of the contract which was thus entered into.

The second proposition is, "that this special agreement was open and subsisting at the time the cause of action is supposed to have arisen." Now, this proposition involves a mixed question of law and fact. If the contract was open, and the action was founded on that contract, then the legal consequence insisted upon, "that Perkins cannot recover in this action," undeniably follows. But whether, in point of fact, it was open when the cause of action is claimed to have arisen, that is, the life-time of W. Hart, must depend upon the evidence in the cause, of which the jury were alone competent to judge. If the agreement was wholly performed by the plaintiff during the life-time of Hart; if its farther execution was put an end to, before its completion, by the act of Hart, or by the agreement of both parties, then the plaintiff was not precluded from recovering in this action. Nay, further, if the contract was fully performed in relation to any one subject covered by it; as, for example, by the sale, collection and remittance of the purchase money for any one township or parcel of land, the plaintiff might well maintain an action of indebitatus assumpsit for his stipulated compensation, in cash, on that transaction, and was not bound to wait until all the lands to which his agency extended were dis- 251*] posed of. Where the *agreement embraces a number of distinct subjects which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed. If, for instance, the agreement between a merchant and his factor be, that the latter shall sell and remit the proceeds of all cargoes which the former shall consign to him upon a stipulated commission, it can hardly be contended that the factor cannot recover his commissions in this form of action, upon the proceeds of a single cargo which have been remitted, while there remain other cargoes yet undisposed of.

But, whether this agreement was wholly closed, or whether any one or more of its parts were closed, in either of the ways above mentioned, or in any other way, was a fact resting altogether upon the evidence, whether written or parol, which was, or might be, laid before the jury. It belonged exclusively to that body to say whether the fact existed or not; and, upon the fact so found, the question of law would fairly arise. In this respect, therefore, we are of opinion that the verdict is clearly defective, and ought to have been set aside by the court below.

It may not be amiss to add that if the question reserved were, whether the agreement was open and subsisting at the time this action was brought, we should be of opinion that the agency of Perkins having terminated by the death of Mr. Hart, the further execution of the agreement was put an end to by that event, and that, consequently, *it was [*252 not open when the action was brought. But the proposition is so stated as to refer to a period antecedent to the death of Hart.

The second point reserved is thus expressed: "That, upon the whole evidence, Hart's letter of January 14th, 1812," and so referring to the other two letters as in the first point, "constitute a special agreement, defining the nature and extent of Perkins's agency, and settling the subjects upon which he was to receive compensation, and the amount of that compensation, the legal operation of which agreement is to preclude Perkins from claiming compensation for anything done in the execution of his agency, except according to the terms of that agreement."

It has been already stated that the three letters particularly referred to in this point, did constitute a special agreement upon the subject of commissions to be paid to Perkins by way of compensation for his agency in the sale of Hart's lands. And, it may be added that this agreement settles the subjects upon which Perkins was to receive compensation, and the amount of that compensation. If so, there can be no question but that the legal operation of this agreement, as to every claim founded upon it, is to preclude Perkins from recovering any compensation which is not consistent with the terms of that agreement. For, although in the cases before stated, in which the special agreement has been executed, or otherwise closed, a general indebitatus assumpsit may be maintained, it is nevertheless true that the special agreement may *be [*253 given in evidence by the defendant for the purpose of lessening the quantum of damages to which the plaintiff is entitled.

But, after all this is admitted, the inference of law insisted upon by the defendant, that Perkins is precluded by the special agreement from claiming compensation for anything done in the execution of his agency, except according to the terms of that agreement, does not follow. The agreement is clearly prospective, and is confined to the single subject of commissions on the sale of lands. This is apparent from Hart's letter of the 14th of January, 1812, which he prefaces by stating that he had concluded to offer certain portions of his lands for sale at that time, and his other lands when they should be partitioned. He desires Perkins, as his agent, to make the necessary previous arrangements, and to proceed in the sale of the portions before mentioned, and of No. 2, in the 13th range, as soon as the partition should be completed, and then he proceeds to inquire his terms of agency as before mentioned. But, when we look into the whole evidence, to which we are referred by the point reserved, it is found that the agency of Perkins commenced as early as the year 1803, and extended to a variety of duties unconnected with that of selling land; such as exploring the lands of his principal, having them surveyed, their quality and value ascertained, investigating titles, attending to law suits, paying taxes, and making other advances.

Now, it is impossible to contend, with any *probability of success, that Perkins [*254 was precluded by the special agreement from recovering, under the general counts, a compen-

sation for those services, or, indeed, for any other services rendered by him in his character of agent, which are not strictly within the scope of the special agreement. But the point raised here is, that he is precluded from claiming compensation for anything done in the execution of his agency, except according to the terms of that agreement, although the services so rendered are not embraced by it.

What was the nature of the particular claim submitted to the jury, upon which the parties consented that a verdict should be given for the plaintiff, the record does not enable this court distinctly to decide. So far as any information is to be derived from the declaration, and the additional bill of particulars, it would rather seem as if it was for general services rendered by the plaintiff without the scope of the special agreement, that being confined, as before observed, to commissions on land sales.

If the paper found in this record, headed thus, "Perkins's account, on which the action is brought," which contains three items for commissions on as many sales of land, and three others for interest on those commissions, is to be considered as the original bill of particulars filed in the cause, it would seem to follow that the action was brought to recover, as well those commissions as a compensation for general services not embraced by the special agree- [*255 ment. *Upon this state of the case, the conclusion of law insisted upon in this point would, nevertheless, be incorrect, for the reasons already stated.

It was contended by the council for the defendant that this action would not lie in a case where, by the agreement, the plaintiff was to be compensated in land. This is not controverted. But it will be sufficient to observe that it is not stated in the points reserved, or in the account just referred to (if it be admitted to be the original bill of particulars), that the commissions there charged arose upon an exchange of lands, or were to be discharged by land. The case is too imperfectly stated to enable this court to say that it gives rise to the question to which the argument is directed.

The third and last point reserved is thus expressed: "That the plaintiff cannot recover for the two items in the bill of particulars claimed and charged to have arisen as matters of account between the parties in 1814 and 1815, because the plaintiff, on the 1st of February, 1815, and on the 19th of March, 1816, exhibited and stated his general account against William Hart, upon each of which a balance was due from, and paid by, the said William, as a settlement upon an account stated, which precludes the plaintiff from recovering in this action, for said two items claimed to have been due before the said accounts were rendered.

The difficulty of this point consists in the imperfect manner in which it is stated. The court may conjecture that the bill of particu- [*256 lars alluded *to is the paper just referred to; but whether it be so or not is by no means certain. If it be the bill intended, the difficulty still remains, as the general account is not stated, or referred to, so as to enable the court to decide whether it does, or does not, include the two items which it is supposed cannot be recovered in this action.

If we look through this record in order to obtain information respecting this matter, we meet with two accounts containing charges for advances made by Perkins, in the years 1814 and 1815, for taxes due by Hart, and in discharge of other expenses connected with his agency, both which accounts were discharged. But it surely cannot be contended that the settlement and discharge of an account for money lent and advanced for the use of the testator, is a bar to a claim for commissions, or of any other demand not included in the settled account. If, to a bill for an account, the defendant plead, or, in his answer rely, upon a settled account, the plaintiff may surcharge, by alleging and proving omissions in the account, or may falsify, by showing errors in some of the items stated in it.

The rule is the same in principle at law; a settled account is only prima facie evidence of its correctness. It may be impeached by proof of unfairness, or mistake, in law, or in fact; and if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it.

*The legal conclusion, therefore, in- [*257 sisted upon by the defendant, that the plaintiff is precluded from recovering in this action for the two items claimed to have been due before the two accounts spoken of were rendered, is not correctly drawn, unless it appeared, from the point reserved, that those two items were included in what is styled the account stated.

It may further be remarked, that even if it appeared that the plaintiff was precluded by the settlement and discharged from recovering the amount of the two items referred to, it would not follow that the law is for the defendant upon the whole verdict, although it might be sufficient to induce the court below to grant a new trial, if it had been applied for, upon the ground that the verdict was for too much.

Were this cause before the court upon a writ of error, the imperfections in the points reserved which have been noticed, would render it proper to reverse the judgment, and to direct a venire de novo to be awarded. Being an adjourned case, it would be improper for this court to give any such direction to the court below.

Certificate.—This cause came on to be argued on the certificate of division in opinion of the judges of the Circuit Court for the district of Ohio. On consideration whereof, this court is of opinion that the points reserved, upon which the opinions of the judges of that court were opposed, are too imperfectly stated to enable this court to pronounce any opinion upon them.

[*Illegal Contract.] [*258

ARMSTRONG, Plaintiff in Error.

v.

TOLER, Defendant in Error.

Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it.

So, if the contract be in part only connected with the illegal consideration, and growing imme-

diately out of it, though it be, in fact, a new contract, it is equally tainted by it.

But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not effected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act.

Thus, where A, during a war, contrived a plan for importing goods on his own account from the enemy's country, and goods were sent to B by the same vessel; A, at the request of B, became surety for the payment of the duties on B's goods, and became responsible for the expenses on a prosecution for the illegal importation of the goods, and was compelled to pay them. Held, that A might maintain an action on the promise of B to refund the money.

But if the importation is the result of a scheme between the plaintiff and defendant, or if the plaintiff has any interest in the goods, or if they are consigned to him with his privity, in order that he may protect them for the owner, a promise to repay any advances made under such understanding or agreement is utterly void.

ERROR to the Circuit Court of Pennsylvania.

This was an action of assumpsit, brought by the defendant in error, Toler, against the plaintiff in error, Armstrong, to recover a sum of 259*] *money paid by Toler, on account of goods, the property of Armstrong and others, consigned to Toler, which had been seized and libeled in the District Court of Maine in the year 1814, as having been imported contrary to law. The goods were shipped during the late war with Great Britain, at St. Johns, in the province of New Brunswick, for Armstrong and other citizens and residents of the United States, and consigned to Toler, also a domiciled citizen of the United States. The goods were delivered to the agent of the claimants on stipulation to abide the event of the suit, Toler becoming liable for the appraised value; and Armstrong's part of the goods were afterwards delivered to him, on his promise to pay Toler his proportion of any sum for which Toler might be liable, should the goods be condemned. The goods having been condemned, Toler paid their appraised value, and brought this action to recover back from Armstrong his proportion of the amount. At the trial of the cause, the defendant below resisted the demand, on the principle that the contract was void, as having been made on an illegal consideration. When the testimony on the part of the plaintiff below was concluded, the counsel for the defendant insisted, on his behalf, to the court, that the several matters propounded and given in evidence on the part of the plaintiff were not sufficient, and ought not to be allowed, as decisive evidence to entitle the plaintiff to maintain the issue, and to recover against the defendant. The judge thereupon *delivered the following charge to the [*260 jury, which is spread at large upon the record.

"The rule of law under which the defendant seeks to shelter himself against a compliance with his contract, to idemnify the plaintiff for all sums which he might have to pay on account of the goods shipped from New Brunswick for the defendant, and consigned to the plaintiff, is a salutary one, founded in morality and good policy, and which recommends itself to the good sense of every man as soon as it is stated. The principle of the rule is, that no man ought to be heard in a court of justice, who seeks to enforce a contract founded in or arising out of moral or political turpitude. The rule itself has sometimes been carried to inconvenient lengths; the difficulty being, not in any unsoundness in the rule itself, but in its fitness to the particular cases to which it has been applied. Does the taint in the original transaction infect and vitiate every contract growing out of it, however remotely connected with it? This would be to extend the rule beyond the policy which produced it, and would lead to the most inconvenient consequences; carried out to such an extent, it would deserve to be entitled a rule to encourage and protect fraud. So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason, but it cannot safely be pushed farther. If, for example, the

NOTE.—Illegal contracts.—A contract which violates or proposes to violate the revenue laws of the country in which it is made, is void. Johnson v. Hudson, 11 East, 180; Cope v. Rowland, 2 Mees. & W. 149; Smith v. Mawhood, 14 Mees. & W. 452; Meux v. Humphries, 3 Car. & P. 79; Holman v. Johnson, Cowp. 341; Cambioso v. Maffet, 2 Wash. C. C. 98; Hannay v. Eve, 3 Cranch, 242; Lightfoot v. Tenant, 1 Bos. & P. 551; 2 Pars. on Cont. 259; Langton v. Hughes, 1 M. & S. 593; Ritchie v. Smith, 6 C. B. 462; Hodgson v. Temple, 5 Taunt. 183; Catlin v. Belle, 4 Camp. 183; Patton v. Nicholson, 3 Wheat. 204.

If any part of the entire consideration for a promise or any part of the entire promise be illegal, whether by statute or at common law, the whole contract is void. Craig v. Missouri, 4 Pet. 410; Bartle v. Coleman, 4 Pet. 184; Donallen v. Lennox, 6 Dana, 91; Brown v. Langford, 3 Bibb. 500; 1 Pars. on Cont. 380; Hinesburg v. Sumner, 2 Vern. 23; Woodruff v. Hinman, 11 Vern. 592; Deering v. Chapman, 22 Maine, 488; Tilson v. Himes, 5 Barr. 452; The Pioneer, Deady, 72.

But where for a good and valid consideration, by deed or other contract, one undertakes to do two things, one legal and the other illegal, he will be held to do that which is legal, if it can be separated from that which is illegal. Leavitt v. Palmer, 3 N. Y. 3 Comst. 37; Kerrison v. Cole, 8 East, 236; Bishop of Chester v. John Freeland, Ley. 79; Norton v. Simmes, Hob. 14; Bk. of Australia v. Bank of A. 12 Jur. 189.

Contracts and agreements having for their object anything repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void. Gray v. Hook, 4 N. Y. 4 Comst. 449; Bell v. Leggett, 7 N. Y. 3 Seld. 176; Combioso v. Maffett, 2 Wash. C. C. 98.

The court will not lend its aid to enforce a contract which grows out of, or is connected with, an illegal act, or to recovery thereon. Barton v. Port Jackson Co. 17 Barb. 397; Rose v. Truax, 21 Barb. 361; Hunt v. Knickerbocker, 5 John. 327; McBlair v. Gibbs, 17 How. 232; Pratt v. Adams, 7 Paige, 615, 653; DeGroot v. VanDuzer, 20 Wend. 390; Pennington v. Townsend, 7 Wend. 276; Pepper v. Haights, 20 Barb. 429; Hayden v. Davis, 3 McLean, 276; Milne v. Huber, 3 McLean, 212; Brown v. Turkington, 3 Wall. 377.

Where the illegal contract is executed, courts will not aid a particeps criminis in setting it aside. Nellis v. Clark, 4 Hill, 424; affirming S. C. 20 Wend. 24; Mosely v. Mosely, 15 N. Y. 334; Westfall v. Jones, 23 Barb. 9; Hooker v. VanDewater, 4 Den. 349; Fales v. Mayberry, 2 Gall. 560; Brooks v. Martin, 2 Wall. 70.

A party to an illegal contract may set up its illegality when it is sought to be enforced against him, though he cannot enforce it. Tylee v. Yates, 3 Barb. 222; Barton v. Port Jackson Co. 17 Barb. 397; Coppell v. Hall, 7 Wall. 542.

Where an unlawful act has been done, a subsequent independent contract in reference thereto, founded on a new consideration, is not avoided by the prior illegal act. Ocean Ins. Co. v. Polleys, 13 Pet. 157; McBlair v. Gibbs, 17 How. 232; Tenant v. Elliott, 1 Bos. & P. 3; Faikney v. Reynous, 4 Burr. 2069; Petrie v. Hannay, 3 T. R. 418; Thompson v. Thompson, 7 Ves. 470.

man who imports goods for another, by means of a violation of the laws of his country, is dis-
261*] qualified from *founding any action upon such illegal transaction, for the value or freight of the goods, or other advances made on them, he is justly punished for the immorality of the act, and a powerful discouragement from the perpetration of it is provided by the rule. But after the act is accomplished, no new contract ought to be affected by it; it ought not to vitiate the contract of the retail merchant, who buys these goods from the importer, that of the tailor, who purchases from the merchant, or of the customers of the former, amongst whom the goods are distributed in clothing, although the illegality of the original act was known to each of the above persons, at the time he contracted.

"I understand the rule, as now clearly settled, to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it. The case before supposed, of an action for the value of goods illegally imported for another, or freight and expenses attending, founded upon a promise express or implied, exemplifies a part of the above rule; the latter part of it may be explained by the following case: As if the importation was the result of a scheme to consign the goods to the friend of the owner, with the privity of the former, that he might protect and defend them for the owner in case they should be brought into
262*] *jeopardy, I should consider a bond or promise afterwards given by the owner to his friend, to indemnify him for his advances on account of any proceedings against the property or otherwise, to constitute a part of the res gestæ, or of the original transaction, though it purports to be a new contract. For it would clearly be a promise growing immediately out of, and connected with, the illegal transaction. It would be, in fact, all one transaction; and the party to whom the promise was made would, by such a contrivance, contribute, in effect, to the success of the illegal measure.

"But, if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. Thus, if A should, during war, contrive a plan for importing goods from the country of the enemy, on his own account, by means of smuggling, or of a collusive capture, and in the same vessel should be sent goods for B; and A should, upon the request of B, become surety for payment of the duties, or should undertake to become answerable for expenses on account of a prosecution for the illegal importation, or should advance money to B to enable him to pay those expenses; these acts constituting no part of the original scheme, here would be a new contract upon a valid and legal consideration, unconnected with the original act, although remotely caused by it; and such con-
263*] tract *would not be so contaminated by the turpitude of the offensive act, as to turn A out of court when seeking to enforce it, although the illegal introduction of the goods into the country was the consequence of the scheme projected by A in relation to his own goods.

"Whether the plaintiff has any interest in the goods imported by the defendant from New Brunswick, or was the contriver of, or concerned in, a scheme to introduce these goods, or even his own, if he had any, into the United States, by means of a collusive capture or otherwise, or consented to become the consignee of the defendant's goods, with a view to their introduction, are questions which must depend upon the evidence, of which you must judge. It ought, however, to be remembered that it would seem, from the letters of introduction of the defendant to the plaintiff, some time after this importation had taken place, that these gentlemen were, at that time, strangers to each other."

And the jurors having submitted to the court an inquiry, in the words following, viz.: "The jury beg leave to ask the judge, whether Toler must have an interest in Armstrong's goods to constitute him a participator in the voyage. If simply having goods on board will constitute him such." The court gave their opinion upon the same as follows: "The plaintiff simply having goods on board would not constitute him a participator, or affect the contract with the defendant. Being interested in the goods would."

This charge was excepted to by the defendant, *and a verdict having been found [*264 for the plaintiff, on which a judgment was rendered in his favor, the cause was brought, by writ of error, to this court.

Mr. Webster and Mr. Wheaton, for the plaintiff in error, stated, that this case arose out of an illegal importation of goods from the enemy's country during the late war, upon the false and fraudulent pretext of a capture jure belli, which was finally pronounced by this court to be collusive, and the property condemned to the government.[1] They argued, that although the abstract principles laid down in the charge of the court below might be considered as correct in point of law, no one of the hypothetical cases put by the learned judge fully stated the facts as proved in the cause. The whole case being submitted, and the court being asked to give a general instruction, the charge ought to have been applicable to the case in evidence, which, it was contended, it was not. Admitting, therefore, the opinions in the charge to be correct, it was still liable to exception, because there was a material part of the case which it did not embrace. The charge did not state what the law would be, if Toler knew, previous to the consignment, that Armstrong was engaged in this unlawful trade. The general principle, that no action could be maintained upon a contract growing out of an immoral or illegal transaction, was insisted on *as applicable to this case, where the [*265 transaction was not subsequent or collateral, but directly connected with the unlawful act.[2]

1.—The George, 1 Wheat. Rep. 408; S. C. 2 Wheat. Rep. 278.

2.—Collins v. Blantern, 2 Wils. Rep. 347; Holman v. Johnson, Cowp. Rep. 341; Biggs v. Lawrence, 3 Term. Rep. 454; Clugas v. Penaluna, 4 Term. Rep. 466; Steers v. Laishley, 6 Term. Rep.

The authorities cited would show that this principle has been constantly recognized in the courts of justice both in England and this country, and it might, indeed, be said to form a rule of universal law which had been incorporated into the civil code of every nation.[1]

266*] *Mr. C. J. Ingersoll, contra, insisted that the law on this subject was accurately laid down in the judge's charge, and although there was some apparent discrepancy in the cases, they would all be found to be reconciled by the clear and intelligible principles of the charge. The distinction was, that where the contract was disconnected with the original unlawful act, and was founded on a new and distinct consideration, an action might be maintained upon it, although it could not be maintained upon a contract directly arising out of the illegal act.[2] The questions of fact,

267*] *whether Toler had any interest in Armstrong's goods, or was the contriver of, or concerned in, a scheme to introduce them into this country by any unlawful means, or consented to become the consignee of the goods with a view to their introduction, were fairly left to the jury, and are found by them in favor of the plaintiff. So that the whole question arose upon the abstract correctness of the charge, and the propositions of law laid down to the jury. Unless these could be shown to be erroneous, the judgment must be affirmed. It was also urged that if the taint of the original illegality of transactions was suffered to infect new contracts with third parties, upon different considerations, it would put a most inconvenient restraint upon trade, and the whole business of life.

Mr. Chief Justice Marshall delivered the opinion of the court, and after stating the case, proceeded as follows:

The only point moved by the defendant's counsel to the court was, that the evidence was not decisive in favor of the plaintiff. The court gave this opinion. The charge does not intimate that the testimony was conclusive, but leaves the case to the jury, to be decided by them under the control of certain legal principles which are stated in the charge. To entitle the plaintiff in error to a judgment of reversal, he must show that some one of these principles is erroneous to his prejudice.

The main object of the charge is to state to *the jury the law of contracts on an il- [*268 legal consideration, so far as it was supposed to bear on the case before them. To enable them to apply the law to the facts, the court supposed many cases in which the contract would be void, the consideration being illegal. It is unnecessary to review this part of the charge, because it is entirely favorable to the plaintiff in error.

After having stated the law to be, that where the contract grows immediately out of an illegal act, a court of justice will not enforce it, the court proceeds to say: "But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. Thus, if A should, during war, contrive a plan for importing goods from the country of the enemy, on his own account, by means of smuggling, or of a collusive capture, and goods should be sent in the same vessel for B; and A should, upon the request of B, become surety for the payment of the duties, or should undertake to become answerable for the expenses on account of a prosecution for illegal importation, or should advance money to B to enable him to pay those expenses, these acts constituting no part of the original scheme, here would be a new contract upon a valid and legal consideration, unconnected with the original act, although remotely caused by it, and such contract would not be so contaminated by the turpitude of the offensive act as *to turn A out of court [*269 when seeking to enforce it, although the illegal introduction of the goods into the country was the consequence of the scheme projected by A in relation to his own goods."

If this opinion be contrary to law, the judgment ought to be reversed. The opinion is, that a new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. This general proposition is illustrated

61; Booth v. Hodgson, 6 Term. Rep. 405; Waymell v. Reed, 5 Term. Rep. 599; Ex-parte Mather, 3 Ves. Jun. Rep. 373; Ribbans v. Crickett, 1 Bos. & Pull. 264; Lightfoot v. Tenant, 1 Bos. & Pull. 551; Aubert v. Maze, 2 Bos. & Pull. 371; Shirley v. Sankey, 2 Bos. & Pull. 130; Thompson v. Thompson, 7 Ves. Rep. 470; Ex-parte Daniels, 14 Ves. Rep. 191; Ex-parte Bell, 1 Maul. & Selw. 751; Cooth v. Jackson, 6 Ves. Rep. 11; Branton v. Taddy, 1 Taunt. Rep. 6; Edgar v. Fowler, 3 East's Rep. 222; Morck v. Abel, 3 Bos. & Pull. 35; Blachford v. Preston, 8 Term. Rep. 89; Gallini v. Laborie, 5 Term. Rep. 242; Sullivan v. Greaves, Park Ins. 8; Mitchell v. Cockburn, 2 H. Bl. Rep. 379; Canaan v. Bryce, 3 Barnw. & Ald. 179; Duncanson v. M'Clure, 4 Dall. Rep. 308; Hunt v. Knickerbocker, 5 Johns. Rep. 327; Whitaker v. Cone, 2 Johns. Cas. 58; Belding v. Pitkin, 2 Johns. Ch. 147; Graves v. Delaplaine, 14 Johns. Rep. 146; Griswold v. Waddington, 16 Johns. Rep. 438; Richardson v. Marine Ins. Co. 6 Mass. Rep. 111; Russell v. DeGrand, 15 Mass. Rep. 35; Wheeler v. Russel, 17 Mass. Rep. 281; Musson v. Frales, 16 Mass. Rep. 334; Frales v. Mayberry, 2 Gallis. Rep. 560; Hannay v. Eve, 3 Cranch's Rep. 242; Patton v. Nicholson, 3 Wheat. Rep. 204; Mitchel v. Smith, 4 Dall. Rep. 269; S. C. 1 Binn. Rep. 110; Maybin v. Coulon, 4 Dall. Rep. 298; Biddis v. James, 6 Binn. Rep. 321; Coulon v. Anthony, 4 Yeates, 24.

1.—Pothier, Des Obligations, No. 43-45; Des Assurances, No. 58; Emérigon, Des Ass. tom. 1, p. 211.

2.—Faikney v. Reynous, 4 Burr. Rep. 2069; Petrie v. Hannay, 3 Term. Rep. 418; Farmer v. Russel, 1 Bos. & Pull. 295; Tenant v. Eliot, 1 Bos. & Pull. 3; Lloyd v. Johnson, 1 Bos. & Pull. 340; Watts v. Brooks, 3 Ves. Jun. Rep. 612; Bird v. Appleton, 8 Term. Rep. 562; Ex-parte Bulmer, 13 Ves. Rep. 313; Sewell v. Royal Exch. Co. 4 Taunt. Rep. 850; Hodgson v. Temple, 5 Taunt. Rep. 181; Haines v. Busk, 5 Taunt. Rep. 521; Simpson v. Bloss, 7 Taunt. Rep. 246; Antoine v. Morshead, 6 Taunt. Rep. 237; S. C. 1 Marsh. Rep. 561; Danbroz v. Morshead, 6 Taunt. Rep. 332; Willison v. Pattison, 7 Taunt. Rep. 439; Evans v. Richardson, 3 Meriv. Rep. 469; Edwards v. Dick, 4 Barnw. & Ald. 211; Woodhouse v. Meredith, 1 Jac. & Walk. 204; Whittingham v. Bourgoyne, 3 Andsr. 900; Booth v. Jackson, 6 Ves. Rep. 12; Edgar v. Fowler, 3 East's Rep. 222; Bensley v. Bingold, 5 Barnw. & Ald. 335; Johnson v. Hudson, 11 East's Rep. 180; Gross v. Lapage, 1 Holt's N. P. Rep. 105, 107, and cases collected in note; Hedley v. Lapage, 1 Holt's N. P. Rep. 392; Duhammel v. Pickering, 2 Stark. N. P. Rep. 00; Stokes v. Twitcher, 3 Taunt. Rep. 492; Gow on Partnership, 105; 2 Evans's Pothier, Appendix, No. I. p. 8; 1 Fonbl. Eq. b. 1, c. 4, s. 4, note y; Puffend. l. 3, c. 7, s. 9, note 2.

by particular examples, and will be best understood by considering the examples themselves. The case supposed is, that A, during a war, contrives a plan for importing goods on his own account from the country of the enemy, and that goods are sent to B, by the same vessel. A, at the request of B, becomes surety for the payment of the duties which accrue on the goods of B, and is compelled to pay them; can he maintain an action on the promise of B to return this money? The opinion is, that such an action may be sustained. The case does not suppose A to be concerned, or in any manner instrumental in promoting the illegal importation of B, but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B afterwards adopted. This illustration explains what was meant by the general words previously used, which, unexplained, would have been exceptionable.

The contract made with the government for 270*] *the payment of duties is a substantive independent contract, entirely distinct from the unlawful importation. The consideration is not infected with the vice of the importation. If the amount of duties be paid by A for B, it is the payment of a debt due in good faith from B to the government; and if it may not constitute the consideration of a promise to repay it, the reason must be, that two persons who are separately engaged in an unlawful trade can make no contract with each other; at any rate, no contract, which, in any manner, respects the goods unlawfully imported by either of them. This would be to connect distinct and independent transactions with each other, and to infuse into one, which was perfectly fair and legal in itself, the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life, not compensated by any one accompanying advantage.

The same principle, diversified in form, is illustrated by another example. If A should become answerable for expenses on account of a prosecution for the illegal importation, or should advance money to B to enable him to pay those expenses, these acts, the court thought, would constitute a new contract, the consideration of which would be sufficient to maintain an action.

It cannot be questioned that, however strongly the laws may denounce the crime of importing goods from the enemy in time of war, the act of defending a prosecution instituted in 271*] consequence *of such illegal importation is perfectly lawful. Money advanced, then, by a friend in such a case, is advanced for a lawful purpose, and a promise to repay it is made on a lawful consideration. The criminal importation constitutes no part of this consideration.

It is laid down with great clearness, that if the importation was the result of a scheme between the plaintiff and defendant, or if the plaintiff had any interest in the goods, or if they were consigned to him with his privity, that he might protect and defend them for the owner, a bond or promise given to repay any advances made in pursuance of such understanding or agreement would be utterly void.

The questions whether the plaintiff had any interest in the goods of the defendant, or was the contriver of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation.

Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that no action can be maintained on a contract, the consideration of which is either wicked in itself, or *prohibited by law. How far this princi-[*272 ple is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal; is a question of considerable intricacy, on which many controversies have arisen, and many decisions have been made. In Faikney v. Reynous, 4 Burr. 2069, the plaintiff and one Richardson were jointly concerned in certain contracts prohibited by law, on which a loss was sustained, the whole of which was paid by the plaintiffs; and a bond was given for securing the repayment of Richardson's proportion of the loss. To a suit on this bond, the defendants pleaded the statute prohibiting the original transaction, but the court held, on demurrer, that the plaintiff was entitled to recover. Although this was the case of a bond, the judgment does not appear to have turned on that circumstance. Lord Mansfield gave his opinion on the general ground that if one person apply to another to pay his debt (whether contracted on the score of usury, or for any other purpose), he is entitled to recover it back again. This is a strong case to show that a subsequent contract, not stipulating a prohibited act, although for money advanced in satisfaction of an unlawful transaction, may be sustained in a court of justice. In a subsequent case, 6 Term Rep. 10, Ashhurst, J., said the defendants were held liable because they had voluntarily given another security.

In the case of Petrie and another, Executors of Keeble, v. Hannay, 3 Term Rep. 418, the *testator of the plaintiffs was engaged [*273 with the defendant and others in stock transactions, which were forbidden by law, on which considerable losses had been sustained, which were paid by Portis, their broker. Keeble repaid the broker the whole sum advanced by him except £84, which was, in part, the defendant's share of the loss, for which Keeble drew a bill on the defendant, which was accepted. The bill not being paid, a suit was brought upon it by Portis against the executors of Keeble, and judgment obtained, they not setting up the illegal consideration. The executors brought this action to recover the money they had paid, and it was held, by three judges against one, on the authority of Faikney v. Reynous, that the plaintiffs could maintain their action. A distinction was taken in cases where money was paid by one person for another, on an illegal transaction, by which the parties were not bound; between a voluntary payment and one made on the request of the party; between an

assumpsit raised by operation of law, and an express assumpsit. Although the former would not support the action, it was held that the latter would.

This, also, is a strong case to show that a new contract, by which money is advanced at the request of another, or, which is the same thing, where there is an express promise to pay, may sustain an action, although the money was advanced to satisfy an illegal claim.

In Farmer v. Russell et al. 1 Bos. & Pull. 274*] *295, it was held that if A is indebted to B on a contract forbidden by law, and pays the money to C for the use of B, a court will give judgment in favor of B against C for this money. In this case, B could not have recovered against A, but when the money came into the hands of C, a new promise was raised on a new consideration, which was not infected by the vice of the original contract. In this case, Chief Justice Eyre said that the plaintiff's demand arose simply from this circumstance that money was put into the hands of C for his use; and Justice Buller said that the action did not arise upon the ground of the illegal contract. Yet, in this case, A's original title to the money was founded on an unlawful contract, and he could not have maintained an action against B.

The general proposition stated by Lord Mansfield in Faikney v. Reynous, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case. A subsequent express promise is, undoubtedly, equivalent to a previous request.

In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it as to be inseparable from it. As, where a vendor in a foreign 275*] *country packs up goods for the purpose of enabling the vendee to smuggle them; or where a suit is brought on a policy of insurance on an illegal voyage; or on a contract which amounts to maintenance; or on one for the sale of a lottery ticket, where such sale is prohibited; or on a bill which is payable in notes issued contrary to law. In these, and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegal transaction. One of the strongest cases in the books is Steers v. Laishley, 6 Term Rep. 61, where the broker, who had been concerned in stock jobbing transactions, and had paid the losses, drew a bill of exchange for the amount on the defendant, and, after its acceptance, indorsed it to a person who knew of the illegal transaction on which it was drawn, the court held that such indorsee could not recover on the bill.

In this case, the broker himself could not recover, being a party in the original offense against the law, and his bill being drawn for the very money which was due on the original transaction, and indorsed to a person having notice, left the indorsee in the same situation with the drawer. Yet, Lord Kenyon said, in this case, that if the plaintiff had lent the money to the defendant to pay the differences, and had afterwards received the bill for the money so lent, he might have recovered on it. The difference between the case decided, and that put by the judge, is not very discernible, as the one or the other may affect *morals, [*276 or the policy of the law. The distinction would seem to be founded on this legal ground, that the money lent would constitute a new consideration, and be the foundation of a new contract, which could not be vitiated by a knowledge of the purpose for which the money was lent, and the bill drawn. So Toler's knowledge of the illegal transactions of Armstrong, and that his money was advanced to procure the delivery of goods which had been illegally imported, could not vitiate a contract to repay that money.

In the case of Booth v. Hodgson, 6 Term Rep. 405, the suit was between the original parties to the illegal transaction, and was bottomed on it.

Supposing the opinions actually contained in the charge to be correct, it is still contended to be liable to exception, because there is a material part of the very case which it does not embrace. The charge, it is said, does not state what the law would be, if Toler knew, previous to the consignment, that Armstrong was engaged in this illicit commerce.

Without entering into the inquiry whether this criticism on the charge be well or ill founded, the court think it proper to declare, in explicit terms, that the plaintiff in error cannot avail himself of it in this stage of the cause.

To bring all the testimony offered at the trial of a cause at common law, instead of facts, into this court, by a bill of exceptions, or otherwise, is a practice which, to say the least, is extremely *inconvenient. Its tendency is to [*277 convert this court from a tribunal for the decision of points of law, into one for the investigation of facts, and for weighing evidence. To look into that testimony for the purpose of inquiring whether the judge has omitted anything material in his charge, would be to yield to this practice, and to sanction it in its most exceptionable form. If the defendant's counsel wished the instruction of the judge to the jury on any point which was omitted in the charge, his course was to suggest the point, and request an opinion on it. If counsel may, without pursuing this course, spread the whole testimony on the record, and then, by a general exception to the charge, enable himself to take advantage, not only of a misdirection, but of any omission to notice any question which may be supposed, by this court, to have arisen in the case, such a course would obviously transfer to the Supreme Court the appropriate duties of a circuit court, and cannot be countenanced.

It is also contended by the counsel for the plaintiff in error, that the judge has erred in not answering fully the inquiry made by the jury. That was in these words: "The jury beg leave to ask the judges whether Toler must have an interest in Armstrong's goods to constitute him a participator in the voyage. If simply having goods on board will constitute him such." The court answered as follows: "The plaintiff, simply having goods on board, would not constitute him a participator, or affect the contract *with the defendant. [*278 Being interested in the goods would."

There is much reason to believe that the first

of these questions was not understood by the jury, or by the judge, according to the literal import of the words. The inquiry would seem to be, whether, under any possible view of the transaction, Toler could be tainted with the guilt of Armstrong so as to affect the contract in suit, unless he had an interest in the goods. This was probably not the intention of the jury, because an answer to this question is to be found in the charge. The judge had stated that if Toler was the contriver of, or concerned in, a scheme to introduce these goods into the United States, or had consented to become the consignee with a view to their introduction, these circumstances would vitiate the contract. He had already said, therefore, that an interest in Armstrong's goods was not indispensably necessary to make Toler a participator in the voyage, as to all the purposes of the defense. He had stated two cases specially, either of which the jury might consider as proved by the evidence, in which the consideration would be unlawful; and he had said generally, "that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be, in fact, only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it." There is much reason to believe that 279*] *the jury could not have intended to put a question which had been already answered, and that they might design to ask, whether, having goods on board belonging to himself, would place him in the same situation as if interested with Armstrong. The answer of the court would show that the questions were understood in this sense, and that answer appears to have been satisfactory to the jury.

However this may be, we think the law was correctly stated by the court; and we cannot admit that a judgment is to be reversed because an answer does not go to the full extent of the question. Had the jury desired further information, they might, and probably would, have signified their desire to the court. The utmost willingness was manifested to gratify them, and it may fairly be presumed that they had nothing farther to ask.

We think that there is no error in the judgment of the Circuit Court, and that it ought to be affirmed, with costs and damages, at the rate of six per centum per annum.

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[*Ejectment. Evidence. Practice.]

CHIRAC et al. v. REINICKER.

A counsel or attorney is not a competent witness to testify as to facts communicated to either by his client, in the course of the relation subsisting between them, but may be examined as to the mere fact of the existence of that relation.

The action for mesne profits may be maintained against him who was the landlord in fact, who received the rents and profits, and resisted the recovery in the ejectment suit, although he was not a party to that suit, and did not take upon himself the defense thereof upon the record, but another did as landlord.

A recovery in ejectment is conclusive evidence in an action for mesne profits against the tenant in possession, but not in relation to third persons. But where the action is brought against the landlord in fact, the record, in the ejectment suit, is admissible to show the possession of the plaintiff connected with his title, although it is not conclusive upon the defendant in the same manner as if he had been a party on the record.

Amendments to the pleadings are matters in the discretion of the court below. Error will not lie to this court, on the allowance or refusal of such amendments.

Variances between the writ and declaration cannot be taken advantage of in the court below, after plea pleaded.

Quære, Whether by the modern practice such variances can be taken advantage of at all.

ERROR to the Circuit Court of Maryland.

This was an action of trespass for mesne profits, brought by the plaintiffs in error, Chirac and others, against the defendant in error, Reinicker, in the court below. The plaintiffs had recovered judgment, and possession of the premises, in an injectment, in which one C. J. F. Chirac prayed *leave of the court, [*281 as landlord of the premises, to be made defendant in the place of the casual ejector, and was admitted accordingly under the common consent rule. At the trial of the present suit the record of the proceedings in the ejectment were offered by the plaintiffs as evidence to maintain this action; and they then offered to prove, by the testimony of R. G. Harper, and N. Dorsey, Esquires, that the defendant had retained and paid them to conduct the defense of the ejectment for his benefit, and also propounded to these witnesses the following question: "Were you retained, at any time, as attorney or counsel, to conduct the ejectment suit above mentioned, on the part of the defendant, for his benefit, as landlord of those premises?"

This question was objected to by the defendant's counsel, as seeking an improper disclosure of professional confidence; and was rejected by the court. Whereupon the plaintiffs excepted.

The plaintiffs then gave in evidence certain deeds and patents, by which, and the admissions of counsel on both sides, the title to the premises in question was vested in John B. Chirac, deceased; and also read in evidence certain depositions to prove who were the heirs of J. B. Chirac; and also offered the record in the ejectment to prove Maria Bonfils to be one of the heirs, and then offered to prove, by parol evidence, that the defendant was, in fact, landlord of the premises at the commencement, and during the progress of the ejectment, and had notice of the *same, and retained [*282 counsel to defend the same, and received the rents and profits thereof during its progress; which last-mentioned evidence the court refused to admit; and the plaintiffs excepted to the refusal.

The plaintiffs then offered to prove the same facts (not saying by parol evidence), with the additional fact that counsel did defend the same action for the benefit of the defendant. This evidence was also rejected by the court, and constituted the third exception of the plaintiffs.

The fourth exception taken by the plaintiffs related to the proper parties to the action. The original plaintiffs in the suit were Anthony

NOTE.—As to competency of prosecuting attorney as witness, see note to 55 L.R.A. 231.

When mesne profits recoverable in ejectment, see note to 5 L. ed. U. S. 547.

Taurin Chirac, Mathew Chapus, and Anna Maria, his wife, Mathew Thevenon and Maria, his wife, and Maria Bonfils, the same persons having been plaintiffs in the ejectment. Pending the suit, the plaintiffs obtained leave to amend their declaration, and amended it by introducing the name of John B. E. Bitarde Desportes, as husband of the said Maria, called, at the commencement of this suit, Maria Bonfils. No objection was taken to this amendment, and the defendant pleaded the general issue to the declaration so amended. The evidence of title of John B. Chirac, deceased, having been introduced, and, also, evidence to prove that Anthony T. Chirac and the female plaintiffs were heirs-at-law of John B. Chirac, the defendant prayed the court to instruct the jury that they ought to find a verdict for the defendant, unless they were satisfied that all the plaintiffs were the proper heirs-at-law 283*] *of John B. Chirac; which direction the court accordingly gave.

The fifth exception related to the supposed variance between the writ and declaration, by the amendment, introducing the husband of Maria Bonfils as a party upon the record. The court held the variance fatal under the general issue.

Mr. D. Hoffman and Mr. Mayer, for the plaintiffs in error, argued: (1) That the rule as to professional secrecy forbids disclosures by the counsel of matters communicated by the client, after the engagement of counsel, and relating to the merits, or grounds of prosecution or defense of the suit. But that the mere fact of the engagement of counsel was out of the rule, because the privilege and duty of being silent does not arise until that fact be ascertained. The concealment of the real client, who may be the party essentially interested, may be part of the client's policy, and be within the client's instructions to his counsel. But the client's injunction of secrecy, per se, would not make secrecy lawful in this respect; and it is, therefore, a petitio principii to say that the counsel shall not tell who really employed him, merely because it happened to be the direction of his client, and his client's view, to conceal the fact. The law would authorize a fraud on its own rules if it would determine otherwise; and the pretension of the defendant is counter to the whole policy of the rule, as to 284*] professional secrecy.[1] *The very refusal to answer implies the affirmation of the witnesses being employed by the defendant as counsel.

2. The defendant was liable, in this action, if he had notice of the ejectment, and was, as landlord, interested in the result of it. He might, even at common law, have been made defendant; but the statute of 11 Geo. II., in force in Maryland, explicity allows it to him. He shall not screen himself from responsibility, because he had artifice enough to waive appearing, and to let an uninterested person figure as defendant in his stead. The lessor of the plaintiff may sue for mesne profits, and the actual tenant shall be liable, although the judgment in ejectment is obtained against the casual ejector only; and in reference as well to the defendant as to the plaintiff in such a suit, the court disregards the fiction of the ejectment cause. He is answerable for the mesne profits who has received them, and has had an opportunity of defending his pretensions in the preliminary ejectment. The ejectment suit is founded on a fiction. Fictions are under the control of the courts who use them. They will be moulded and applied to the views of justice, and according to reason—for they take their rise from the equity of the law: In fictione juris subsistit equitas. The authorities *sustain all these positions.[2] Before the [*285 statute of 11 Geo. II., regulating the appearance of landlords as defendants in lieu of the casual ejector, a judgment in ejectment was habitually set aside, where, upon the complaint of the landlord, it appeared that he had had no notice of the suit. Where a party sells a chattel with warranty of title, notice to the vendor, of a suit against the vendee for it, is sufficient to bind the vendor by the verdict or judgment in that suit. One obtaining possession of land, while an action of ejectment is pending, is answerable for the mesne profits during his occupation, whether proved to have had notice of the action or not; constructive notice, then, sometimes implicates a third party in this suit.[3] All these rules are calculated to prevent an evasion of the statute, allowing landlords, not in actual possession, to be actors in the ejectment suit, and to keep the fictions of law to their original purposes of justice. Our claim is clear of the point of Lifford's case, in 11 Co. 51; though according to the decisions in Massachusetts we might rest this suit even upon that point.[4] Before the statute of Marlbridge, 52 Hen. III., damages was not recoverable in any *real action, except against the dis- [*286 seisor himself, and then only in the assize of novel disseisin. Hence the practice for the disseisor (similar in principle to the attempt of this defendant) to enfeoff persons to act as defendants, who were not responsible. To prevent this abuse the statute was passed, making all pernors of the profits responsible in real actions for damages.[5] But the action of ejectment, being a personal action in its origin, there was no need of a statuable provision to authorize an award of damages in it. It has taken the place of the real actions of common law. Reinicker, claimant of the fee, must be regarded as in possession; and his tenant's possession was his.

It is true that Chirac appeared as landlord in the ejectment cause. But our purpose is to show that Reinicker appeared by another; and though that other also assumed his (Reinicker's) title, that circumstance serves only to aggravate the fraud attempted upon the law, and to show the more conclusively that Reinicker waived his privilege of defending in his own

1.—7 East, Rep. 357, in note; 4 East, Rep. 759; 4 Esp. N. P. C. 23; 2 Esp. N. P. C. Bull. N. P. 284; 4 T. R. 432, 752; 17 Johns. Rep. 335; 18 Johns. Rep. 330; Norris's Peake, 250, 251, 252; 3 Johns. Cas. 198; 18 Johns. Rep. 492.

2.—1 Burr. 667; Runningt. Eject. 192, 193, 198, 200, 201; Adams' Eject. 328, 337; 2 Johns. Cas. 468; 3 Camp. 455, in point, and inaccurately stated in Adams on Eject.; the notice of the suit to the landlord not being required, as Adams states, to be by service of the declaration in ejectment, 2 Burr. 1290; 7 T. R. 108.

3.—13 Johns. Rep. 447; 1 Harris and Johns. Maryland Rep.

4.—Stearnes on Real Actions, 416.

5.—Stearnes' Real Act. 390.

name, and by candidly announcing his interest on the record. We are not estopped, then, by C. J. F. Chiras's usurpation of the title of landlord, as well as the part of a defendant. If this action were even against him, we should be compelled to prove him landlord, notwithstanding his pretension to the character by appearing as landlord. His appearing might be relied on to prove his being landlord, but only 287*] as a *circumstance, and as evidence, and not as an estoppel. We admit that a party, to be liable for mesne profits, must be a trespasser; and we meant to prove Reinicker, by privity, to be a trespasser. The case in 7 Term. Rep. 108, shows that if the husband there had had notice of the ejectment, he would have been answerable for the mesne profits.

3. The action for mesne profits being the mere sequel of the recovery in the ejectment cause, the record of that recovery is the proper evidence to show the lessors of the plaintiff entitled to the mesne profits so as they are claimed within the terms of the demise in the ejectment. If profits antecedent to the term are asked, then the plaintiffs cannot rely on the ejectment recovery as conclusive evidence, but must prove their title to the land anew, and again open the merits of the ejectment cause. The claim for mesne profits here keeps within the limits of the ejectment demise, and we had no occasion, therefore, to prove our title otherwise than by the record of recovery in the ejectment.[1] Although the husband, who did not appear as a lessor of the plaintiff, is joined in this action with his wife, who was a lessor, still the record of the ejectment is evidence for us, since the husband is no new party in interest. If necessary, this might be enforced by analogy from the writ of re-disseisin in the case of 288*] *a similar change of parties. The addition of the husband, at the utmost, only imposed on us the duty of proving the marriage.

4. A variance between the writ and declaration could only have been taken advantage of upon oyer of the writ, and plea in abatement.[3] Oyer will not now be granted, and such a plea cannot, therefore, obtain. Nor will the proceedings be set aside for irregularity, on account of such a variance.[4] Even supposing, that for this defect the party might have refused to plead, or otherwise have made the objection available, it is too late now since he has pleaded the general issue.[4] A variance of this kind could once have been taken advantage of in England upon writ of error; but that cannot now, since the statute of jeofails, be done there; nor in Maryland, since her act of 1809, ch. 153. Where the writ is, according to the ancient practice, fully recited in the declaration, advantage might be had of the variance on demurrer. But that is not the case here.[5] The recital of the writ in the declaration is unnecessary; and when made, as in this instance, is to be rejected as surplusage.[6] *The [*289 body of the amended declaration here speaks of "the plaintiffs," not of the persons mentioned or named in the recital. Besides, even the recital does not say that Maria Desportes was sued by the name of Maria Bonfils, but only mentions the circumstance of her "being called" so at the bringing of the suit, as it would insert an alias for her name.

The variance occurs in an amended declaration, filed after leave had to amend. The statute of Maryland of 1809, ch. 153, authorizes any amendment to be made "to bring the merits of a suit to issue." This amendment was justified by that act of the legislature; and the court might have made the writ to conform to the alteration, as in England an original writ is made to suit the declaration. The writ, in Maryland, is sometimes altered from debt to case to suit the narr. The husband, here, was joined to the wife only for conformity, and not by reason of a new interest, or as interested; since the suit, if no objection had been made before general issue, might have proceeded in the single name of the wife. One suing by guardian in the first instance, and afterwards becoming of age during the suit, may, and must, appear then by attorney. If the variance could have been, and had been, pleaded in abatement, the court would, under the statute of Maryland, have allowed the declaration to be amended and cleared of the variance. This declaration may be assimilated to a declaration by-the-by, by the husband and wife, though *the writ is sued out in the single name [*290 of the husband.[7] Though a misnomer may be pleaded in abatement, even in England, the narr. and writ may be rectified in that particular upon terms. A party naming himself generally in a writ, may, nevertheless, declare in a special character.[8] The variance between the amended declaration and the first declaration, does not show that the former varies from the writ. The amended declaration is as good evidence of the contents of the writ as the original declaration is.

Mr. D. B. Ogden and Mr. Webster, for the defendant in error, stated, (1) that it was necessary to advert to the specific question which was put as to the defendant's retaining counsel, and to the circumstances under which it was asked. The question involved the disclosure of the party's views, and of his instructions to his counsel, and of communications which were received by him in his capacity of counsel, and that would not have been made to him if he had not been so. It is not necessary that a suit should be pending to bind the counsel to secrecy for his client; any communication, after retainer of counsel, is within the rule against disclosure, if it relates to the suit and is within the scope of the confidence given to the counsel.

2. No person can be made liable for the mesne profits after recovery in ejectment, who

1.—Runningt. Eject. 492 to 497; Skinn. 247; Salk. Rep. 260; Bull. N. P. 87; 1 Burr. Rep. 665; Strange's Rep. 960; Cowp. Rep. 243; Dougl. Rep. 584; Adams' Eject. 329, 333, 334.

2.—Stephens on Plead. 69; Chitt. Plead. 439; 2 Wils. Rep. 85, 395; 2 Salk. Rep. 658.

3.—1 Bos. & Pull. 645; 6 T. R. 364; Com. Dig. Abatement, G. 8; Bac. Abr. Abatement, H. 1.

4.—1 Bos. & Pull. 383 (a decision founded on the statute, allowing a plaintiff, in certain cases, to enter an appearance for a defendant, and proceed to judgment.)

5.—1 Saund. 318, in nota.

6.—1 Saund. 318; Keb. 544; 2 Lord Raym. 908; 1 Strange's Rep. 225; Rep. temp. Hardw. 184, 189; 1 H. Bl. 250.

7.—Chitty's Plead. 252.

8.—1 Wils. Rep. 141; 3 Wils. Rep. 61; 2 Bl Rep. 722.

291*] has not *been a trespasser. The ejectment suit complains of a trespass, and the person to be charged for the mesne profits must therefore have been actually a party to that suit by having appeared as defendant, or by having been required to appear by service of process in the suit, and then failing to appear. It is only by this judicial notice, and a waiver of the privilege of appearing, testified by the record of the suit in ejectment, that the defendant in the action for mesne profits can be treated as if he had been a defendant in the ejectment, and adjudged a trespasser, to bear the liability for mesne profits. By mere waiver in pais, or notice extraneous to the record, a party cannot be rendered liable for mesne profits, although, in fact, he may have been interested in the result of the ejectment suit. That interest, however, quoad the ejectment, and in reference to the suit for mesne profits, does not prove him to be a trespasser, which he must be before he can be liable to the claim.[1] The court must look to the record of the ejectment for light as to the responsible parties on the score of mesne profits; they cannot derive it from other quarters, or collateral proof. Hence, too, the record of the ejectment is not evidence of the right of the lessors of the plaintiff to the mesne profits, as against one who was not actually a party in the ejectment suit, nor effectually so by being called on through notice in the process of ejectment to appear as de-
292*] fendant. Here, however, *another person than the defendant, Reinicker, was admitted in the ejectment suit to defend as the landlord of the property in question. He declared himself the landlord in claiming to defend as such; and the plaintiffs in ejectment, not denying his pretension in that respect, have acceded to his representation of himself, and must now be bound by it, and are estopped from saying that any other person was landlord. Reinicker, therefore, can in no wise be connected with the ejectment suit; and at all events, the recovery there is not conclusive against him, that the lessors of the plaintiff are the proper claimants of the mesne profits. They must prove themselves the heirs entitled to the land and to the mesne profits, as the result of that proof. The case from 3 Campb. Rep. 455, does not establish the plaintiffs' positions on these heads. The decision there was on another point; and the reasoning of it shows that the party liable for the mesne profits must be a trespasser. The action for mesne profits will lie only where trespass quare clausum fregit would lie. According to that principle, Reinicker could not, by mere force of notice in pais of the suit, be held liable for the mesne profits.

3. The case as to the amended declaration is clear of all the learing respecting the mode of taking advantage of a variance between the declaration and the writ. The variance there meant, is not such a departure from the writ as in this case, as it effects an entire change of suit, and substitutes, in reality, a new suit for
293*] *that which the writ and first declaration defined. There is no declaration here in the suit which was originally brought; or at least, that which was a declaration has not been acted on; but the issue is taken, and the jury sworn, between new parties, and out of the suit which the record professes to carry on. The court may, therefore, take notice of the change of parties, and of claim, and of suit, in this case; since they cannot fail to see between what parties they are adjudicating; and it is not necessary that the inconsistency be brought to their knowledge by a plea in abatement exclusively. It does not appear that Maria Bonfils was unmarried at the time of bringing the suit.

Mr. Justice Story delivered the opinion of the court:

This is an action of trespass for mesne profits, brought by the plaintiffs in error against the defendant in error in the Circuit Court for the district of Maryland. The cause comes before this court upon exceptions taken by the plaintiffs on the trial of the cause in the court below.

The plaintiffs had recovered judgment, and possession of the premises, in an ejectment, in which J. C. F. Chirac prayed to be admitted as landlord to defend the premises, and was admitted accordingly under the common consent rule. The record of the proceedings in that action were offered by the plaintiffs as evidence in the present suit; and they then offered to prove, by the testimony of R. G. Harper, and W. Dorsey, *Esquires, that the defend- [*294
ant had retained and paid them to conduct the defense of the ejectment for his benefit, and also propounded to these witnesses the following question: "Were you retained, at any time, as attorney or counselor, to conduct the ejectment suit above mentioned, on the part of the defendant, for the benefit of the said George Reinicker, as landlord of those premises?" This question was objected to as seeking an improper disclosure of professional confidence. The court sustained the objection; and this constitutes the first ground of exception.

The general rule is not disputed, that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent. The real dispute in this case is, whether the question did involve the disclosure of professional confidence. If the question had stopped at the inquiry whether the witnesses were employed by Reinicker, as counsel, to conduct the ejectment suit, it would deserve consideration, whether it could be universally affirmed that it involved any breach of professional confidence. The fact is preliminary in its own nature, and establishes only the existence of the relation of *client and [*295
counsel, and therefore might not necessarily involve the disclosure of any communication arising from that relation after it was created. But the question goes farther. It asks, not only whether the witnesses were employed, but whether they were employed by Reinicker to conduct the ejectment for him, as landlord of the premises. We are all of opinion that the question, in this form, does involve a dis-

1.—1 Selwyn's N. P. 121.

closure of confidential communications. It seeks a disclosure of the title and claim set up by Reinicker to his counsel, for the purpose of conducting the defense of the suit. It cannot be pretended that counsel could be asked what were the communications made by Reinicker as to the nature, extent or grounds of his title; and yet, in effect, the question, in the form in which it is put, necessarily involves such a disclosure. The Circuit Court was, therefore, right in their decision on this point.

The plaintiffs then gave in evidence certain deeds and patents, by which, and the admissions of counsel on both sides, the title to the premises in question was vested in John B. Chirac, deceased; and also gave in evidence certain depositions to prove who were the heirs of J. B. Chirac, and also offered the record in the ejectment to prove Maria Bonfils to be one of the heirs; and then offered to prove, by parol evidence, that the defendant was, in fact, landlord of the premises at the commencement and during the progress of the ejectment, and had notice of the same, and employed counsel to 296*] defend *the same; and received the rents and profits thereof, during the progress of the ejectment; which evidence the court refused to admit; and this constitutes the second exception of the plaintiffs. The plaintiffs then offered to prove the same facts (not saying by parol evidence), with the additional fact that counsel did defend the same action for the benefit of the defendant. This evidence was also rejected by the court, and constitutes the third exception of the plaintiffs.

The question of law involved in each of these exceptions is substantially the same. It is, whether a person, who was not a party to the ejectment, and did not take upon himself, upon the record, the defense thereof, but another did as landlord, may yet be liable in an action for the mesne profits, upon its being proved that he was, in fact, the landlord, received the rents and profits, and resisted the recovery.

It is undoubtedly true, that in general, a recovery in ejectment, like other judgments, binds only parties and privies. It is conclusive evidence in an action for mesne profits against the tenant in possession, when he has been duly served with a notice in ejectment, whether he appears, and takes upon himself the defense, or suffers judgment to go by default against the casual ejector. The reason is, that in the first case he is the real party on the record; in the last he is considered as substantially the defendant, and the judgment by default, as a confession of the title set up in the ejectment. 297*] Such was the decision *of the court in Aislin v. Parkin, in 1 Burr. 667. But in relation to third persons the judgment in ejectment is not conclusive; and if they are sued in an action for mesne profits, which is substantially an action against them as trespassers, they may controvert the plaintiff's title at large. In such a suit, the record of the ejectment is not evidence to establish the plaintiff's title; but it seems admissible for another purpose, that is to say, to show the possession of the plaintiff. The plaintiff may certainly prove his possession connected with his title, by any sufficient evidence in pais; and if his possession has been under a judgment of law, he is entitled to establish it by introducing the record of the recovery, and an executed writ of possession under it.

The question, then, is, generally, whether it is competent for the plaintiff to maintain an action for mesne profits against any person who is in possession of the land by means of his tenants, and who, by his acts, commands, or co-operation, aids in the expulsion of the plaintiff, and in withholding possession from him. All persons who aid in, or command, or procure a trespass, are themselves deemed in law to be trespassers, whether they are actually present, or do the act through the instrumentality of their agents and servants. A recovery of the possession, in an ejectment against one of such agents, does not constitute a bar to an action for mesne profits against another agent, for the same reason that *the former suit is no bar to the latter [*298 against the defendant in ejectment, viz., that the mesne profits were not a matter in controversy in the ejectment. If, then, it is competent to maintain the action for mesne profits against any trespasser, although not a defendant in ejectment, it is competent to prove that the defendant is in that predicament. The evidence offered, in this case, was strong to prove the fact that the defendant was a party to the trespass, supposing the plaintiffs to have established their title and possession. If he was landlord of the premises, and the other parties were in possession under him; if he was in the perception of the rents and profits; if he resisted the plaintiff's title and possession, and co-operated in the acts of the tenants for this purpose, the evidence was proper for the jury as proof of his being a co-trespasser.

This doctrine is supported by the case of Hunter v. Britts, 3 Campb. N. P. Rep. 455, which was cited at the bar. There the judgment was against the casual ejector in the ejectment suit, and the action for the mesne profits was brought against Britts as landlord; and he was proved to be in the receipt of the rents and profits from the time of the demise till the writ of possession was executed. The ejectment was served upon the tenant; there was no evidence that Britts had any notice of this till after judgment; but, subsequently, he promised to pay the rent, and the costs, to the plaintiff. It was objected, that the judgment in ejectment was not, under these circumstances, evidence of *title against [*299 Britts; and Lord Ellenborough held that it was not, without notice of the ejectment. But he thought that his subsequent promise amounted to an admission that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser. The language of the learned judge seems, indeed, to import that if the landlord had had notice of the ejectment, he would have been concluded by the recovery in the ejectment. It might be so, if the common notice had been formally given to him as tenant in possession, and he had neglected to take upon himself the defense of the suit. If, however, the notice was in pais, and conduced merely to prove his actual knowledge of the suit, without calling upon him to defend it, we are not prepared to admit

1.—Adams on Ejectment, p. 336, 2d ed.

that, on general principles, it ought to have such an effect.[1] But the point actually decided was, that a party might be charged, in an action for mesne profits, who was not, in any sense, a party to the ejectment, by establishing the title against him, and showing his connection as landlord with the tenant in possession, and his adoption of the acts of the latter.

But, it is said that assuming the law to be so in general, yet in the present case the plaintiffs are estopped from setting up the fact that the defendant was the real landlord, because, in the ejectment, one J. C. F. Chirac prayed leave of the court, "as landlord of the premises, to be made defendant" in the place of the casual ejector, which was, with the consent of the les- 300*] see of *the plaintiffs, allowed by the court. It does not appear to us that any such estoppel arises from this allegation in the record. The record itself ecrtainly does not constitute a technical estoppel, for it is res inter alios acta. The most that can be said is, that it is proper evidence to prove who the plaintiffs at that time deemed to be landlord, and, therefore, admissible to rebut the presumption that the present defendant was the landlord. But, certainly, the evidence was not conclusive upon either party. It was open to the plaintiffs to show that, in point of fact, the present defendant was the real landlord, that the admission in the record was founded in mistake of the facts, or that J. C. F. Chirac was a sub-landlord under Reinicker, or his superior landlord. What would have been the effect of such proof is not for this court to determine. We think, then, that the evidence offered by the plaintiffs was admissible upon general principles; and we see no estoppel which excludes it in this particular case. The directions of the Circuit Court were, on this point, erroneous.

If it had appeared upon the record, that the evidence offered by the plaintiffs was solely to connect the defendant with the ejectment, so that the recovery would be conclusive upon him in the same manner as if he had been a party on the record, and, as such, admitted to defend, and actually defending the suit, the case might have required a very different consideration. We have already intimated an opinion that notice of an ejectment suit, or de- 301*] fense of the suit, by a *person not tenant in possession, or defendant on record, does not make him a party to the suit in contemplation of law, so as to conclude his rights.

In considering the fourth and fifth exceptions, it is necessary to advert to the fact that the plaintiffs in this action originally were Anthony Taurin Chirac, Matthew Chapus and Anna Maria, his wife, Matthew Thevenon and Maria, his wife, and Maria Bonfils, the same persons having been plaintiffs in the ejectment. During the pendency of the suit the plaintiffs obtained leave to amend their declaration, and did amend it, by introducing the name of John B. E. Bitarde Desportes, as husband of the said Maria, called, at the commencement of this suit Maria Bonfils. To this amendment no objection was taken, and the defendant pleaded to the declaration, so amended, the general issue. The evidence of title of John B. Chirac, deceased, being introduced, and also evidence to prove that Anthony T. Chirac and the female plaintiffs were heirs-at-law of John B. Chirac, the defendant then prayed the court to direct the jury "that they ought to find a verdict for the defendant, unless they are satisfied that all the plaintiffs are the proper heirs-at-law of the aforesaid John B. Chirac," which direction the court accordingly gave. The probable intention of the defendant was to pray an instruction to the jury, that unless all those of the plaintiffs who claimed to be heirs of John B. Chirac, should establish their title, the suit could not be maintained. In this view, the opinion of *the court would be correct, [*302 for it is a general rule that no recovery can be had unless all the plaintiffs are competent to maintain the suit. If, therefore, the title fails as to one, it is not maintainable in favor of the others. The proof does not, under such circumstances, meet the case set up in the declaration. But, framed as this exception actually is, the direction given by the court is, in its terms, erroneous. It was not necessary to prove that all the plaintiffs are the proper heirs-at-law of J. B. Chirac. The action was maintainable if the husbands were not the proper heirs of J. B. Chirac; for, in right of their wives, they were proper parties to the suit. The fourth exception is therefore well taken.

The fifth exception is founded on the supposed variance between the writ and declaration, by the amendment, introducing the husband of Maria Bonfils upon the record. The court held this variance fatal under the general issue. It is observable that this amendment was made under an order of the court, and was not objected to, on the record, by the defendant; and that the general issue was subsequently pleaded. It has been decided in this court, that the allowance or disallowance of amendments is not matter for which a writ of error lies here. Variances between the writ and declaration are, in general matters, proper for pleas in abatement; and if, in any case, a variance between the writ and declaration can be taken advantage of by the defendant in the court below, it seems to be an established rule that it cannot be done except *upon [*303 oyer of the original writ, granted in some proper stage of the cause. The existence of sush variance forms no matter of controversy upon the general issue, by which the jury are to be governed in forming their verdict. In the present case, as no objection was taken to the amendment upon the record, it must be deemed to have been waived by the defendant, and therefore not proper to be insisted upon at the trial.[1] It does not appear on the record, whether Maria Bonfils was married before or pending the suit; and the fact might have a material bearing upon the propriety of granting the amendment, since, at all events, if pending the suit, it would not of itself abate the suit; and the objection could only be made available by a plea in abatement.[2]

Upon the whole, it is the opinion of the court that there is error in the directions of the Circuit Court in the four last exceptions, and contained in the record, and for this cause the judgment must be reversed, and a venire facias de novo awarded.

1.—See Com. Dig. Abatement, G. 8; Com. Dig. Pleader, C. 13; 2 Wils. Rep. 85, 394, 395; 1 Chit. Pl. 438, 439; Stephens on Plead. 68, 423; 1 Saund. Rep. 318, note 2, by Williams.

2.—Com. Dig. Abatement, H. 42.

304*] [*Practice. Chancery. Mortgage.]

FINLEY, Appellant,
v.
THE PRESIDENT, DIRECTORS and COMPANY of THE BANK OF THE UNITED STATES, Respondents.

Although, in general, all encumbrancers must be made parties to a bill of foreclosure, yet where a decree of foreclosure and sale was made and executed, at the suit of a subsequent mortgagee, and with the consent of the mortgageor, it not appearing to the court that there was any prior encumbrance, the proceedings will not be set aside upon the application of the mortgageor, in order to let in the prior mortgagee, who ought regularly to have been made a party, unless it be necessary to prevent irremediable mischief.

Quære, Whether such a practice be admissible in any case.

But in such a case the prior encumbrancers are not bound by the decree in a suit to which they are not made parties; and the purchasers under the sale take subject to the prior liens.

THIS cause was argued by Mr. Bibb for the appellant,[1] and by Mr. Webster for the respondents.

Mr. Chief Justice Marshall delivered the opinion of the court:

305*] *This is a bill in chancery brought by the Bank of the United States against James Finley, to obtain a decree for the sale of property mortgaged for the security of a debt due to the bank.

The mortgage deed was executed on the 28th of September, 1822, and contains a recital of debts due to the bank to the amount of $6,240, on account of which a note was executed on that day to the bank for that sum, payable sixty days after date. At the November term of the Circuit Court of the United States for the district of Kentucky, the bill was filed, stating the consent of the mortgagor to an immediate sale of the mortgaged property, although the day of payment was not arrived; and on the same day an answer was filed consenting to a decree for the sale. A decree was immediately entered, by consent of parties, directing the marshal to sell the property. The court then proceeds to direct the marshal, after deducting the expenses of sale, his commission, and the costs, to pay to the bank the sum of $6,240, with interest from the date of the note. The sale was made in pursuance of the decree, and the report thereof was returned to the court by the marshal.

At the succeeding term, William Coleman filed his petition, stating, among other things, that he held a prior mortgage on the same lands, and praying that he might be made a party defendant to the suit. His petition was rejected, and he prayed an appeal to this court,

306*] which *has been dismissed as irregularly granted. After dismissing this petition, the Circuit Court pronounced a decree affirming the sale made by the marshal, and directing the credit to which Finley should be entitled for the money paid out of its proceeds to the bank. This decree also considers the debt due to the bank as amounting to $6,240, with interest from the date of the note.

The mortgage to Coleman is filed, and appears to be dated three days anterior to that made to the bank. A suit to obtain a sale of the premises was instituted in the State Court in March, 1823, and was depending when the final decree was pronounced at the suit of the bank. After the final decree had been pronounced, Finley filed a petition, praying that the sale and decree might be set aside, alleging, among other reasons therefor, that Coleman, the prior mortgagee, had not been made a party, although the existence of his mortgage was known to the bank.

The prayer of the petition was rejected, and Finley has appealed to this court. The counsel for the plaintiff in error insists that this decree ought to be reversed, because it was pronounced in a case in which proper parties were not before the court.

It cannot be doubted that Coleman ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the cause until he was introduced into it. But this fact was kept out of view until *the decree was pronounced, [*307 the sale made, the money paid to the creditor, and the report of his proceedings returned by the marshal. If the manner in which the sale was made, and the money directed to be paid, be unusual and exceptional, it was done by consent, and the error is not imputable to the court. The only question presented to judges by this petition was, whether a decree, completely executed by a sale of the property and payment of the purchase money, should be set aside, and the suit re-instated for the purpose of introducing a party who ought regularly to have been an original defendant, but who was not shown, by any proceedings in the cause, to be concerned in interest until the decree was made and executed. There would certainly be great inconvenience in such a practice; and, if it be admissible in any case, on which the court gives no opinion, it must be where the mischief resulting from a rejection of the petition would be irremediable. This is not shown to be a case of that description. Coleman's mortgage cannot be affected by this decree. His rights cannot be extinguished by it. His suit in the State Court will proceed as if this decree had never been pronounced. The purchasers under the decree of the Circuit Court take the land subject to prior encumbrances, and have probably taken this encumbrance into consideration in the price given for the land. But, be this as it may, they do not complain, or object to their purchase, in consequence of the cloud hanging over the title. Coleman's rights cannot *be affected; [*308 and if Finley has suffered by selling his land subject to a lien, it is an injury which he has knowingly brought upon himself. This is not, then, a case for such an extraordinary measure as opening a decree made by consent, after it

1.—He cited the following authorities, to show that all encumbrancers, or persons having an interest existing at the commencement of the suit, must be made parties to a bill of foreclosure, or they will not be bound by the decree: Haines v. Beach, 3 Johns. Ch. Rep. 459, 466; Ensworth v. Lambert, 4 Johns. Ch. Rep. 605; M'Gown v. Gerks, 6 Johns. Rep. 450, and the authorities collected in those cases.

has been carried into execution, on the petition of the party who has given that consent. We do not think the decree is erroneous because the prior mortgagee was not made a defendant, the fact not having appeared to the court until the decree was completely executed.

But in the disposition of the money produced by the sale, a small mistake appears to have been made. There were some previous debts due from Finley to the bank, amounting to $6,240, which appear to have been absorbed in the note given for that sum on the 28th of September, 1822, payable sixty days after date, to secure the payment of which the mortgage deed was executed. If this note carried interest from its date, that fact does not appear, and cannot be presumed. The mortgage deed does not purport to secure the payment of such interest. Yet the decree of the Circuit Court subjects the mortgaged property to its payment. This error ought to be corrected, and may yet be corrected in the Circuit Court. It does not affect the sale. In all other respects the decree is to be affirmed.

Decree.—This cause came on to be argued, etc. On consideration whereof, this court is of opinion that there is no error in the decree for the sale of the mortgaged premises in the bill 309*] *mentioned, the same being made by consent; nor in the final decree confirming the report of the marshal, except so far as it directs that the note in the deed of mortgage mentioned should carry interest from its date, whereas interest should be computed from the day on which the said note was made payable, which was sixty days after its date. The said decree, therefore, is erroneous, so far as respects the computation of interest before the said note became payable, and is so far reversed, and is, in all other respects, affirmed. And the cause is remanded to the said Circuit Court, that the said decree may be reformed so far as it is herein declared to be erroneous. And the parties are to pay their own costs.

[Statute of Limitations.]

WETZELL v. BUSSARD.

An acknowledgment of a debt which will take a case out of the statute of limitations, must be unqualified and unconditional.

If it be connected with circumstances which, in any manner, affect the claim, or if it be conditional, it may amount to a new assumpsit, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown.

Thus, where an action was brought, on a promise in writing to deliver a quantity of powder, and the original assumpsit being satisfactorily proved, the defendant relied upon the statute of limitations; *and one witness deposed that [*310 the defendant told him that the plaintiff need not have sued him; for if he had come forward and settled certain claims which defendant had against him, the defendant would have given him his powder. To another witness defendant said that he should be ready to deliver the powder whenever the plaintiff settled a suit which Dr. E. had brought against him, etc. Held, that those declarations did not amount to an unqualified and unconditional acknowledgment of the debt, but that the plaintiff ought to have proved a performance, or a readiness to perform the condition on which the new promise was made.

THIS cause was argued by Mr. Swann for the plaintiff,[1] and by Mr. Jones and Mr. Key for the defendant.[2]

Mr. Chief Justice Marshall delivered the opinion of the court:

This was an action of assumpsit brought by the plaintiff in the Circuit Court of the United States for the District of Columbia, and county of Washington, on a promise in writing to deliver a quantity of powder. The defendant pleaded the general issue, and the statute of limitations. The original assumpsit having been satisfactorily proved, the plaintiff, to support the second issue, introduced a witness who swore that the defendant, in a conversation with him soon after the commencement of the suit, said that the plaintiff need not have sued him, for if he had come forward and settled certain claims which the defendant had against him, the defendant would have given him *his powder. To another witness who [*311 spoke to him before the commencement of the suit, at the instance of the plaintiff, he said that he should be ready to deliver the powder whenever the plaintiff settled a suit which Doctor Ewell had brought against him in the District Court of Alexandria. Other witnesses proved declarations of the same import.

The defendant demurrer to this testimony, and the plaintiff joined in demurrer. The court gave judgment in favor of the defendant; and the plaintiff has brought his cause, by a writ of error, into this court.

It is contended, on the part of the plaintiff, that he has proved an acknowledgment of the debt, and that such acknowledgment, according to a long series of decisions, revives the original promise, or lays a foundation on which the law raises a new promise.

1.—He cited Swan v. Sowell, 2 Barnw. and Ald. Rep. 759; Leaper v. Tatton, 16 East's Rep. 420; Salk. 29; Slubry v. Champlin, 4 Johns. Rep. 461.

2.—They cited Clementson v. Williams, 8 Cranch, 72; Bush v. Barnard, 8 Johns. Rep. 407.

NOTE.—Statute of limitations.

As to limitations of actions in equity cases, see note to Thomas v. Hawes, 10 Wheat. 146.

A new promise which will remove the bar of the statute of limitations must be positive and unequivocal; and if a new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt, in unequivocal language, which the party is liable and willing to pay. Van Kemen v. Parmelee, 2 N. Y. 523; Bloodgood v. Bruen, 8 N. Y. 362; Bell v. Morrison, 1 Pet. 351; Hulbert v. Nichol, 20 Hun. 454; 15 Wend. 284.

To take the case out of the statute of limitations by an acknowledgment or promise, a present indebtedness must be admitted, which the party is willing to pay, and an express promise to pay, or evidence from which an implied promise may be fairly inferred. Arnold v. Dexter, 4 Mas. 122; Bk. of Alexandria v. Clarke, 2 Cranch, C. C. 464; Clementson v. Williams, 8 Cranch, 72; Moore v. Bk. of Columbia, 6 Pet. 86; Otterback v. Brown, 2 McArthur, 541; Cowen v. Magauran, Wall, Jr. C. C. 66; Jenkins v. Boyle, 2 Cranch, C. C. 120; Young v. Wetzel, 3 Cranch, C. C. 358; Thompson v. Peters, 12 Wheat. 565; Moore v. Bk. of Col. 6

The English, as well as American books, are filled with decisions which support this general proposition. An unqualified admission that the debt is due at the time, has always been held to remove the bar created by the statute. But where the terms of the acknowledgment are in any degree equivocal, or where some qualification has been annexed to the admission, the question whether the declarations of the party amount to an acknowledgment, of an existing debt on which the law will raise an assumpsit, has been differently determined.

Leaper v. Tatton, 16 East's Rep. 420, was a suit against the acceptor of a bill of exchange, 312*] *who pleaded the statute of limitations. At the trial, the plaintiff offered a witness who swore that the defendant, when applied to for payment, said that he had been liable, but was not liable then, because the bill was out of date. He acknowledged his acceptance, but said he would not pay it; that it was not in his power to pay it. A verdict was taken for the plaintiff; and, on a motion for a new trial, Lord Ellenborough said: "As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumptive payment, if his own acknowledgment that he has not paid be shown, it does away the statute." Bayley, J., said the acknowledgment was evidence of a debt: acknowledging his acceptance, and that he had not paid it, creates a debt. The rule was discharged.

Although, in this case, the defendant did not expressly admit the existence of the debt, the implication is irresistible. The reason he assigns for not being liable is, that the bill is out of date, and his reason for not paying it is his inability. The court so understood the testimony; and Lord Ellenborough speaks of his acknowledgment as amounting to an admission that he had not paid the bill, and could not pay it.

In the case of Swan v. Sowell, 3 Barnw. & Ald. 759, Bayley, J., says that if a party admits the debt, and does not say that it is satisfied, or refuses to pay it, alleging at the time an insufficient excuse for not paying it, the law will, in *these cases, raise an implied [*313 promise to pay the debt then acknowledged to be due.

The language of Mr. Justice Bayley is not entirely free from doubt. If, by "insufficient excuse," he means an excuse which in itself implies an admission that the debt remains due except for the bar created by the act of limitations, the proposition is undoubtedly supported by the general course of the cases. But if his declaration extends to an excuse which, if true, furnishes a real objection to the payment of the claim, in whole or in part, we think it is laid down too broadly.

Both the English and American cases are very well summed up in a note in 4 Johns. Rep. 469, note b. The current of the English decisions seems to be in favor of the principle that any expressions which amount to an admission that the debt was originally due, and has not been paid, will remove the bar created by the act, and revive the original assumpsit. The decisions, however, as to this point, have not been entirely uniform. In Coltman v. Marsh, 3 Taunt. Rep. 380, on a motion to set aside a nonsuit in a case in which the statute of limitations had been pleaded, it appeared that the defendant had said to the plaintiff, "I owe you not a farthing, for it is more than six years since." It was contended that these words ought to have been left to the jury; but the court refused the motion. So, in the case

Pet. 86; Nicholls v. Warfield, 2 Cranch, C. C. 429; Reynold v. Calvert, 3 Cranch, C. C. 211.

If the promise be conditional, the remedy is not revived, unless the condition is performed, nor can payment be enforced except on the terms proposed. Read v. Wilkinson, 2 Wash. C. C. 514; Kampsbell v. Goodman, 6 McLean, 189; Lonsdale v. Brown, 4 Wash. C. C. 148; Davis v. VanZandt, 2 Cranch, C. C. 208; Cattledge v. West, 2 Den. 377; Wakeman v. Sherman, 9 N. Y. 85; Bush v. Barnard, 8 John. 407; Tompkins v. Brown, 1 Den. 247.

The acknowledgment by one partner after dissolution, or by one of two joint makers, not sufficient to revive the debt as to the others. Bell v. Morrison, 1 Pet. 359; Hubert v. Nicoll, 20 Hun. 454.

Mention of demand in deed of trust for creditors, or schedule of insolvent's estate, sufficient acknowledgment to take it out of the statute. King v. Riddle, 7 Cranch, 168; Bowie v. Henderson, 6 Wheat. 514.

Acknowledgment by personal representatives of deceased debtor, not sufficient. Thompson v. Peters, 12 Wheat. 565.

A state statute of limitations cannot bar the prosecution of action for infringement of patent, in a federal court. Read v. Miller, 3 Fish's Pat. Cas. 310.

The statute of limitations of the state may be pleaded as a defense to an action in the Circuit Court for infringement of a patent. Rich v. Ricketts, 7 Blatchf. 230.

Coupons cut from bonds retain the same character as security as the bond, and do not, by being detached, become simple contract debts. City v. Lamson, 9 Wall. 477.

The enumeration of a debt in a schedule to a petition for discharge in insolvency, is not such an admission of the debt as can remove the bar of the statute. Georgia Ins. Co. v. Ellicott, Taney, 130; Matter of Kingsley, 7 Am. L. Reg. N. S. 423; 1 Bank. Reg. 66.

When a debtor admits a certain sum as due, and denies that a larger sum claimed is due, a payment of the amount admitted cannot be treated as a payment on account of the larger sum denied, so as to take the claim for such larger sum out of the statute. U. S. v. Wilder, 13 Wall. 254.

Acknowledgment before debt barred, sufficient: state statute governs. Re Reed, 11 Bank. Reg. 94.

The evidence of new promise must show an express promise to pay, absolute or conditional, made to the creditor or some one acting for him, or to some one in his interest, who may be expected to communicate it to him. Wakeman v. Sherman, 9 N. Y. 85; Meyerhoff v. Froelich, 27 Week. R. 258; Sibert v. Wilder, 16 Kan. 176; Winterton v. Winterton, 2 Hun, 230.

Under the present statute in New York, an acknowledgment, or new promise, relied on to take the case out of the limitation, must be in writing, signed by the party sought to be charged. N. Y. Code, Civ. Pro. s. 395; Esselstyn v. Weeks, 2 Abb. Pr. 272; S. C. 12 N. Y. 635; Adger v. Allston, 15 Wall. 555, 561.

This statute does not alter the requisite acknowledgment or new promise, but only requires it to be signed, and the date of the writing may be shown by parol. Kincaid v. Archibald, 73 N. Y. 189; aff'g 10 Hun. 9.

The above section of the N. Y. Code provides that "this section does not alter the effect of a payment of principal or interest." N. Y. Code, Civ. Pro. s. 635.

Payment of interest by maker of note in the name of, and as agent for, an indorser, and a subsequent approval of the act by the indorser, with knowledge of the facts, is, as to the limitation, equally binding on him as a payment by himself. First Nat. Bk. v. Ballou, 49 N. Y. 155.

Oral evidence is competent to connect the new

of Leaper v. Tatton, 16 East's Rep. 420, the defendant said "that he had been liable, 314*] *but was not liable then, because the bill was out of date." Lord Ellenborough held, at Nisi Pruis, that this might be considered as no more "than pleading the statute of limitations in his own person;" and the verdict was taken on other words spoken at the same time. Yet these words imply very strongly that the debt was originally due, and remains unpaid.

Some of the American cases proceed on the idea of a new promise, for which the ancient debt is a sufficient consideration; and this is a distinction of great importance, where the acknowledgment is connected with anything required by the defendant.

In the case of Clementson v. Williams, 8 Cranch's Rep. 72, this court expressed the opinion that the doctrine of reviving debts barred by the act of limitations, had been carried full as far as it ought to be carried, and that the statutes on that subject ought to be construed like other statutes, so as to effect the intention of the legislature. In that case, a declaration by one partner that the account was originally due, and that he had never paid it, and did not know that it had ever been paid, but supposed his partner had discharged it, was declared to be insufficient to take the case out of the statute. It is true that the partnership was dissolved when this declaration was made, but the court did not put the case on that point. It was determined on the insufficiency of the acknowledgment. We think, upon the principles expressed by the court in 315*] the case in 8 Cranch's Rep. that an *acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim, or, if it be conditional, it may amount to a new assumpsit for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown.

In the case at bar, the defendant said to one witness that if the plaintiff had come forward and settled certain claims the defendant had against him he would have given him his powder; and to another he said "he should be ready to deliver the powder whenever the plaintiff settled a suit which Doctor Ewell had brought against defendant in the court of Alexandria, on account of a patent-right and machine sold to him by the plaintiff."

These declarations do not amount to an unqualified and unconditional acknowledgment that the original debt was justly demandable. They assert a counter claim on the part of the defendant, which he was determined to oppose to that of the plaintiff. He did not mean to give validity to the plaintiff's claim, but on condition that his own should be satisfied. These declarations, therefore, cannot be construed into a revival of the original cause of action, unless that be done on which the revival was made to depend. It may be considered as a new promise, for which *the [*316 old debt is a sufficient consideration, and the plaintiff ought to prove a performance, or a readiness to perform, the condition on which the promise was made.

A distinction seems to have been taken in England between a promise to pay a sum of money, and a contract for the performance of a particular act. In Boydell v. Drummond, 2 Campb. N. P. Rep. 157, Lord Ellenborough

written promise with the original debt. Isley v. Jewitt, 2 Metc. 168, 173.

Promise to pay when able is insufficient without evidence of the ability to pay. Thompkins v. Brown, 1 Den. 247; Chandler v. Glover, 32 Penn. St. 509.

Ability to pay may be inferred from circumstances, as that he was in business and kept open store. Lonsdale v. Brown, 4 Wash. C. C. 86; Everson v. Carpenter, 17 Wend. 419, 422.

Defendant may controvert his ability to pay. Duffie v. Phillips, 31 Ala. 571.

The statute requiring a new promise to be in writing does not prescribe any new rule of evidence of part payment; and part payment may be proved by oral admissions of the debtor. First Nat. Bank v. Ballou, 49 N. Y. 155; 2 Lans, 120; Smith v. Ryan, 66 N. Y. 352.

Part payment must be of something of value, and not a mere indorsement or deduction, and under circumstances showing a recognition of the debt and a willingness to pay it. Blanchard v. Blanchard, 122 Mass. 558; S. C. 23 Am. R. 397; Smith v. Ryan, 66 N. Y. 352; Pickett v. King, 34 Barb. 193; Harper v. Fairley, 53 N. Y. 442; Livermore v. Rand, 26 N. H. 85.

Compulsory payment is not enough. Morgan v. Reynolds, L. R. 7 B. 493; S. C., 2 Moak's Eng. 611, and cas. cit.

The effect of part payment is not impaired by evidence that he supposed the part payment would extinguish the whole. Carrington v. Crocker, 37 N. Y. 336; S. C. 4 Abb. Pr. N. S. 335.

But the effect of part payment may be repelled by proof showing that the debtor, at the time of making it, expressly disputed the balance or the item now contested. Peck v. N. Y. etc., S. Co. 5 Bosw. 226, 237.

An indorsement is sufficient to go to the jury, if in the handwriting of defendant, or of the creditor who is since deceased. Risley v. Wightman, 13 Hun, 163 165; Roseborn v. Billington, 17 John. 182; See also Knight v. Clements, 45 Ala. 89.

When an executor inserted in the inventory of the estate, a note given by himself, which was then outlawed, held sufficient acknowledgment in writing. Morrow v. Morrow, 12 Hun, 386; Ross v. Ross, 6 Hun, 80; Kincaid v. Archibald, 10 Hun, 9; 73 N. Y. 189; Heath v. Grennell, 61 Barb. 190; Clark v. Van Amburg, 14 Hun. 557.

A note indorsed by defendant as part payment, or as security for part of his indebtedness, is sufficient. Smith v. Ryan, 66 N. Y. 352.

So, payment of interest by one of two joint debtors, by direction of the other. Haight v. Avery, 16 Hun, 252.

The partial payment must be clearly established, and not a matter of conjecture. Hulbert v. Nicol, 20 Hun, 454; Burr v. Burr, 26 Penn. 284; Barclay's Appeal, 64 Penn. 69; Knight v. Clements, 45 Ala. 89.

The code of N. Y. does not require that the time when the acknowledgment or promise was made should appear in the writing, and parol evidence of date, or to correct an error in a date, may be given. Kincaid v. Archibald, 73 N. Y. 189.

As to when payment will be construed as a new promise removing the bar of the statute, see Bowe v. Gano, 9 Hun, 6; Smith v. Velie, 60 N. Y. 106; Rich v. Niag. Sav. Bk., 3 Hun, 481; Pursell v. Fry, 19 Hun. 595.

Mere proof of plaintiff's account containing credits in favor of defendant without other proof of an account or demand in favor of defendant against the plaintiff, will not take the case out of the statute. Cuck v. Quackenbush, 13 Hun. 107; see Davis v. Smith, 48 Vt. 52.

An admission in a letter written on Sunday, that a debt is unpaid is sufficient to remove the bar of the statute. Ayers v. Bane, 30 Iowa, 508; see Thomas v. Hunter, 29 Md. 406.

said: "If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment where the cause of action arises from the doing, or omitting to do, some act, at a particular moment, in breach of a contract."

But, without placing the cause on this distinction, the court is of opinion that the original cause of action is not revived, and that there is no error in the judgment.

Judgment affirmed with costs.[1]

320*] [*Demurrer to Evidence.]

FOWLE

v.

THE COMMON COUNCIL OF ALEXANDRIA.

No judgment can be rendered upon a demurrer to evidence until there is a joinder in demurrer; and issue cannot be joined upon the demurrer so long as there is any matter of fact in controversy between the parties.

The demurrer to evidence must state facts, and not merely the evidence conducing to prove them.

One party cannot insist upon the other party joining in demurrer, without distinctly admitting, upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to prove.

Where the demurrer to evidence is defective in these respects, and judgment has, notwithstanding, been rendered upon it for the party demurring, by the court below, the judgment will be reversed in this court, and a new trial awarded.

THIS cause was argued by Mr. Webster and Mr. Swan for the plaintiff,[2] and by Mr. Jones and Mr. Taylor for the defendants. But, as it was determined by the court upon the defects in the demurrer to evidence, it has not been thought necessary to report the arguments of counsel.

Mr. Justice Story delivered the opinion of the court:

*This is a writ of error from the Cir- [*321
cuit Court sitting at Alexandria for the District of Columbia. The original action was brought against the defendants to recover damages asserted to have been sustained by the plaintiff, in consequence of the neglect of the defendants to take due bonds and security from one Phillip G. Marsteller, licensed by them as an auctioneer for the years 1815, 1816, 1817 and 1818, according to the express provisions of the statute in this behalf enacted.

At the trial below, upon the general issue, one of the principal points in controversy was, whether the said Marsteller was, in fact, licensed by the defendants as an auctioneer during the years above stated; and both parties introduced a good deal of evidence for the purpose of supporting or repelling the presumption of the fact. The defendants demurred to the evidence as insufficient to maintain the plaintiff's action, and the record itself contains

1.—The courts both in this country and in England, have frequently expressed their regret that, in construing the statute of limitations, the original text had not been more strictly adhered to, so as to effectuate the intention of the legislature, proceeding upon the reasonable presumption furnished by the lapse of time and upon the salutary policy of discouraging vexatious litigation. See Bryan v. Horsman, 4 East's Rep. 599; Ward v. Hunter, 6 Taunt. Rep. 210; Brandran v. Wharton, 1 Barnw. & Ald. 463; Bartley v. Faulkner, 3 Barnw. & Ald. 288. Mr. Evans, in the notes to his Translation of Pothier on Obligations, speaking of Bryan v. Horsman, has the following observations, 317*] which *are marked by the independent spirit of that able writer; "The decision was certainly in conformity with the series of precedents upon the subject; but, as to the general precedent of adhering to the mere authority of former cases, in opposition to the positive terms of an act of parliament, or an established maxim of law, of placing a secondary above a primary authority, much doubt may fairly, and without disrespect, be entertained. Where the return to the ancient principle would be attended with material detriment, as by disturbing titles to real estates held under the sanction of rules which, however erroneous in themselves, have been established by a series of precedents, the reason for an adherence to the precedents evidently preponderates; but where there will be no immediate inconvenience beyond the immediate case, where the general consequences will be wholly prospective, I cannot but adhere to the opinion (which I have, perhaps, expressed with obtrusive repetition) that the courts of justice have as much authority now to restore the law as they have had before to subvert it: and that a correct principle of law is an authority entitled to a higher respect than an erroneous set of precedents. Considering the law, however, upon this particular subject as now beyond the reach of argument, and aware how much my own opinion, upon the effect of precedent, is different from that which usually prevails in practice, I think it not irrelevant to suggest to persons whose claims are barred by the statute, and who wish to obtain an acknowledgment of the subsistence of the debt, and utility of filing a bill of discovery, obliging the defendant to state whether the debt was contracted, and whether it has been paid. If the subsistence of the debt is admitted, and without perjury it cannot be denied, it will not, if there is any consistency of decision, be of any avail to add a claim to the protection of the statute." 2 Evans' transl. Pothier Oblig. Appendix, No. XV., p. 125, note b. Mr. Serjeant Williams also remarks that, "after all, it might, perhaps, have been as well if the letter of the statute had been strictly adhered to; it is an extremely beneficial law, on which, as it has been observed, the security of all men depends, and is, therefore, to be favored. Green v. Revitt, 2 Salk. Rep. 421, 422. And although it will now and then prevent a man from recovering an honest debt, yet it is his own fault that he postponed his action so long; beside which, the permitting of evidence of promises and acknowledgments, within the six years, seems to *be a dangerous inlet to [*318
perjury." 2 Williams' Saund. 64 b, note.

In the countries governed by the Roman civil law, a much more liberal rule of interpretation has been always applied to their ordinances of prescription or limitation. Thus, in France, though a positive acknowledgment of the debt is sufficient to interrupt the running of the prescription, yet a verbal acknowledgment, when the debt exceeds 100 livres can be of no use to the creditor, as the French law requires all contracts exceeding that amount (now 150 francs, Code Civ. Nap. No. 1341) to be in writing; and this statute of frauds has also been very strictly adhered to by the courts of justice in that country. Pothier, Des Oblig. No. 660, 688; Erskine's Inst. Law of Scotland b. 3, tit. 7, s. 10. But what is called the de-

2.—They cited, as to the liability of corporations in a private action for neglect of their duties, and consequent damages sustained by individuals, Yarborough v. Bank of England, 16 East's Rep. 6, and Riddle v. Proprietors, etc. 7 Mass. Rep. 169.

the whole evidence introduced at the trial, as well that arising from the testimony of witnesses as that arising from written documents. There is no joinder in demurrer on the record, which is probably a mere defect in the transcript, as the court proceeded to give judgment upon the demurrer, in favor of the defendants. Without a joinder in demurrer, no such judgment could be properly entered; and such joinder ought not to have been required or permitted while there was any matter of fact in controversy between the parties.

322*] *Indeed, the nature of the proceedings upon a demurrer to evidence seems to have been totally misunderstood in the present case. It is no part of the object of such proceedings to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts. This doctrine is clearly established by the authorities, and is expounded in a very able manner by Lord Chief Justice Eyre; in delivering the opinion of all the judges in the case of Gibson v. Hunter, before the House of Lords. 2 H. Bl. Rep. 187. It was there held that no party could insist upon the other party's joining in demurrer, without distinctly admitting, upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to prove. If, therefore, there is parol evidence in the case which is loose and indeterminate, and may be applied with more or less effect to the jury, or evidence of circumstances which is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts of which the evidence is so loose, indeterminate and circumstantial, before the court can compel the other side to join *therein. And if there should be such [*323 a joinder without such admission, leaving the facts unsettled and indeterminate, it is a sufficient reason for refusing judgment upon the demurrer; and the judgment, if any is rendered, is liable to be reversed for error. Indeed, the case made for a demurrer to evidence, is, in many respects, like a special verdict. It is to state facts, and not merely testimony which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption. The principal difference between them is, that, upon a demurrer to evidence, a court may infer, in favor of the party joining in demurrer, every fact of which the evidence might justify an inference; whereas, upon a special verdict, nothing is intended beyond the facts found.

Upon examination of the case at bar, it will be at once perceived that the demurrer to evidence, tried by the principles already stated, is fatally defective. The defendants have demurred, not to facts, but to evidence of facts; not to positive admissions, but to mere circumstances of presumption introduced on the other side. The plaintiff endeavored to prove, by circumstantial evidence, that the defendants granted a license to Marsteller as an auctioneer. The defendants not only did not admit the existence of such a license, but they introduced testimony to disprove the fact. Even if the demurrer could be considered as being exclusively taken to the *plaintiff's evidence, [*324

cisory oath may be tendered to the debtor in a manner somewhat similar to a bill of discovery, as suggested by Mr. Evans. Pothier, Des Oblig. No. 660, 684; Code Civ. Nap. art. 2275. That admirable system of jurisprudence which forms the basis of the municipal law of all Europe (except England) is strongly imbued with the principles on which the rules for the prescription or limitation of actions are founded. Many of the eminent judges who have successively adorned the equity tribunals of England have expressed their strong sense of the provident wisdom of these principles, derived from a deep knowledge of human nature, and adopted from a due regard to the peace and order of society. See Cas. temp. King, 156; 4 Bro. Ch. Cas. 269; 1 Ball & Beatt. 156; 2 Jac. & Walk. 140. And for the doctrines of this court as to the application of the analogy of the statute of limitations of possessory action, etc. in equity, see Elmendorf v. Taylor, ante, Vol. X., p. 152, 168, and note a; Ib. p. 177; Prevost v. Gratz, ante, Vol. VI. p. 504; Thomas v. Harvie's Heirs, ante Vol. X. p. 146; Hughes v. Edwards, Vol. IX. p. 489, 497. And, as to the presumption of grants from the lapse of time, see Ricard v. Williams, ante, Vol. VII. p. 59, 109.

The judges in this country have recently shown a strong disposition to break through the chain of authorities by which a mere acknowledgment of the existence of a debt has been permitted to take the case out of the statute of limitations of personal actions. See the very able judgment of Mr. Justice Spencer in Sands v. Gelston, 15 Johns. Rep. 511, in which a powerful effort is made to rescue the statute from a series of misrepresenta-319*] tions which has *nearly destroyed its efficacy. See, also, Roosevelt v. Mark, 6 Johns. Ch. Rep. 266, 290, where the authority of Sands v. Gelston is recognized by Mr. Chancellor Kent, and the principle is asserted, that an acknowledgment, to take a case out of the statute of limitations, must be of a present, subsisting debt; and, if the acknowledgment be qualified so as to repel the presumption of a promise to pay, it is not evidence of a promise to pay.

In the case referred to in the text, of Clementson v. Williams, 8 Cranch's Rep. 72, this court stated that it had "been frequently decided that an acknowledgment of a debt barred by the statute of limitations takes the case out of the statute, and revives the original cause of action. So far as decisions have gone on this point, principles may be considered as settled, and the courts will not lightly unsettle them. But they have gone full as far as they ought to be carried, and this court is not inclined to extend them. The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away." The court proceed to observe that, in the case then in judgment, there was "no promise, conditional or unconditional; but a simple acknowledgment." This acknowledgment goes to the original justice of the account; but this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not, then, sufficient to take the case out of the act, that the claim should be proved, or be acknowledged to have been originally just; the acknowledgment must go to the fact that it is still due. In the case at bar the acknowledgment of J. Clarke is, that he had not discharged the account presented to him, but he does not say that it was not discharged. His partner may have paid it without the knowledge of Clarke; and, consequently, the declaration of Clarke that he had not himself paid it, and that he did not know whether his partner had paid it or not, is no proof that the debt remains due, and therefore is not such an acknowledgment as will take the case out of the statute of limitations."

it ought not to have been allowed without a distinct admission of the facts which that evidence conduced to prove. But when the demurrer was so framed as to let in the defendant's evidence, and thus to rebut what the other side aimed to establish, and to overthrow the presumptions arising therefrom, by counter presumptions, it was the duty of the Circuit Court to overrule the demurrer, as incorrect, and untenable in principle. The question referred by it to the court was not a question of law, but of fact.

This being, then, the posture of the case, the next consideration is, what is the proper duty of this court, sitting in error. It is, undoubtedly, to reverse the judgment, and award a venire facias de novo. We may say, as was said by the judges in Gibson v. Hunter, that this demurrer has been so incautiously framed that there is no manner of certainty in the state of facts upon which any judgment can be founded. Under such a predicament, the settled practice is, to award a new trial, upon the ground that the issue between the parties, in effect, has not been tried.

Judgment reversed, and a venire facias de novo awarded.[1]

325*] [*Local Law.]

PILES et al., Plaintiffs in Error, v. BOULDIN et al., Defendants in Error.

Under the statute of limitations of Tennessee of 1797, c. 43, s. 4, peaceable and uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant, or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession.

THIS cause was argued by Mr. **Isaacs** for the plaintiffs in error, no counsel appearing for the defendants in error.

Mr. Justice **Duvall** delivered the opinion of the court:

This cause is brought up by writ of error from the judgment of the Circuit Court for the district of West Tennessee.

The lessee of Bouldin and others, who were plaintiffs in the court below, brought an ejectment against Conrad Piles and others, for a tract of land containing 2,500 acres, lying in Overton county, on Wolf River, granted by the state of North Carolina, by patent dated July 10, 1788, to Thomas and Robert King, who, by deed bearing date 25th of March, 1793, for a valuable consideration, conveyed the same to David Ross, of Virginia. Ross, by 326*] his last will and testament, *duly proved and recorded, devised the same to his four children, namely, Eliza Myers, wife of Jacob Myers, Amanda A. Duffield, wife of John Duffield, Frederick A. Ross, and David Ross, Jun., the lessors of the plaintiff, as tenants in common in fee.

The defendant, Piles, rested his defense on the location of several grants which were offered in evidence on the trial: (1) A grant dated 24th of December, 1798, founded on a warrant dated 10th of March, 1780, by the state of North Carolina, to Henry Rowan, for a tract containing 320 acres, called Walnut Grove, lying in Hawkins county, on Spring Creek. (2) A grant bearing the same date, and founded on the same warrant, by the state of North Carolina to Henry Rowan, for another tract containing 320 acres, adjoining Walnut Grove, and having the same beginning. This tract was conveyed by deed dated 22d of September, 1800, for a valuable consideration, to Conrad Piles, and is described to include a cabin known by the name of Livingston's cabin. (3) A grant bearing date on the 15th of August, 1808, to Conrad Piles, by the state of Tennessee, for a tract lying in Overton county, on Rotton's fork of Wolf River, containing 200 acres; and, (4) Another tract adjoining the former, containing the like quantity, granted by patent of the same date to Conrad Piles. Piles possessed both the tracts granted to Rowan; one by purchase, the other by a parol lease for years. All these tracts located on the plat exhibited on the trial, and none of the locations were contested. The title *of [*327 the plaintiffs is admitted to be regularly deduced from the first patentee.

The defendants read in evidence the two grants before mentioned from the state of North Carolina to Henry Rowan, for 320 acres each; the first is described as lying in Hawkins county, "beginning on two hickories, an ash, and a Spanish oak, on the north side of Spring Creek; running north 50 poles to a stake; west 335 poles to a stake; south 167 poles to a stake, crossing Spring Creek; east 335 poles to a stake; and thence to the beginning." The second tract has the same beginning, calls "to adjoin the first, running east 335 poles to a stake; north 167 poles to a stake; west 335 poles to a stake; then to the beginning." Also, two grants from the state of Tennessee to himself for 200 acres each, dated 15th of August, 1808. These grants interfere with the plaintiff's grant of 2,500 acres, and cover all the land of which the defendant was in possession within the bounds of the plaintiff's grant at the commencement of the suit, viz., the 17th of October, 1817. Nearly one-half of Rowan's tract, called Walnut Grove, is included within the tract for which the ejectment is brought; the settlement called Livingston's cabin lies principally in that part of Walnut Grove thus running foul of the tract owned by the lessors of the plaintiff. Helm's improvement is contained partly in Walnut Grove, and within one of the tracts of 200 acres granted to Piles, which is included almost wholly in the tract of the lessors of the plaintiff, and includes both Livingston's cabin and Helm's *settle- [*328 ment. Piles has made another settlement included in the tract called Walnut Grove, a part of which is contained within the lines of the tract for which the ejectment is brought.

The defendant, Piles, proved that the grants before mentioned, to Rowan and to himself, covered all the lands of which he was possessed within the grant of the plaintiffs; he also proved

1.—Vide, United States Bank v. Smith, ante, p. 171.

that the grant of Walnut Grove to Rowan included Livingston's cabin as represented on the plat, and that he had been in the peaceable possession thereof for more than eight years before the commencement of this suit; and that he had also been in possession of a piece of ground within one of the grants to himself, and which is also within the plaintiff's grant, and which he had held and cultivated more than eight years before the commencement of this suit; and relied on the statute of limitations. It was also proved that Rowan, in 1806, had made a parol lease of the tract called Walnut Grove, to one Helm, for six years, in consideration of certain improvements; that Helm took possession, built a cabin, and cleared a few acres of land; that, in the fall of 1807, Piles bought his lease, and agreed to make the further improvements stipulated, and return the possession to Rowan; that he took possession immediately, and continued in possession, claiming for himself, and not as tenant for Rowan, though he did not mention his claim until after he had bought Helm's lease.

Under these circumstances, the defendant, Piles, by his counsel, moved the court to in-
329*] struct *the jury that if the deed from Rowan to Piles contained, in its first part, a sufficiently certain description, according to the evidence, of the land included in Rowan's first grant, that then they should disregard any subsequent description therein which should be repugnant to said first description. And, also to charge the jury that if the deed from Rowan to the defendant did not cover said land, yet, that if they believed the defendant went into possession of the land contained in the said first grant to Rowan, under the lease from Rowan to Helm, as stated in the evidence, the defendant could defend himself in this action of ejectment, as tenant of Rowan, without making his landlord a defendant; that, as between Rowan and the defendant, he, the defendant, could not change the nature of his possession, but that the same would operate for Rowan's benefit to perfect his title under the statute of limitations as against the plaintiff and persons claiming under adversary grants; and that, if the defendant's possession had perfected Rowan's title, and made it a better title than the plaintiff's, then, the defendant having shown a better outstanding title, the plaintiff would not be entitled to recover. Which instructions the court refused to give, but instructed the jury that Piles could not avail himself of the statute, and that his *deed from Rowan, by legal construction, did not cover the land included in Rowan's first grant. From this opinion of the court an exception was taken, and the cause is now before this court for revision.

330*] *The counsel for the plaintiffs in error insists that the Circuit Court erred on both points.

The two grants to Rowan begin at the same place, have the same form and dimensions, and contain the same quantity of land. The deed from Rowan to Piles adopts the courses and distances of the second grant precisely, and proceeds to describe it as including the cabin commonly called Livingston's cabin; but Livingston's cabin is included in the first grant called Walnut Grove. The counsel for the plaintiffs in error contend that if the first grant is not conveyed by the deed, it is, at least, doubtful which of the two tracts was intended to be conveyed; and that, therefore, it was a question of location to be settled by the jury, not a question of law to be decided by the court. But this court is of a different opinion. Admitting the universality of the maxim, de jure respondent judices, de facto juratores, it will not be denied that it is the province of the court to decide upon the force and legal effect of a sealed instrument. The deed conveys, by metes and bounds, the land contained in the second grant to Rowan, corresponding precisely, in courses and distances, from the beginning to the given line inclusive; and will not admit of the construction that the first tract, called Walnut Grove, was conveyed, merely because it includes Livingston's cabin. The description in the deed was full and complete without reference to Livingston's cabin, the mention of which appears evidently to be a mistake from inattention in the writer of the deed, and *conveyed [*331 no right or interest whatever in the first grant. And it is conclusive, in the construction of this deed, that it could not have been the intention of either party that the tract called Walnut Grove was intended to be conveyed, that it calls to begin "on the corner of the Walnut Grove tract." There is no error in the judgment of the Circuit Court in refusing to instruct the jury according to the first prayer of the counsel for the defendant.

The second question arises upon the plea of the statute of limitations.

By the 4th section of the act of the state of Tennessee, passed in the year 1797, ch. 43, peaceable possession, for seven years, by any person, under a grant or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession; and all persons who neglect, for that period, to prosecute their claims, are declared to be forever barred. There is the usual saving to infants, etc. In this case, the record affords abundant proof, which is uncontradicted, that Piles had peaceable and uninterrupted possession of all the settlements made by him, comprehended within the lines of the plaintiff's grant, and claimed to hold the same as his own, adverse to the claims of all persons whatever. The settlement called Livingston's cabin, and that made by Helm, and transferred by Helm to Piles, are included in his own grant for two hundred acres, dated August 15, 1808, and also within the plaintiff's grant, and principally within that part of Rowan's first *grant which interferes [*332 with that of the plaintiffs. His third possession is contained within Rowan's first grant, which interferes with the plaintiff's grant, as has already been stated. All these possessions, being founded on grants, are protected by the act of limitations, the provisions of which are too plain to be misunderstood.

On this point, the opinion of the Circuit Court is reversed, and a venire facias de novo awarded.[1]

1.—Vide ante, Somerville v. Hamilton, Vol. IV. p. 230; Patton v. Eaton, Vol. I. p. 476; M'Iver v. Ragan, Vol. II. p. 25; M'Clung v. Ross. Vol. V. p. 116; Walker v. Turner, Vol. IX. p. 541.

[Alien. Local Law.]

DOE ex dem. GOVERNEUR'S HEIRS, v. ROBERTSON et al.

An alien may take real property, by grant, whether from the state or a private citizen, and may hold the same until his title is devested by an inquest of office, or some equivalent proceeding.

The act of assembly of Virginia of 1779, c. 13, s. 3, secured from escheat all the interest acquired by aliens in real property, previous to the issuing of the patent, and left the rights acquired by them under the patent to be determined to the general principles of the common law.

The title of an alien thus acquired by patent in 1784, under the laws of Virginia, and subsequently confirmed to him by a legislative act of Kentucky in 1796, and to his heirs, and their grantees, by an act in the same state in 1799, will overreach a grant made by Virginia, to a citizen in 1785, and defeat the claim of all persons holding under such grant.

These legislative acts were valid, under the compact of 1789, between the states of Virginia and Kentucky.

333*] *THIS was an action of ejectment brought in the Circuit Court of Kentucky, in which the lessors of the plaintiff gave in evidence a patent from the comonwealth of Virginia, for the lands in controversy, lying in Kentucky, to Robertus S. Brantz, then an alien, bearing date the 11th of October, 1784, founded on a land-office treasury warrant. They also gave in evidence a certificate of naturalization of the said Brantz, in the state of Maryland, on the 8th of November, 1784, and an act of the legislature of Kentucky, passed in 1796, entitled. "An act for the relief of Robertus Samuel Brantz," which recited that he was an alien when the patent issued; confirmed his estate as fully as if he had been a citizen at the time of the grant, with a proviso, that nothing in the act should affect the right or title of any other person or persons, but only "the right which this commonwealth may have in the said lands." The said Robertus S. Brantz died in 1797, leaving a son, Johannes Brantz, an alien, incapable of inheriting the lands. An act of the legislature of Kentucky, passed December 9th, 1799, reciting that Robertus S. Brantz had departed this life indebted to Isaac and Nicholas Governeur; that Johannes Brantz, his son and executor, and an alien, made a power of attorney to the said N. Governeur to sell the lands of the said R. S. Brantz, for the payment of the debt, which sale had been made; therefore "all the right which the said R. S. Brantz, had, before, and at his death," and the right of the said Johannes Brantz was declared to be vested in *the said I. and N. Governeur, [*334 "as fully as if the said Robertus S. Brantz had done in his life-time, or as if the said Johannes Brantz had been a naturalized citizen when he executed the power of attorney for the sale and conveyance of the said lands."

The defendants claimed title under a grant of the commonwealth of Virginia, dated the 2d of December, 1785, to one Duncan Rose, and proved a regular derivation of title from him.

The plaintiffs thereupon moved the court to instruct the jury that if they found that the grants to R. S. Brantz covered the lands in controversy, that the lessors of the plaintiff duly derive title under N. and I. Governeur, and that R. S. Brantz neither conveyed nor devised those lands, and left no heirs capable of inheriting them, and that the defendants were in possession at the commencement of this suit, that the verdict should be for the plaintiff.

The defendants moved the following instructions:

1. That if the jury find, from the evidence, that Robertus S. Brantz was an alien at the time when the patent given in evidence was procured by him, that nothing passed to him by said grant, but that it was void.

2. That if Robertus S. Brantz died, leaving his son an alien, and having no relations who were citizens of the United States, or of any of the States, then, upon his death without heirs, the title, if it had passed out of the commonwealth by the patent, was immediately vested in the commonwealth; and if the grant to Duncan

NOTE.—Alienage, effect of as to title.

By the common law an alien may take by purchase, by grant or devise, but not by descent. He has not capacity to hold land, and the land may be seized into the hands of the sovereign. But until the lands are so seized, the alien has complete dominion over them. People v. Conklin, 2 Hill. N. Y. 67; Wadsworth v. Wadsworth, 12 N. Y. 376; Jackson v. Lunn, 3 Johns. Cas. 109; Fairfax v. Hunter, 7 Cranch. 603; Craig v. Radford, 3 Wheat. 594; Jones v. McMasters, 20 How. 8; Levee v. McCartee, 6 Pet. 102; Contee v. Godfrey, 1 Cranch, C. C. 479; Orr v. Hodgson, 4 Wheat. 453; Bollerman v. Blake, 11 N. Y. Week. Dig. 555; Hall v. Hall, 81 N. Y. 130.

As to laws of Maryland on this subject, see Spratt v. Spratt, 1 Pet. 343; 4 Pet. 393; Matthews v. Rae, 3 Cranch. C. C. 699.

As to laws of Kentucky, see Beard v. Rowan, 1 McLean, 135; Butterworth's case, 1 Wood. & M. 323.

As to the statutes of Rhode Island, Cross v. Devalle, 1 Wall. 5.

One born in England before the year 1755, and who always resided there, as an alien, and could not in 1795 take lands in Maryland by descent from a citizen of the U. S. Dawson v. Godfrey, 4 Cranch, 321.

The naturalization of the father in 1795 confers the rights of citizenship on a child then resident in Scotland, and who came to the U. S. while an infant, and prior to the act of April 14, 1802, ch. 288, by virtue of this last act. Campbell v. Gordon, 6 Cranch, 176.

The alienage of the vendee is not sufficient ground to entitle the vendor to a decree rescinding a contract for the sale of lands, though perhaps it might afford a reason for denying a specific performance against a vendee. Hepburn v. Dunlap, 1 Wheat. 197.

A native of France, naturalized in the U. S. died in 1799, seized of real estate in Maryland, intestate, leaving heirs natives and residents of France, held, that such heirs were entitled to recover the real estate in ejectment. Chirac v. Chirac, 2 Wheat. 259.

Where one dies, leaving issue, who are aliens, the latter are not deemed his heirs-at-law; but the estate descends to his next of kin who have inheritable blood, in the same manner as if no such alien issue were in existence. Orr v. Hodgson, 4 Wheat. 453; Blight v. Rochester, 7 Wheat. 535.

British subjects, though born before the revolution, are equally incapable with those born subsequent to that event, of inheriting or transmitting the inheritance of lands in this country. Ibid.

Natural born citizens in Maryland held not capable of taking by descent, through their father, he being an alien and still living. McCreery v. Somerville, 9 Wheat. 354.

An alien mortgagee may come into equity and have the property pledged for the security of his debt sold for the purpose of raising the money. His demand is merely a personal one, the debt being considered as the principal, and the land merely as an incident. Hughes v. Edwards, 9 Wheat. 48.

The settled doctrine of this country is, that persons born here, but who left the country before the declaration of independence and never returned here, became an alien, and incapable of taking land

335*] *Rose, from the commonwealth of Virginia, includes the land in controversy, then the act of Kentucky, granting the land to N. and I. Governeur, cannot, under the articles of the compact between Virginia and Kentucky, overreach the grant to Duncan Rose from the commonwealth of Virginia; and they ought to find for the defendants.

3. That the plaintiff, showing no title or connection with Robertus S. Brantz, but through and by virtue of the act of Kentucky, given in evidence by plaintiff, such grant from Kentucky is, by virtue of the 3d and 5th articles of the compact with Virginia, of inferior dignity, and inoperative to overreach the grant by the state of Virginia to Duncan Rose.

4. That the acts of Kentucky of 1796 and 1799, given in evidence by the plaintiff, being in pari materia, are to be taken together; that the latter act is explained by the former and by operation of said two acts, and of the said compact between Virginia and Kentucky, the title of the plaintiff, as offered in evidence by him, is younger in date, and inferior in dignity, and cannot overreach the grant to Duncan Rose, so far as those grants conflict.

5. That if they find that the grant to Duncan Rose, given in evidence, includes the land held thereunder by the defendants, then the grant of the commonwealth of Kentucky, in the act given in evidence by the plaintiff, is the junior and inferior claim of title, and the jury ought to find for the defendants.

336*] *The judges of the Circuit Court being divided in opinion upon the instructions moved, the division was certified to this court.

The counsel for the plaintiff made the following points:

1. That Robertus S. Brantz, both at common law, and by the special provisions of the act of Virginia of 1779, c. 13, s. 3, upon his naturalization, took and held an indefeasible title to the lands in question, under his grant.

2. That, consequently, the junior grant to Duncan Rose was void, and conferred no title; and, of course, could not have estopped Virginia if no separation had taken place; and, therefore, could not estop Kentucky, by the articles of compact between the two states, from vesting the title to those lands, by the legislative act of 1799, in I. and N. Governeur.

The defendants, counsel insisted,

1. That R. S. Brantz being an alien when the grant of Virginia issued to him, the title did not pass out of the commonwealth; therefore, the grant to Duncan Rose must be considered as the prior legal title.

2. That under the compact of 1789, between Virginia and Kentucky, the legislative acts of Kentucky of 1796 and 1799, under which the plaintiff claims, cannot overreach the prior grant from Virginia to Rose.

Mr. Sampson, for the plaintiff, argued (1) that *it had been conclusively settled [*337 by an uniform series of decisions in this court, that an alien can take, and hold, real property, either by grant or devise, until office found.[1] The grantee of the state takes by purchase as much as a private grantee.[2] In Craig v. Radford[3] the alienage of a grantee from the state was presented distinctly as a positive bar to his taking, but the court determined the grant to be good, and the decision of that point was inevitably involved in the determination of the cause. And there was no reason, either of policy or law, for making a distinction between a public and a private grant. The title of the government being devested by the grant, which is matter of record, it could not be revested again but by an inquest of office, by which alone the fact of alienage can be determined. Every person resident in the country is presumed to be a citizen until the con-

1.—Fairfax v. Hunter, 7 Cranch's Rep. 603; Craig v. Radford, 8 Wheat. Rep. 594; Craig v. Leslie, 3 Wheat. Rep. 563; Orr v. Hodgson, 4 Wheat. Rep. 453.

2.—Co. Litt. 18 b.

3.—3 Wheat. Rep. 594.

by descent. The right to inherit depends upon the existing state of allegiance at the time of the descent cast. Ingles v. Sailors' Snug Harbor, 3 Pet. 126; Dawson v. Godfrey, 4 Cranch, 321.

Under the laws of New York, one citizen cannot inherit in the collateral line to the other, where he must take his pedigree or title through a deceased alien ancestor. Lessee of Levy v. McCartee, 6 Pet. 162; Luhrs v. Eimer, 80 N. Y. 171.

See further as to who are aliens: Jackson v. Clark, 3 Wheat. 1; Orr v. Hodgson, 4 Wheat. 453; Blight v. Rochester, 7 Wheat. 535; McCreery v. Somerville, 9 Wheat. 354; Hughes v. Edwards, 9 Wheat. 48.

A citizen of the U. S. who purchased land in Texas whilst it was a foreign country, although incompetent as an alien to that country to hold land there after office found, became entitled to hold the same on the admission of Texas into the Union, office not having been previously found. Osterman v. Baldwin, 6 Wall. 116. See Hammekin v. Clayton, 2 Woods, 336.

A court of equity will treat the devise of an alien as valid against heirs-at-law until the title of the alien has been impeached by proceedings on the part of the state. At common law an alien can take lands by purchase, that is by grant or devise, though not by descent; although the estate vests in the alien, not for his own benefit, but for the benefit of the state. If the state sees fit to seize the lands, the same rule must prevail in equity, for it is a general principal of equity that equitable estates are subject to the same modes and conditions as corresponding legal estates. Cross v. DeValle, 1 Cliff. 282.

An alien female who intermarries with a citizen becomes herself a citizen, by virtue of such marriage and may take and hold lands in New York, by purchase or descent. Luhrs v. Eimer, 80 N. Y. 171; 15 Hun. 399; Renner v. Muller, 57 How. Pr. 229.

The incapacity of alien heirs of a citizen who died intestate, to take lands of which he died seized, was not removed by the New York act of 1845 (s. 4, chap. 15, Laws of 1845) enabling resident aliens to take and hold real estate. Id. Larrean v. Davignon, 5 Abb. Pr. N. S. 367.

Under the provisions of the said N. Y. act of 1845, a resident alien devisee of a citizen, upon acceptance of the devise takes a conditional title absolute as against the heirs of the testator, but defeasible by the state until he complies with the conditions as to aliens. Hall v. Hall, 81 N. Y. 130.

Non-resident aliens take under the act of New York of 1855 as if they were citizens, with full power of disposition and transmission. Harrison v. Harrison, 3 Law. Bull. N. Y. 65.

Under the N. Y. act of 1798, an alien has power to convey. Adrich v. Mantor, 13 Wend. 458; and an alien heir may take by descent. Cumberland v. Graves, 7 N. Y. 305; and a devise of lands by an alien, to alien trustees, is valid. Howard v. Moot, 64 N. Y. 262; 2 Hun. 475.

By the common law, lands held by an alien on his death vest in the state. Larrean v. Davignon, 5 Abb. Pr. N. S. 367.

Inheritance between brothers is immediate, and not through the father, and will not be hindered by the alienage of the father. Smith v. Mulligan, 11 Abb. N. S. N. Y. 438.

grant was absolutely void, although the fact of the patent previously issued for the same land does not appear on the face of his grant, but is to be proved by other evidence. But, when the authorities speak of a grant as void, all that is meant is, that it shall be held inoperative and of no legal effect, whenever the facts which invalidate it shall appear. Whenever, by the pleadings between other parties, the facts show the King's title, judgment shall be given for him, although he is not a party.[1] A great variety of cases might be mentioned where a resort to evidence in pais would be necessary to determine the validity of the grant. That the grant to Rose was not void, in the sense supposed, but that it was evidence of a contract [*347] between Virginia and the grantee; *that it passed a vested interest capable of being transmitted from one to another by deed or will; that such interests of the junior patentee are treated as legal and not mere equitable interests, and still less as nonentities, a number of cases from the local decisions were cited.[2]

As to the case of Elmendorf v. Carmichael,[3] which had been cited as determining the questions in this cause, it could have no weight as authority in this court, because it did not decide the point as to the construction of the compact of 1789; a subject peculiarly of federal jurisdiction, which was involved in several other cases, all of which would be brought before this court for revision. The opinions, therefore, of the state judges, in that case, could be entitled to no more respect than the judgments of any tribunal, state or national, which this court might be called on to revise on error.

The case of Craig v. Radford,[4] had been cited as determining the question that an alien can take by direct grant from the government. But, it would be found, upon examination, that Sutherland, under whom the respondent claimed in that case, was entitled to a bounty in land under the proclamation of 1783, for military services during the preceding war, and that he obtained his warrant and survey in 1774, at which time he was not an alien. He [*348] did not obtain a *patent until 1788, and it is not, therefore, of this that the court speak, when they say that he took the estate "during the war," and was not devested by any act of Virginia before the treaty of 1794, by which his title was confirmed. But the court meant to refer to the act of Virginia of 1779 (passed during the war), by which the legislature declared that the surveys under the proclamation of 1763 were valid. All the other cases cited to show that an alien can take by grant, and hold, until office found, are cases of grants, or devises, from private individuals to an alien. The distinction between such conveyances and grants from the crown is to be found in all the authorities, from the year books down to the latest elementary writers.

Mr. Justice Johnson delivered the opinion of the court:

This cause comes up from the Circuit Court of Kentucky, upon a difference of opinion certified from that court.

The case was this: Robertus S. Brantz, through whom the plaintiffs make title, obtained, on the 11th of October, 1784, two grants from the commonwealth of Virginia, comprising, together, ten thousand acres of land lying in Kentucky.

One Duncan Rose, through whom the defendants make title, obtained a similar grant, of the date of December 2d, 1785, covering a part of the same land.

Robertus Brantz, at the date of his patent, *was an alien, but became natural- [*349] ized in Maryland on the 8th of November, 1784, less than one month after the date of his patent, and near a year before that of the defendant was obtained.

Some doubts appear to have been raised on the validity of Brantz's patent at an early period, and, in the year 1796, the legislature of Kentucky passed an act, reciting that Brantz was an alien when the patent issued, and affirming his estate as against the rights of the commonwealth, leaving it to operate as to all other persons as if that act had not passed.

Brantz died in 1797, leaving a son, Johannes Brantz, an alien, incapable of inheriting, and owing debts to a considerable amount to the Governeurs. The son, unaware of his disability, executed a letter of attorney, under which the land was sold, and the purchasers, the Governeurs, subsequently discovering this defect, obtained another act from that state affirming their estate.

And this makes out the plaintiff's title.

The defendants' title is regularly deduced through the patent to Duncan Rose.

The record presents, first a general instruction prayed for in behalf of the plaintiffs on their right to recover. And of this there can be no question independently of the points made in the instructions moved for by the defendant, having regard to the effects, (1st) of his alien character; (2d) that of his son; and (3d) of the compact between Virginia and Kentucky on the rights of the parties.

*These will be considered in their [*350] own language, and in their order. The first is,

"That if the jury find that R. S. Brantz was an alien at the time when the patents given in evidence were procured by him, nothing passed to him by the said patent, but that it was void."

Although this, as well as the subsequent prayers of the defendant, purport to present distinct propositions, it will be unavoidable that they should be considered in connection with each other, and with reference to the general prayer of the plaintiff for a charge in his favor The defendant's object in propounding them is to repel the prayer of the plaintiff, and to obtain a charge that the jury should find in his favor. They are introduced, in fact, as grounds upon which the prayer of the plaintiff should be rejected.

And, in this view of the subject, the proposition stated draws after it the consideration of

1.—Plowd. Rep. 243.

2.—1 Marsh. Kentuck. Rep. 525; 3 Bibb's Rep. 535; 4 Bibb's Rep. 225; 1 Monr. Rep. 48, 189, 188.

3.—3 Littel. Rep. 473.

4.—3 Wheat. Rep. 594.

another, to wit: Whether, although the patent to Brantz should be pronounced void, in consideration of his incapacity to take at the time of its emanation, his subsequent naturalization did not relate back so as to obviate every consequence of this alien disability.

On this subject of relation, the authorities are so ancient, so uniform and universal, that nothing can raise a doubt that it has a material bearing on the cause, but the question whether naturalization in Maryland was equivalent to naturalization in Kentucky. To this the articles of confederation furnish an affirmative an- [*351
351*] swer, and the *defendant has not made it a question. Nor, indeed, has he made a question on the subject of relation back; yet it is not easy to see how he could claim the benefit of an affirmative answer on the question he has raised, without first extricating his cause from the effects of the subsequent naturalization, upon the right derived to Brantz through his patent.

The question argued, and intended to be exclusively presented here, is, whether a patent for land to an alien be not an absolute nullity.

The argument is, that it was so at common law, and that the Virginia land laws, in some of their provisions, affirm the common law on this subject.

We think the doctrine of the defendant is not to be sustained on either ground.

It is true, Sir William Blackstone has expressed himself on this subject with less than his usual precision and circumspection; but, whether the context be considered, or his authorities examined, we shall find that this doctrine cannot be maintained. The passage relied on is found in his second volume (p. 347, 348, of Christian), in these words: "If the King grants lands to an alien, it operates nothing." But it would be doing injustice to the writer not to weigh his meaning by the words preceding and following this sentence. His language is this: "But the King's grant shall not enure to any other intent than that which is precisely expressed in the grant. As, if he grants lands to an alien, it operates nothing; [*352
352*] for such grant shall not also *enure to make him a denizen, that so he may be capable of taking by grant." And the authority referred to is Brooke's Abr. Patent, 62, and Finch's Law, 110. It ought to be 111.

If we could admit that this learned writer could have committed so egregious a blunder as to suppose that an alien must be made denizen before he could take by grant, as a general proposition, he might stand charged with having greatly transcended his authorities. But when it is considered that the effect of an alien's being made denizen is not to enable him to take lands, but to enable him to hold them against the King, we at once see that his language is to be limited to the proposition laid down in the previous sentence, to wit, that the King's grants shall not enure to the double intent, when made to an alien of vesting in him the thing granted, and then, by implication, constituting him a denizen, so as to enable him to hold an indefeasible estate.

In the case referred to as abridged by Brooke, the latter proposition alone is laid down; and the case in the year books, which the author cites, affirms nothing more. This was Bagot's case (7 Edw. IV., p. 29), which appears to have occasioned a vast deal of discussion for several terms in the British courts, and in which Bagot, and another grantee of an office by the crown, brought assize, and the defendant pleaded, as to Bagot, alien nee. In that cause there was no office found, and the question on this part of the case distinctly was, whether the grant did not both vest the right to the office, and create a capacity *to maintain assize to recov- [*353
er it. So, in a case in 4 Leon. 82, the same question was raised, where there had been an inquest of office; and in both the decision distinctly was, that the King's grant did not enure to an intent not expressed distinctly as its object; or, in other words, to a double intent, one direct, the other incidental. In the latter case the alien's right had been affirmed by a patent from the Queen, and the point argued was, that the right of the party was protected by the act of the Queen against the effect of the office found. But, in both these cases the decision was no more than this, that the act of the crown did not incidentally make the party a denizen; and while an alien, he could not be enabled, by any act of the crown, to exercise rights which appertained only to denizens, or to persons naturalized, or natural born subjects.

The other authority to which Blackstone refers, to wit, Finch, imports no more than that an alien shall not maintain an action real or mixed, but has no direct bearing upon the doctrine for which it seems to have been cited by the author.

The words in the passage in Blackstone, more immediately relied on by the defendant, to wit, "If he grants to an alien, it operates nothing," are obviously taken from another passage in Brooke's Abr. Patent, 44, which article gives those words as a dictum of Keble, one of the judges. And by referring to the authority in *the year book on which the author re- [*354
lies, to wit, 2 Hen. VII., 13, the dictum is there found attributed to Keble. But, in that case, as in Bagot's case, there is nothing more argued than that the King's grant shall not enure to the double purpose. And the observation of Keble is only made by way of illustration, accompanied by several others of a similar character, such as that a grant of land to a felon shall not operate as a pardon; or a grant to a company not corporate carry with it a grant of incorporation.

It is clear, therefore, that this doctrine has no sufficient sanction in authority; and it will be found equally unsupported by principle or analogy.

The general rule is positively against it, for the books, old and new, uniformly represent the King as a competent grantor in all cases in which an individual may grant, and any person in esse, and not civiliter mortuus, as a competent grantee. Femes covert, infants, aliens, persons attainted of treason or felony, clerks, convicts, and many others, are expressly enumerated as competent grantees. Perkin's Grant, 47, 48, 51, etc.; Comyn's Dig. Grant, B, 1. It behooves those, therefore, who would accept aliens, when the immediate object of the Kings' grant, to maintain the exception.

It is argued that there is an analogy between this case and that of the heir, or the widow, or the husband, alien; no one of whom can take,

but the King shall enter upon them without office found. Whereas, an alien may take by 355*] purchase, *and hold until devested by office found. It is argued that the reason usually assigned for this distinction, to wit, "Nil frustra agit lex," may, with the same correctness, be applied to the case of a grant by the King to an alien, as to one taking by descent, dower or curtesy. That the alien only takes from the King to return the subject of the grant back again to the King by escheat. But this reasoning obviously assumes as law the very principle it is introduced to support; since, unless the grant be void, it cannot be predicated of it that it was executed in vain. It is also inconsistent with a known and familiar principle in law, and one lying at the very root of the distinction between taking by purchase and taking by descent. It implies, in fact, a repugnancy in language; since the very reason of the distinction between aliens taking by purchase, and by descent is, that one takes by deed, the other by act of law; whereas a grantee ex vi termini, takes by deed and not by act of law. If there is any view of the subject in which an alien, taking under grant, may be considered as taking by operation of law, it is because the grant issues, and takes effect, under a law of the state. But this is by no means the sense of the rule, since attaching to it this idea would be to declare the legislative power of the state incompetent to vest in an alien even a defeasible estate.

That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established 356*] that the *reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society, and a desire to protect the individual from arbitrary aggression. Hence it is usually said that it has regard to the solemnity of the livery of seisin, which ought not to be devested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which, from its good sense and applicability to the nature of our government, makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it. "Every person," says he, "is supposed a natural born subject, that is resident in the kingdom, and that owes a local allegiance to the King, till the contrary be found by office." This reason. it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold.

It remains to examine the effect of the Virginia laws upon grants made to aliens. Those laws provide that aliens may purchase warrants for land, and pass them through all the stages necessary to obtain a patent, and may exercise every power over the inchoate interest thus acquired, in the same manner with citizens: and after returning the plat and survey to the register's office, shall be allowed eighteen months to become a citizen, or transfer their interests to those who are citizens.

357*] *These provisions, it is contended, import a prohibition to issue a grant to an alien.

But we think the inference by no means unavoidable; and, in addition to the general and strong objections to raising an enactment by inference, consider it as unsupported either by the policy or the provision of the act.

It is well known that the purchaser of a warrant, under the laws of Virginia, acquired a beneficial interest in the soil, that the survey located that interest upon a particular portion of soil by metes and bounds, and the interest thus acquired was devisable, assignable, descendible, and wanted, in fact, nothing but a mere formality to give it all the attributes of a freehold. Hence a doubt arose, not whether an alien could acquire an interest under a warrant and survey, but whether that interest might not be subject to escheat. The object of the law was to encourage aliens to purchase, and to settle the country; and all its provisions on this subject were intended to enlarge his rights, not to restrict them. Aliens arriving in the country could not immediately be naturalized, but they might immediately enter upon those arrangements for establishing themselves when naturalized, which were necessary to precede a grant. Hence the only true construction of the Virginia law is, that as to all the interest acquired in land previous to grant, it was intended to enlarge their rights, and secure them from escheat; while, as to the rights which they might acquire by patent, they were to be left under the ordinary *alien disabilities, whatever those were, [*358 which the law imposed.

The Virginia act, therefore, has no influence upon the rights of the parties in this cause.

The object of the next four prayers for instruction in behalf of the defendant is, to maintain the proposition that the act of Kentucky of 1799, which confirmed the interest of the purchasers under the letter of attorney of the son of Brantz, was in derogation of the rights of Duncan Rose, the subsequent grantee.

The argument is, that on the decease of the father, without an heir that could take, the land in controversy reverted to the state, and the junior patent then fastened upon it in the ordinary manner in which it attaches to the soil when a prior grant is removed from before it. That the act of 1799 was nothing more than a junior grant for the same land, and a grant which the state was estopped from making to the prejudice of the prior patentee, as well upon general principles, as under the provisions of the compact between the two states.

It is obvious, that in considering this argument, the court cannot place the defendant on more favorable ground than by substituting Virginia for Kentucky, and allowing him all the rights that he might have set up against the former state. And it is equally obvious, that to admit of the right set up in favor of the junior patent's attaching as a patent upon the escheat, it must be affirmed that escheated land was liable to be taken up by patent; whereas the act authorizes patent *to [*359 issue upon waste and unappropriated lands exclusively, and not upon eschcated property. And so it has been settled by adjudications both in Kentucky and Virginia. Elmendorf v. Carmichael, 3 Littel. Rep. 484.

It is further obvious, that as to the claim

set up by the defendant on the ground of moral right and estoppel, the court will concede much more than he has a right to assume if it allows him the benefit of his argument to the whole extent in which it may be applied to the rights and obligations of individuals. Assuming, argumenti gratia, that the state could not supersede the right of the defendant derived under his patent, in any case in which an individual would be estopped, or might be decreed to convey. But it is only on the ground of fraud or contract that the law acts upon individuals in either of the supposed cases. Fraud is not imputable to a government; but if it were, where is there scope found for the imputation of it in the relation between a state and the patentee of its vacant lands? In selling the warrant, the state enters into contract no further than that the purchaser shall have that quantity of vacant land if he can find it. And when the patent issues, it is to the patentee, if to anyone, that the fraud is imputable if the land be not vacant. The state never intends to grant the lands of another; and where the grantee is ignorant of the previous patent, the maxim, caveat emptor, is emphatically applicable to this species of contract.

But to what result would this doctrine lead 360*] *us? A junior grant is to be vested with the attribute of hanging over a valid and indefeasible appropriation of soil, waiting to vest upon the occurrence of the casualty of an escheat or an indefinite failure of heirs? This may not happen in a hundred years; it may not occur upon one life, as in this case, but may occur after the lapse of one hundred lives. It is impossible that such a claim can be countenanced. Neither principle nor policy sustains it. And, in fact, the decision upon the first ground is fatal to the cause of the defendant upon the last; for, upon no principle but the assumed nullity of the patent to Brantz, could any contract be imputed to the state to make good the junior patent, under which the defendant deduces his title. In that case, the land would still have remained vacant land, and, as such, the junior patent would, of course, have taken effect upon it as a patent, and by the immediate operation of the land law, without reference to the supposed incidental rights here set up.

So far this court has considered the cause as one of a new impression; but, on examining the adjudications quoted, they are satisfied, that in every point material to the plaintiffs, the case has been solemnly adjudicated in the courts of Kentucky.

They will, therefore, direct an opinion to be certified in favor of the plaintiff.

361*] [*Statute Of Limitations. Pleading. Local Law.]

SHELBY et al., Executors of Shelby, Plaintiffs in Error,

v.

GUY, Defendant in Error.

The terms "beyond seas," in the saving clause of a statute of limitations, are to be construed as equivalent to without the limits of the state where the statute is enacted.

Quære, How far this construction has been adopted by the courts of Tennessee.

Five years bona fide possession of a slave constitutes a title, by the laws of Virginia, upon which the possessor may recover in detinue; and this title may be set up by the vendee of such possessor in the courts of Tennessee, as a defense to a suit brought by a third party in those courts.

THIS cause was argued by Mr. Jones for the plaintiffs in error, and by the Attorney-General and Mr. White for the defendant in error.

Mr. Justice Johnson delivered the opinion of the court:

The plaintiffs here were defendants in the court below in an action of detinue brought by Thomas Guy, to recover sundry slaves.

The defendants below plead non detinet, and the act of limitations of the state of Tennessee, which bars the action of detinue in three years.

The plaintiff joins issue upon the plea on non detinet, and files a special replication to the plea *of the statute, the object of [*362 which is to bring himself within the saving in favor of absentees. The defendants demurred to this replication, but the demurrer being overruled, the parties went to trial on the general issue, and a verdict was rendered for the plaintiff in the form now usual in the action of detinue.

To revise the judgment of the court in overruling the demurrer, and its decisions upon various points of law raised in the progress of the trial, this writ of error is brought.

The case was this: One Dickerson, a citizen of Virginia, the father of the plaintiff's mother, was owner of a female slave named Amy, from whom the slave claimed had descended. Upon the marriage of Thomas Terry Guy with the plaintiff's mother, or soon after, and prior to the year 1778, the slave Amy passed into the possession of T. T. Guy, but whether by loan or parol gift, is a point litigated, and upon which some of the principle questions in the cause arise.

From the year 1778 to 1794, the slaves remained in Virginia, in the possession of the plaintiff's father T. T. Guy, when he sold her and her increase to David Shelby, who thereupon removed with the slaves to Tennessee, where he and they have ever since resided.

In the year 1788, Dickerson made his will and died; and the will was proved and recorded in July, 1788. In this will he says: "I lend to my son-in-law T. T. Guy, the negroes which he now has in his possession, that I lent him in the life-time of his wife, during his natural life, viz., *Cuffee, Gilbert, and Amy; [*363 and at his death I give the aforesaid slaves, with their increase, to my grandsons John and Thomas Guy, and their heirs, forever."

Thomas Guy, here named, is the plaintiff in this action; the executory devise to him and John took effect by the death of their father in 1795. John died unmarried, under age, and intestate, after his father, but before the action brought, and neither of the brothers had been in the state of Tennessee until within three years prior to the institution of the suit, but had resided in the state of Virginia.

These are the material facts in the cause. The points argued have been very numerous; but if the plaintiff has tripped in pleading, by a vicious replication, the questions on the merits are put out of the case. The points arising on the demurrer, therefore, must first be considered.

The replication demurred to, states, in substance, the right of Dickerson to the negro Amy, and the continuance of that right up to his death; the bequest to the father of the plaintiff for life, and to the plaintiff and John after his death; the death of the father, and of John; the qualifying of the executors on the will, and their assent to the legacy; the sale by the father to Shelby in 1794; Shelby's removal with the slaves of Tennessee, and subsequent residence there, and the residence of John up to his death, and of the plaintiff, to within three years of the bringing of this suit, in the state of Virginia.

364*] *The demurrer filed to this replication is special, and assigns for cause,

1. That it states the evidence of title, and does not allege a fact.

2. That it is double, in relying on the facts both of title and of non-residence.

But, claiming the right of looking back to the first fault, and other benefits appertaining to a general demurrer, to which, no doubt, he is entitled, the counsel for the defendant have raised a variety of other questions in the cause, of more interest than those specified.

As, first, that the counts in the declaration are repugnant, the one being essentially a count in trover, the other in detinue; and,

Second, that the replication involves a departure, inasmuch as the writ claims the whole property, and the replication shows him to be entitled to no more than a moiety.

That the replication is more characterized by prolixity than by science, the court will readily admit; but that it is essentially vicious cannot be maintained.

The general object of the plaintiff is to fortify his title or demand, and this is a legitimate object. Nor can we perceive, that in doing this he has either stated evidence where he ought to allege facts, or tendered to the defendant a double answer to his plea, or, rather, "distinct matters to one and the same thing, whereunto several answers are required." That it is redundant, and abounds in surplusage, with reference to the issue tendered, is obvious; 365*] but it prefers only one *answer that will fit the plea, which is, absence from the state of Tennessee during the term when the statute would bar him.

Yet, as he has thought proper to amplify upon the nature of his demand, if he had prostrated his own action, the law would visit him with the consequences.

The argument on this point is, that having set out a joint devise to himself and his brother, he is incapable of maintaining alone a suit for the entirety of the thing devised. But in this we are of opinion that the law is with him.

It is true, that tenants in common must ordinarily join in an action, and that the laws of Virginia produce a severance upon the death of a joint tenant, so that the right of survivorship is abolished. But it is also true, that in suits for an indivisible thing, a right of action survives to a tenant in common; and this from the necessity of the case, as we conceive the authorities sufficiently maintain. Co. Litt. 198 a; Bro. Abr. tit. Tenant in Common, pl. 18.

The exceptions to the courts clearly cannot be sustained. They are consubstantial, and the same plea and judgment proper to both. Averring that the defendant came to the possession of the chattel by finding, does not constitute a count in trover; an alleged conversion characterizes that form of action. Nor is it any objection to the counts that one of them states a right to recovery founded in a possession merely, without the direct allegation of property, since a tortious detention may well be of that which another has *no interest in, but [*366 to the temporary use or custody. Co. Litt. 286; Roll. Abr. 575. Thus, a bailee, or common carrier, or sheriff, may maintain this action, and expressly against one who has them by delivery or finding. 2 Saund 47; Cro. Jac. 73, et passim. We come, then, to the question raised by the demurrer upon the statute of limitations of Tennessee; and here we are met by one of those embarrassments which necessarily grow out of our peculiar system.

North Carolina, in common with most of the old states, adopted the language of the statute of James in its act of limitations. This was the law of Tennessee before its separation from that state, and continues so to this day. The persons excepted from its operation, are infants, femes covert, etc., and "persons beyond seas."

During a century nearly that this law has been the local law of that country, we cannot ascertain that the courts of either of those states have been called on to decide whether it shall be construed according to its literal meaning. In the meantime, solemn adjudications have taken place in several of the states, to the purport that persons without the jurisdiction of the country, though not actually beyond seas, are within the equity, if not within the actual meaning of the statutes containing the same words, and borrowed from the same source. And in a case which came up to this court from Georgia, in the year 1818, it was solemnly decided that it was impossible to give a sensible and reasonable *construction to those [*367 words according to their literal signification. But we are now informed, and, as it is admitted by the opposite counsel, we cannot question it, that a contrary adjudication has taken place in the courts of Tennessee within the last year, for the first time. It is obvious, that without a more particular report of that adjudication, this court could not now act finally upon its authority. But if the majority of the court were of opinion that an insulated decision on a point thus circumstanced ought to control the previous decision of this court, the course would undoubtedly be, to hold up this cause for advisement.

That the statute law of the states must furnish the rule of decision to this court, as far as they comport with the constitution of the United States in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the

statute law of the country, however we may doubt the propriety of that construction. It is obvious, that this admission may, at times, involve us in seeming inconsistencies; as, where states have adopted the same statutes, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us, to administer, as between certain individuals, the laws of the respective states according to the best lights we possess of what those laws are. This court has uniformly man-
368*] ifested its respect for *the adjudications of the state tribunals, and will be very moderate in those claims which may be preferred on the ground of comity. Yet, in a case like the one now occurring, it cannot acknowledge the objection to go farther, at present, than to examine the decision formerly rendered on the construction of these words.

We have reflected, and heard arguments on our former decision, and not a doubt has been entertained, except on the question how far we were bound to surrender an opinion, under the actual state of difference existing between our construction and that of the state from which this cause comes.

It is true, that the words "beyond seas," considered abstractedly, must, in every state in this Union, mean something more than "without the limits of the commonwealth;" which words the state of Virginia has very properly added to the statute of James. But it is also true, that if the words "beyond seas" be considered with reference to the insular situation of the country from which we adopted the law, they mean exactly the same as the words superadded in the Virginia law. And it was this consideration, as well as the obvious absurdity of applying the terms, "beyond seas," in their literal signification, that induced this court, and has induced so many state courts, to give it the meaning of beyond the commonwealth.

If equity, as applied to the construction of statutes by an eminent writer, means "the correction of that wherein the law, by reason of
369*] *its universality, is deficient;" or, as another defines it, "interpreting statutes by the reason of them," may be applied to any case, we think it may to one which, while it operates in restraint of common right, would, by a literal construction, make no saving in favor of persons residing in the most distant and unfrequented parts of this extensive continent.

Nevertheless, as this cause must go back upon other grounds, we will, for the present, waive a positive decision on this point as applied to the state of Tennessee, trusting that the courts of the state from which this cause comes will, in due time, furnish such lights upon the fixed law of that state on this subject as will enable the courts of the United States to come to a satisfactory conclusion upon the question.

The next class of questions in the cause arise under bills of exception. The object of the defendants, in the several prayers for instructions propounded to the court, was to be let into proof of a title, without will or deed, in the father of T. T. Guy, from whom they purchased, and to maintain, that although that title was only derived to him by implication under the limitation acts of Virginia, it was sufficient, not only to make out a defense by pleading, but by giving such facts in evidence as would be a good defense on a plea of the statute of limitations, if the suit were instituted in the state of Virginia, or to maintain detinue in a suit to recover in right of a possession under the statute in that state. *With this [*370 view, he proposed to rely on the following propositions:

1. That the proof that Dickerson, on the marriage of Guy with his daughter, had sent the slave in question with them, or to them, upon their going to house-keeping, and permitted her to remain there ever after as their property, without any specific declaration of the interest vested in them, other than the will of 1788, with a variety of corroborating facts, was sufficient to sustain an inference of a gift or transfer by parol, and of such an adverse possession as might constitute a bar under the act of limitations of Virginia of 1705.

This the court refused, on the ground that a parol gift of slaves in Virginia was, at the date of that transaction, absolutely void.

In this, it is contended the court erred, both as to the law and as to its application to the case.

As to the law, we are of opinion that the question is not now to be stirred. We do not mean to intimate an opinion on the construction of the acts of 1757 and 1758, on this subject; but only to treat it as a decided point upon the construction of those statutes, that a parol gift of slaves made in Virginia, even where the possession passed, between the years 1757 and 1787, was void, or voidable; for, as to all the purposes of this case, it is immaterial which. The declaratory act of December 31, 1787, we regard as a new enactment, taking effect from its date, as a repeal of the prior acts in those *cases in which the possession [*371 passed with the gift. The possession here relied on was from 1775 to 1788, at which time the will was recorded. And here the material question arises, whether, if void or voidable, it does not create such an adverse interest in the donee, as the statute of 1795 may attach upon, so as to vest a complete interest. And on this point we think the court erred in rejecting the proof. For, although the gift may have been void or voidable, the fact of delivery of possession attended it, and this must have put the party to his action to re-instate himself in the enjoyment of the property. The limitation to the action of detinue in Virginia is five years; and here the supposed donee proves a possession of ten years.

There can, then, be but one doubt raised on the right of the defendant to the instruction here prayed, and to the admission of the evidence offered to the fact of a parol gift, and that is, whether he could avail himself of this defense in this mode.

In the case of Newby v. Blakley, 3 Hen. & Mun., 57, a case strikingly resembling this in its circumstances, it was adjudged that a plaintiff, in Virginia, may recover in detinue upon five years peaceable possession of a slave acquired without force or fraud. And four months after that decision, and obviously without being apprised of it, this court, in the case of Brent v. Chapman, maintained the same doctrine. 5 Cranch's Rep. 358.

It follows, we think, that on the same prin-

372*] ciple, *such a possession must constitute a good defense in Tennessee. To preclude the defendant from availing himself of the benefit of that evidence which would have sustained an action for the same property by the person from whom he purchased it, would be to convert a good and valid title in Virginia into a defeasible title in Tennessee; a sufficient title in a vendor into a defeasible title in his vendee; and, by an indirect operation, to make the seller liable, where a direct action could not have been maintained against him to recover the property sold.

The second prayer is calculated to obtain of the court an instruction that, after an indefinite loan to Guy, the father, a subsequent devise to his children, if intended to save the slaves from his creditors, was inoperative as to Guy, and purchasers for valuable consideration claiming under him, unless with actual notice of the will.

On this, it is sufficient to remark, that as there were no creditors before the court, the court was under no obligation to speculate upon the possible effect of their interests upon the case. And this gets rid of the influence of the decision in Fitzhugh v. Anderson, on the cause, as will be more particularly shown in a subsequent part of this opinion. The defendant here was a purchaser from T. T. Guy at the time when the will of the grandfather was of record. How far purchasers are affected with record notice, is obviously a point of local law. And we understand that much importance is attached to it in the jurisprudence of 373*] Virginia. Certainly, in ordinary *cases, where such a source of information is open to all, those who do not avail themselves of it come with an ill grace before a court to complain of imposition.

The third prayer was intended to maintain that, on the circumstances of the case, the jury might infer both a deed and the recording of that deed. Broad as this claim was, it is obvious that the court was not bound to give the instruction, since it would have availed the party nothing, without the additional fact of the loss or extinction of the record also.

The fourth prayer has relation to the question, whether the right of action survived to the tenant in common, which has been already answered. As Thomas Terry Guy died before his son John, the executory devise to John and the plaintiff became vested in possession. Their right of action then accrued, and that right survived to this plaintiff, whatever may be the ultimate distribution of the slaves when recovered. This also was rightfully refused.

And the same remark answers many of the exceptions taken to the charge which the court below did give upon the sufficiency of the plaintiff's cause of action, and the form of laying it.

Other exceptions are taken to the legal doctrines of that charge; one of which is, that, under the Virginia statute of frauds of 1785, the loan, with five years' possession, became a vested title in T. T. Guy; another, that upon the general doctrines of courts of law, on the subject of frauds imputable where the posses- 374*] sion remains *in one, and the right in another, this will should be adjudged a mere cover and evasion, or a new devise for the perpetration of fraud.

But on these subjects we think it unnecessary to remark at any length; the dates and facts do not bring the case within the operation of the statute of frauds of 1785; and, with regard to the general doctrine, it never has been supposed to extend to a purchaser with notice, much less to a purchaser whom the local law effects with notice of the highest order. Had the defendant, in this instance, been a creditor of T. T. Guy, who had trusted him on the faith of this property, and now sought relief under the principle in Twyne's case, the decision in Fitzhugh v. Anderson, 2 Hen. & Mun., 289, might have applied. That case was expressly decided upon the principle in Twyne's case. The complainants were legate of their grandfather, under a will that was not recorded until three years after the creditors (who were defendants) had sold the son's slaves under execution; slaves which he had held in possession for fifteen years, under a loan, which was never avowed until the slaves were set up for sale, and which there was obviously much cause for bringing into serious suspicion.

Judgment reversed, and a venire facias de novo awarded.

[*Devise.] [*375

WALKER et ux., Appellants,

v.

CYRUS GRIFFIN'S HEIRS, Respondents.

Devise of the testator's estate, "One-fourth part to be given to the families of G. Holloway, W. B. Blackbourn, and A. Bartlett, to those of their children that my wife shall think proper, but in a greater proportion to F. P. Holloway, than to any other of G. Holloway's children; to E. P. Bartlett in a greater proportion than any of A. Bartlett's children. The balance to be given to the families of C. and J. T. Griffin's children, in equal proportion." Held, that the children of C. & J. T. Griffin took per stirpes, and not per capita, and that the property devised to them was to be divided into two equal parts, one moiety to be assigned to each family.

THIS cause was submitted without argument.

Mr. Chief Justice Marshall delivered the opinion of the court:

This case depends entirely on the will of Francis Peart, deceased. The testator had devised his estate to the County Court of Woodford, in trust for purposes therein mentioned; after which he adds, "should the County Court of Woodford not have a right to take into possession this donation of the within will, I do request one-fourth part to be given to the families of G. Holloway, William B. Blackbourn, and A. Bartlett, to those of their children that my wife may think proper, but in a greater proportion to Francis *P. Hollo- [*376 way than any other of G. Holloway's children; to Elizabeth P. Bartlett in a greater proportion than any of A. Bartlett's children. The bal-

ance to be given to the families of Cyrus and John T. Griffin's children, in equal proportion."

The devise to the County Court of Woodford was held void; and thereupon the heirs of Cyrus Griffin, who was dead at the time the will was made, brought a friendly suit against the heirs of John T. Griffin, who was also dead, in the Circuit Court for the district of Kentucky, for a division of the property. The Circuit Court decided that the children were entitled to it in exclusion of the grandchildren, whose parents were living, and that all the children should take in equal proportion. From this decree the heirs of John Taylor Griffin have appealed to this court.

It is apparent, that in the devise of one-fourth to the families of G. Holloway, William B. Blackbourn, and A. Bartlett, the testator intended to designate the children in exclusion of the grandchildren, because he adds, "to those of their children that my wife may think proper;" obviously having the children only in his mind, and not taking grandchildren into view. When, in the same paragraph, and in the succeeding sentence, he uses the same word in the devise to the families of Cyrus and John T. Griffin, he must be supposed to have used it in the same sense, unless the additional words, "children to take in equal proportion," should show a change of intention, and that 377*] the property *was given to the children of the families, and not to the families themselves.

The use of the words, "families of Cyrus and John T. Griffin's children," to designate the grandchildren of Cyrus and John T. Griffin, would certainly be an unusual as well as awkward mode of describing them, and we think there is no necessity for resorting to this construction. The introduction of these words is to be readily accounted for. In the preceding devise, the testator had directed the children of two of the families to take unequally. In this he intended them to take equally; and therefore makes that provision.

The more difficult inquiry is, whether the property is to be divided into two equal parts, the one to be assigned to the family of Cyrus, and the other to the family of John T. Griffin; or is to be divided equally among all the children of the two stocks.

In solving this difficulty, it becomes necessary again to resort to the preceding sentence.

The families of G. Holloway, Wm. P. Blackbourn, and A. Bartlett, take, each family, as a single devisee. Whatever may be the number of persons composing the family, and however unequal may be their number, they take, collectively, distinct and equal shares by families; each family constituting an individual devisee. This would be, we think, the natural import of the words, if unexplained by others. But we think this construction is strengthened by the 378*] residue of the *sentence. The testator adds, "to those of their children that my wife may think proper, but in a greater proportion to F. P. Holloway than to any other of G. Holloway's children, to E. P. Bartlett in a greater proportion than to any of A. Bartlett's children."

These words show that the inequalities intended by the testator were between children of the same family, not between the families. Francis P. Holloway was to have more, not than any of those who took under the devise, but than any other of G. Holloway's children. So with respect to Elizabeth P. Bartlett. In each case the share of the family is to be distributed among the children of the family at the discretion of the wife; that discretion being limited so far only that F. P. Holloway should have more than any other of G. Holloway's children, and E. P. Bartlett more than any of A. Bartlett's children.

We think it perfectly clear that the families take in equal proportions.

It is reasonable to suppose that the same intention was preserved with regard to the families of Cyrus and John T. Griffin, and the words must receive the same construction if not controlled by those with which they are connected. Had the devise been to the families of Cyrus and John T. Griffin, the natural and obvious construction would have been that the families took equally. We are, then, to inquire, what is the effect of the additional words, "children in equal proportion." Cyrus Griffin and John T. Griffin were both dead, Cyrus leaving four, and John T. Griffin two children, who were living at *the death of the [*379 testator, and were the objects of this devise. Had he intended them to take equally, the natural mode of expressing that intention would have been to devise the property to the children of Cyrus and John T. Griffin. They would then have taken individually, and not by families; but the testator directs them to take by families. Why, then, are the words, "children in equal proportion," added? The testator had, in the preceding sentence, devised a part of the same property to three families, and had directed that the children of each should take unequally. Proceeding immediately to the two families of the Griffins, it was natural, though not necessary, to express his wish that the children should take equally. But neither in this, nor in the preceding devise, does he mingle the children of the different families in one mass. He speaks of them severally by families. We are therefore of opinion that the children of Cyrus and John T. Griffin take by families, and that the property devised to them is to be divided into two equal parts, one moiety to be assigned to each family.

Decree.—This cause came on to be heard on the transcript of the record from the Circuit Court for the District of Kentucky, etc. On consideration whereof, this court is of opinion that the children of Cyrus and John T. Griffin took the property devised to them in the will of Francis Peart, deceased, by families. This court is therefore of opinion that the decree of the *Circuit Court is erroneous, inso- [*380 much as it directs the said property to be divided among the said children per capita, and not per stirpes, and ought to be reversed, and this court doth so far reverse the same, and in all things else it is affirmed. And the cause is remanded to the said Circuit Court, that farther proceedings may be had therein according to law.

[Local Law.]

DOE, EX DEM. PATTERSON, v. WINN ET AL.

In general, the validity of a patent for lands can only be impeached for causes anterior to its being issued, in a court of equity. But where the grant is absolutely void, as where the state has no title, or the officer has no authority to issue the grant, the validity of the grant may be contested at law.

The laws of Georgia, in the year 1787, did not prohibit the issuing of a patent to any one person for more than 1,000 acres of land. The proviso in the act of assembly of the 17th of February, 1783, limiting the quantity to that number, is exclusively confined to head-rights.

THIS cause was argued by Mr. Berrien and Mr. Wilde for the plaintiff, and by Mr. White for the defendant.

Mr. Justice Thompson delivered the opinion of the court:

This case comes up from the Circuit Court 381*] for *the district of Georgia. And the question presented for decision appears by a certificate of division of opinion in that court, as to the admissibility of the grant offered in evidence on the part of the plaintiff.

The certificate states that the plaintiff, to maintain his action, offered in evidence a patent, purporting to be a grant, in due form of law, from the state of Georgia to one Basil Jones, for seven thousand three hundred acres of land, including the premises in question. And also the warrant of survey upon which the said tract of land was laid off and surveyed, and the minutes of the court which granted the warrant. The defendant's counsel objected to the grant's going to the jury, affirming the same to be void in law, inasmuch as no grant could issue under the laws of the state for so great a number of acres as are comprised in the said grant. On which question so made the court was divided in opinion.

The broad ground assumed in the objection is, that the patent was absolutely void, and not even prima facie evidence of title. The question, as stated, does not distinctly present to the court the point that was probably intended to be submitted. The objection alleges the patent to be void, because, by the laws of Georgia, no grant could issue for so great a number of acres as seven thousand three hundred, without stating the limitation as to the number of acres. But, from the argument, it is understood that the limitation contended for on the 382*] part of the defendant, *is to one thousand acres, and that all grants for a greater quantity are absolutely void.

How far it is within the province of a court of law to entertain inquiries tending to impeach a patent, is a question upon which conflicting opinions have been held, particularly in the different state courts in this country. By some, the patent is considered only prima facie evidence of title, and open to extrinsic evidence to impeach its validity. By others, that the defect must appear upon the face of the patent, to authorize a court of law to pronounce it invalid; and that unless the defect does so appear, the patent is only voidable, and recourse must be had to a court of chancery to vacate it. By others it has been considered that the powers of a court of law were not so broad as laid down in the former of these opinions, nor so limited as in the latter, but that a court of law may inquire whether the patent was issued without authority, or against the prohibition of a statute, or whether the state had title to the land granted. It is unnecessary, if not improper, at this time, to enter into an examination which of these opinions is best founded in principle. For, so far as the question applies to the present case, it has been settled by this court in the case of Polk's Lessee v. Wendell et al. 9 Cranch's Rep. 87. In that part of the case to which I refer, the exceptions under consideration were for causes not apparent on the face of the patent; and the proposition stated for decision is, whether in any, and in what cases, it is allowable, in an action of ejectment, to impeach *a grant from the state for [*383 causes anterior to its being issued. It is said that the laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. These rules are, in general, directory, and when all the proceedings are completed by a patent, issued by the authority of the state, a compliance with these rules is presupposed. That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title, from its commencement to its consummation in a patent. But, in order to guard against the conclusion that this doctrine would lead to, closing the door against all inquiry into any matter whatever beyond the grant for the purpose of avoiding it, the court adds, that the great principles of justice and of law would be violated, if there did not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined, if it had been acquired by the violation of principles essential to the validity of a contract; but that a court of equity is the more eligible tribunal, in general, for these questions, *and they ought [*384 to be excluded from a court of law. But the court say there are cases in which a grant is absolutely void (or inoperative), as where the state has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law.

This doctrine was again recognized and sanctioned by this court five years afterwards, when the same cause (5 Wheat. Rep. 293) was a second time under consideration; and it is in coincidence with the rule settled in the Supreme Court of New York in the case of Jackson v. Lawton, 10 Johns. Rep. 23. We may therefore assume, as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law, in an action of ejectment. But, in general, other objections and

defects complained of must be put in issue, in a regular course of pleadings, on a direct proceeding to avoid the patent; and we are not aware of any contrary rule prevailing in the state courts of Georgia. But, so far as we have any information on the subject, the practice there is in accordance with the rule laid down by this court.

The objection in this case to the admissibility of the grant in evidence is, that it was issued without the authority of law, and in violation of certain statutes of the state of Georgia, which, it is alleged, prohibit the issuing of a 385*] grant to *any one person for more than one thousand acres of land; and if the statutes referred to will warrant this construction, the objection was well taken, and can be sustained in a court of law. And this leads to an examination of those statutes as applicable to the grant in question.

The grant bears date on the 24th of May, 1787, and is for 7,300 acres of land in the county of Franklin, described by metes and bounds, and referring to a plat of the same thereunto annexed. No consideration is expressed in the grant, or any designation of the nature of the rights which made up the quantity of land mentioned in the grant, but it is in the common form prescribed by statute. The proceedings of the court of Franklin county, on the application of Basil Jones, accompany the grant, by which it is ordered that he have 7,300 acres in lieu of part of old warrants of John Peter Wagnor—bounty reserved. This shows that the aggregate quantity of land mentioned in the grant was made up of sundry old warrants, and affords also an inference of the existence of a practice of consolidating a number of warrants in one grant; and there is nothing in the land laws of Georgia prior to the year 1794 at variance with such a practice. The limitation as to quantity will be found to relate to warrants for head-rights, and not to grants; and, as warrants were transferable, no objection existed to their being united in one grant.

The land law of Georgia is comprised under several statutes, passed at different periods, va- 386*] rying *and modifying the system occasionally, as policy required. But all being in pari materia, are to be looked to as one statute, in explaining their meaning and import. Under these laws, there were various ways in which persons became entitled to rights and could obtain warrants for land; such as head-rights, according to the number of a family; bounties to soldiers and to citizens, and likewise for the encouragement of certain manufactures, etc. And for the purpose of ascertaining and determining whether applicants were entitled to warrants, a land court was instituted in each county, to receive applications for lands, and grant warrants for surveys to such as should show themselves entitled to land, according to the provisions of the land laws. A county surveyor was required to be appointed by each county, who was authorized to lay out and survey, to any person who should apply to him, the land for which a warrant had been obtained. And he was required to record, in an office to be kept for that purpose, all surveys by him made, so as to enable those who had any objections to make to the passing of the grant, to enter a caveat, which was to be tried by a jury of twelve men, sworn to try the matter according to law and equity. And under the act of July 17, 1783 (Prince's Dig. 266, sec. 36), this was declared to be final and conclusive. An appeal was afterwards given to the Governor and executive council (sec. 56 of the Dig.), who were required and empowered to proceed to decide such caveats, in manner *and form as they should [*387 think most conducive to justice; and expressly declaring that from their decision there should be no appeal. And this was the existing law at the time the grant in question issued. By a subsequent statute (Dig. sec. 83) the power of hearing and determining such appeals, and signing grants, was vested in the Governor alone.

To permit an inquiry whether a warrant, obtained under such guards and checks, was authorized by law, would be opening the door to endless litigation, and against the spirit and policy of the land laws in general as well as the letter of the statute, which provides for caveats, and which declares the ultimate decision thereon to be final and conclusive. If the validity of the warrants cannot be called in question, the issue of the grant follows, as matter of course, and cannot be said to be without authority, unless the statute prohibits the issuing of a grant for more than one thousand acres of land.

The act relied upon on the part of the defendant, as containing such prohibition, is that of the 17th of February, 1783 (Dig. sec. 32), and is to be found in the proviso to the first section. The enacting clause relates entirely to head-rights, and declares that each master or head of a family shall be allowed, as his own head-right, and without any other or further charges than the office and surveying fees, two hundred acres; and shall also be permitted to purchase, at the rates therein specified, a further quantity, according to the number of head-rights in such family. *Provided the [*388 quantity of land granted and sold to any one person shall not exceed one thousand acres, and that such person do live on and cultivate a part of the said land twelve months, before he shall be entitled to a grant for the same.

The word "granted" is said to be used here in its technical sense, as synonymous with patent, and to imply a general prohibition to issue a grant to any one person for more than one thousand acres. Admitting this to be the sense in which the term is used, the consequence would not follow that is contended for. The term is here used in the proviso; the office of which is to limit and restrict the operation of the enacting clause. The enacting clause relates entirely to head-rights, and is without limitation as to quantity; that depended on the number of the family. The master or head of the family is allowed 200 acres as his own head-right, on paying office and surveying fees, and is permitted to purchase, at the rate therein mentioned, any further quantity, according to the number of head-rights in his family. The proviso, however, limits the quantity to one thousand acres; but the limitation is upon the subject-matter of the enacting clause, to wit. head-rights. The enacting clause speaks of two modes of acquiring these head-rights. One, a gratuity allowed to the head of the family:

the other, a purchase. And the words "granted" and "sold," as used in the proviso, may well be constructed in reference to these two modes of acquiring land. And the proviso is equivalent to saying that no one person shall be 389*] *allowed, on his own head-right, and on the purchase of head-rights in his family, more than one thousand acres. But this does not prohibit him from purchasing other warrants, and including all in one grant when it is issued.

That the word "granted," as here used, has reference to the warrant or incipient step towards acquiring the title, and not to the consummation of it by grant, is evident both from the subsequent part of the proviso, and from the use of the same word, as synonymous with warrant in other parts of the land laws. By the proviso, the person to whom land is granted and sold is required to live on, and cultivate a part of the said land twelve months, before he shall be entitled to a grant for the same. To give to the word "granted," in the former part of the sentence, the same meaning as to the word "grant" in the latter part, would involve gross inconsistency.

This construction is corroborated by the enacting clause in the third section of the same act, containing, substantially, a like provision, that every person applying by head-rights as aforesaid, shall, previous to his obtaining a grant for his land, or having it in his power to dispose of the same (otherwise than by will), settle and improve a part of such tract or tracts as he may obtain a warrant and survey of, etc.

And, in a subsequent act, passed the 23d of December, 1789 (Dig. sec. 85), the very word "granted" is used as the act of the land court, whose authority extended only to the issuing of warrants, and not grants. The enacting 390*] clause *gives to three or more justices of the peace, in their respective counties, the same powers that had been exercised by four justices and an assistant justice, under a former act; provided that the said three or more justices shall each of them sign all warrants for land by them granted.

Other parts of these land laws might be referred to, to show that this word is not always used in a technical sense as synonymous with patent. And that it is not so used in the proviso to the act of 1783, we think is very evident; and throughout all these laws, so far as we have been able to discover, whenever there is a limitation to one thousand acres, it is applicable to the warrant, and not to the grant.

It is clearly to be inferred, from various parts of these land laws, that warrants were transferable. Thus, in one of the earliest acts passed on the subject in the year 1777 (Dig. 261), it is provided that all persons who have had lands ordered them, and have not taken out grants for the same, or sold their warrants or rights, or are either dead, or left the state, such person or persons as have bought such warrants, or rights and titles, and continued in this state, shall have such lands granted them, agreeably to such order or warrant so purchased. And the prohibition afterwards, in the year 1794 (Dig. 280), to survey or renew transferred warrants, necessarily implies that, previous to that time, such transfers were sanctioned by the land laws; and if so, there could be no reason why a number of such *warrants should [*391 not be consolidated, and included under one grant, although the aggregate quantity might exceed one thousand acres. There might be very good reason for putting this limitation upon warrants for head-rights, as the settlement and improvement of the country might be thereby promoted.

That grants for more than one thousand acres were sanctioned, is evident from the act of the 23d of December, 1789 (exemplification produced), fixing the fees of the officers of the state; by which the Governor is allowed six dollars for signing a grant of land exceeding one thousand acres. So, also, in the act to revise and amend the above act, passed the 18th of December, 1792 (Dig. 173), the Governor is allowed, on all grants above one thousand acres, at and after the rate of two dollars for every thousand acres therein contained. Dig. 173.

Upon the whole, therefore, without pursuing this examination further, we are satisfied, that, in the year 1787, when the grant in question was issued, the land laws of Georgia did not prohibit the issuing of a patent to any one person for more than a thousand acres; and that the grant offered on the trial is not, therefore, void in law, and should have been admitted in evidence.

Certificate.—This cause came on, etc. On consideration whereof, this court is of opinion, and directs it to be certified to the said Circuit Court, that the evidence offered in the court below *by the plaintiff, and to the com- [*392 petency of which objection was made, and upon which question the opinions of the judges of said court were opposed, was competent evidence, on the part of the plaintiff, to sustain the issue on his part, etc.

[Construction of statute. Evidence.]

THE UNITED STATES v. AMEDY.

Under the act of the 26th of May, 1790, c. 38 (XI.), copies of the legislative acts of the several states, authenticated by having the seal of the state affixed thereto, are conclusive evidence of

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NOTE.—The term "person" in a statute includes corporations, if they fall within the general reason and design of the act. Thornton v. Bank of Washington 3 Pet. 36, 42; Society for the Propagation of the Gospel v. Town of New Haven, 8 Wheat. 464; Louisville, etc. R. R. Co. v. Letson, 2 How. 497; Lafayette Ins. Co. v. French, 18 How. 404; Culbertson v. Wabash Nav. Co. 4 McLean, 544; Copier v. Grover S. M. Co. 2 Woods, 494; Blair v. Worley, 1 Scam. Ill. 178; School Directors v. Carlisle Bank, 8 Watts, 291; People v. Schoonmaker, 63 Barb. 44; Planter's Bank v. Andrews, 8 Port. Ala. 404; Mineral R. Co. v. Keep, 22 Ill. 9; Fisher v. Horizon Co. 10 Wis. 351; Otis Co. v. Inhab. of Ware, 8 Gray, 509; Ontario Bk. v. Bunnell, 10 Wend. 186.

A corporation—deemed a citizen—for certain purposes. Pomeroy v. N. Y. R. R. Co. 4 Blatchf. 120; Hatch v. Chicago R. Co. 6 Blatchf. 105; Atkins v. Fibre, etc. Co. 7 Blatchf. 555; 10 Am. L. Reg. N. S. 389; Minot v. Phila. R. Co. 2 Abb. N. S. 323; New Eng. Ins. Co. v. Detroit Co. 10 Am. L. Reg. N. S. 383; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410.

such acts in the courts of other states, and of the Union. No other formality is required than the annexation of the seal; and, in the absence of all contrary proof, it must be presumed to have been done by an officer having the custody thereof, and competent authority to do the act.

Under the crimes act of the 26th of March, 1804, c. 393 (XL.), s. 2, on an indictment for destroying a vessel with intent to prejudice the underwriters, it is sufficient to show the existence of an association actually carrying on the business of insurance, by whose known officers de facto the policy was executed, and to prejudice whom the vessel insured was destroyed; without proving the existence of a legal corporation authorized to insure, or a compliance on the part of such corporation with the terms of its charter, or the validity of the policy of insurance.

The terms "any person or persons" in the act, extend to corporations, and bodies politic, as well as to natural persons.

THE prisoner, John B. Amedy, was indicted in the Circuit Court of Virginia, under the 393*] act *of Congress of the 26th of March, 1804, c. 393 (XL.)[1] for destroying a vessel with intent to prejudice the underwriters, and after a verdict of guilty, his counsel moved the court for a new trial upon the following grounds:

1. That the exemplification of the acts of the legislature of the state of Massachusetts, incorporating the Boston Insurance Company (who were the underwriters), given at the trial, was not admissible in evidence as a sufficient verification thereof. The papers given in evidence were printed copies of the acts, with certain erasures and interlineations in writing, and to the copy of each act was annexed a separate attestation in the following words: "A true 394*] copy *attest, Edward D. Bangs, Secretary." The copies were attached together, and exemplified under the great seal of the state of Massachusetts, with the following certificate annexed: "Commonwealth of Massachusetts. Secretary's Department, November 12, 1825. I certify that the printed copies of the following acts, viz., 'An act to define the powers, duties, and restrictions of Insurance Companies' —'An act authorizing the several Insurance Companies in this commonwealth to insure against fire'—'An act to incorporate the Boston Insurance Company'—'An act to incorporate the Commonwealth Insurance Company'—and 'An act in addition to an act, entitled, An act to incorporate the Commonwealth Insurance Company;' to which printed copies this certificate is annexed, have been by me compared with the original acts on file in this office, and that the same are now true copies of the said original acts, except the usual attestation of enactment, and signatures subjoined to each act. In testimony whereof, I hereunto set my hand, and have affixed the seal of said commonwealth, the day and year above mentioned. (Signed.) Edward D. Bangs, Secretary of the Commonwealth."

2. That before the policy of insurance underwritten by the Boston Insurance Company could be given in evidence, it was necessary to prove that the subscription to the stock, and the payment of such subscription, as required by the act of incorporation, had actually been made. The policy of insurance was admitted *in evidence by the court below, with- [*395 out proof that the subscription to the stock had actually been made; it being proved that there was a company in Boston called the Boston Insurance Company, doing the business of insurance, and paying losses when incurred, and that the paper produced was executed after the manner in which they usually made their policies of insurance.

3. That the policy ought to have been proved to be executed by the authority of the company, in such manner as to be legally binding on them.

4. That the court instructed the jury "that it was not material whether the company was incorporated or not; and it was not material whether the policy were valid in law or not; that the prisoner's guilt did not depend upon the legal obligation of the policy, but upon the question whether he had wilfully and corruptly cast away the vessel, as charged in the indictment, with intent to injure the underwriters.

The judges of the court below having been divided in opinion upon the motion for a new trial, the case was brought before this court upon a certificate of that division.

Mr. Worthington, for the prisoner, argued that, in order to convict him of the offense charged in the indictment, it was necessary that the policy of insurance should be a valid contract. The intent with which an act is done is not susceptible of direct proof. The only means by which it can be established is by evidence of *facts from which it may be [*396 directly inferred. If the probable consequence of the act done is to produce the result from which the intent is inferred, the inference may be reasonable; but when, by no possibility, the result could occur, how can a fraudulent intent be inferred? If, in this case, the policy were valid, the probable consequence of the destruction of the vessel is a prejudice to the underwriters, from which might be fairly inferred, in the absence of explanatory testimony, a design to prejudice. But if the policy was void, no such consequence could possibly happen, and no inference can arise, from it alone, of a design to produce such a consequence. The strongest analogous cases are those of forgery, in which the distinction appears clearly to have been taken. In those cases it has been determined that where the probable consequence of the act was to defraud, the intent might be inferred. But where such was not the case, as

1.—Which provides (s. 2) "that if any person shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or vessel of which he is owner in part or in whole, or in anywise direct or procure the same to be done with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods thereon, or of any other owner or owners of such ship or vessel, the person or persons offending therein, being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death."

It is stated, in a note to the case of The United States v. Johns. 4 Dall. Rep. 412, that the second member of the above section is so inaccurately expressed, that the attorney of the district (Mr. Dallas) thought, at first, there must have been some error of the press; but the Secretary of States informed him that the printed copy was found, upon a comparison, to agree exactly with the roll. See the analogous English statutes, 4 Geo. I. c. 12, s. 3, and 11 Geo. I. c. 29; 1 Abbott on Shipp. 167, 168.

where the instrument was void on its face, and therefore could not deceive if ordinary vigilance was exerted, the intent could not be inferred.[1] Thus, where one Wall was indicted and convicted of the forgery of a will void under the statute of frauds, the conviction was held to be erroneous.[2] This question appears to have been 397*] decided in England in the *case of the King v. Gillson.[3] In that case, the prisoner was indicted under the statute of 43 Geo. III. c. 58, s. 1, for feloniously setting fire to a house with intent to defraud the London Assurance Company. A policy was produced, regularly executed, covering goods in Wood street, on which was indorsed a memorandum stating that the goods were removed to Old Boswell Court, and that the removal was allowed. This memorandum was not stamped. The question arose, whether the written contract, being void by the revenue laws for want of a stamp, was properly admitted in evidence, and it was determined that the evidence was not admissible. In the case of The United States v. Johns,[4] this point was decided, and the court held that it was necessary to prove a valid policy. If, then, the validity of the policy is essential to the offense, it becomes necessary in this case to show a legally subsisting corporation, capable of executing a valid policy of insurance, and a policy legally executed. On the first point, it might be contended on the part of the prosecution that though it may be necessary to prove a party actually contracting, yet that proof of a corporation de facto would be sufficient. But it was insisted a corporation exists by its charter alone. It is that which controls its operations, and settles the mode and extent of its obligations. If the validity of the policy is necessary, it is surely essential to show that 398*] the body which *executes it was legally empowered to do so, and that the act itself was performed in pursuance of those powers. This question was so decided in the case of The United States v. Johns. It was insisted that the papers given in evidence did not afford evidence of these facts because they were described in the certificate as printed papers, whereas they are partly written; and they were so loosely attached to the paper to which the seal is affixed as not to afford satisfactory evidence that they were the papers intended to be verified. If, however, the papers should be deemed sufficiently authenticated, still it is necessary, in order to show a valid policy, to exhibit evidence that the corporation went into operation according to the terms of its charter.[5] It was also insisted that a corporation was not a "person" within the meaning of the act of Congress. This point was raised in the case of The United States v. Johns, but not decided. It appears, however, to have been determined in England, in the case of The King v. Harrison.[6]

1.—Jones' case, 2 East's Cro. Law, 952.

2.—2 East's Cro. Law, 953; Moffat's case, 2 East's Cro. Law, 854; 2 Leach, 483.

3.—1 Taunt. Rep. 95.

4.—4 Dall. Rep. 412.

5.—Henriquez v. The Dutch West India Company, cited in 2 Lord Raym. 1535; 4 Com. Dig. 468, note a. Am. ed.

6.—1 Leach, 180; 2 East's Pl. Cro. 927, 988.

The Attorney-General, for the United States, argued that the evidence given of the acts of the legislature of Massachusetts incorporating the Boston Insurance Company, who were the underwriters intended to be prejudiced by the *felony, was sufficient under the act of [*399 Congress of the 26th of May, 1790, c. 38 (XL.), prescribing the manner in which the public acts. etc., of each state shall be authenticated so as to give them full faith and credit in every other state. All that the statute requires, in respect to legislative acts is, that the seal of the state should be affixed, and that obviates every objection which had been made to the exemplification in this case.

It was further contended that proof that the company actually carried on the business of insurance was sufficient, in a public criminal prosecution, without showing that they were legally authorized to transact it. It was immaterial whether there was a valid policy or not. The guilt of the act consists in the act itself, and the animus with which it was committed. It was analogous to the cases of forging a will, where the act was intended to defraud, not the party whose signature is forged, but third persons, and it turns out the testator was alive.[7] The guilt in such cases cannot depend upon the certainty that the party would have the benefit of the crime had his attempt been successful. In the case of The King v. Gillson the objection was not to the proof of the policy, but to the written indorsement or memorandum, which a particular statute had specially declared inadmissible in evidence unless stamped. It was, on its face, inadmissible, and the existence of the insurance *could [*400 not, therefore, be established. As to the requisition of proof that the conditions of the incorporating act had been complied with, it was a sufficient answer to say that the party was estopped from denying it, by receiving a policy executed by the company. To require proof of a valid contract would be to go into the whole case as a civil action, and would require an investigation of the whole law of insurance. Whether the term "person or persons," in a statute, includes such artificial persons as a corporation, had never been decided in this country. The supposed authority cited in the negative[8] was entitled to the less weight as it rested merely upon a MS. note of Mr. Justice Buller, was decided without argument, and is contrary to the analogy of the law which regards corporations as persons for all civil purposes. Lord Coke, in commenting on the statute 31 Eliz. ch. 7, concerning the erection of cottages, where the term used is, "no person shall," etc., says, "this extends as well to persons politic and incorporate as to natural persons whatsoever."[9] The other authorities are to the same purpose, and consider the term "persons" as including those artificial beings called corporations, as well as natural persons.[10]

Mr. Coxe, for the prisoner, in reply, stated, *that in order to determine the ques- [*401

7.—Hawk. Pl. Cro. ch. 70, s. 7; 2 East's Pl. Cro. 948.

8.—2 East's Cro. Law, 988; 1 Leach, 215.

9.—2 Inst. 736.

10.—1 Mod. Rep. 164; 1 Woodes. Rep. 195; 1 Bl. Comm. 476.

tions in the case it was important to consider the character of the offense created by the statute, and charged in the indictment.

In ordinary cases of crime, the act charged is, in itself, criminal; the intent to commit the offense is legally inferred from the act itself. In murder, the act of killing draws after it the legal inference of the malice prepense; in larceny, the act of taking the property of another proves the animus furandi, and so in other instances. The intent, or mental design is, in all these instances, proved by the act, and this intent is co-extensive with the act done. In the present case, however, the act done by the accused is innocent and legal in itself. He was the owner of the vessel—so charged in the indictment. In that character he might destroy his own property without being chargeable with any evil disposition or design. The simple act of destruction is, then, evidence of no criminality. Whence, then, does the criminality arise? From the intent to prejudice the underwriter. This intent is the hidden operation of the mind, legally to be inferred from certain facts positively proved. Those facts, which alone can warrant this inference, are, first, that such a person exists as the indictment charges that he designed to prejudice; second, that such person was in the situation which made such act likely to prove prejudicial. The first, therefore, requires that such a party should be in existence; the second, that his relation should be proved to subsist.

402*] *It is essential, then, that it should appear in proof that there was such a corporation as the Boston Insurance Company, because, unless such a party existed, the law cannot infer the design to prejudice it. It is equally essential that a valid policy of insurance should be proved, because, unless that party was placed in the situation in which it could be injured by the destruction of the vessel, it is impossible that such a design can be inferred.

These circumstances, then, are of the very essence of the crime charged, and must be established by plenary proof. How, then, is the existence of the corporation to be proved? In cases in which it is a plaintiff, it must also prove its existence; and this is to be done by the production of the charter, or the act of incorporation.[1] It cannot be pleaded in abatement by a defendant, sued by a corporation, that there is no such corporation, because, as that fact must be necessarily proved as part of the title, it is included in the general issue. In the case of The United States v. Johns,[2] (more fully, as to this point, reported in MS. statement of the case by Mr. Justice Washington), on an indictment under this act of Congress. proof of the act of incorporation was required and produced.

That there should be a valid and subsisting policy is equally essential. Unless there was such a policy, covering the identical property, upon the very voyage in which the vessel was 403*] engaged, *covering such a risk, and known to the accused, the law cannot intend that he designed to prejudice the underwriter. The rule of law is, that if every fact laid in the indictment may be true, and yet the accused may be innocent of any offense, the indictment is defective.[3] If essential to lay it in the indictment, it is equally essential to establish it by testimony. Unless, therefore, it be proved that there was a valid policy, there could be no underwriter who could be injured. There might be a policy covering the vessel against capture by the enemy, against destruction by fire, upon a different voyage from that which the vessel was pursuing. Under such circumstances, the law would not infer the intention to prejudice the underwriter. The case of The King v. Gillson[4] appears decisive of this question, so far as its authority is recognized. And in the case of The United States v. Johns the court held it was essential to prove a valid subsisting policy.

As to the supposed analogous cases of forgery cited on the part of the prosecution, all cases of forgery necessarily imply that the instruments are in themselves invalid; that they are false in reality is of the essence of the crime, which consists in the representation of such void instruments to be valid, with intent to deceive somebody. Such deception is practiced upon third persons, not upon those whose names are forged. Were a man indicted for representing a forged *will to be a [*404 genuine one, with intent to defraud a person shown to be dead, or never to have been in rerum natura, it might bear upon the former point raised in this case. Upon this point they can have no bearing whatever. Unless the instrument charged to be forged is proved to be false, there can be no conviction for forgery. Unless, in this case, the policy is proved to be valid, we insist the same conclusion follows. The essence of that crime is the representation of a false instrument to be a genuine one; the gist of the offense here is, that a party was in such a predicament that he might be injured by the act of the prisoner, and consequently that the policy was a valid one. The deception in that case might be equally successful, and therefore equally injurious, whether the bill purported to be made by a dead man or by a living one, whether the person who purported to be the drawer of a bill of exchange was in existence or not; and therefore that circumstance could make no difference. In this case, no person could be injured unless there was a valid policy of insurance, and therefore the proof of such policy is essential. If it be essential that a valid policy should be proved (which, in itself, includes the proof of a legally subsisting corporation), in what manner, and by what species of evidence, is this to be made out? By producing the act of incorporation or charter. Was, then, the exemplification of the acts of the Massachusetts legislature, in this case, sufficient? The statute of Congress directs that the legislative acts of *the several states should be [*405 proved by the annexation of the great seal. But this provision was merely in affirmance of the common law, and was not designed to dispense with any of the rules of the common law. The seal of the state proves itself, and may also prove the truth of the certificate which it purports to sanction, but that certificate ought to show, in its terms, that it was

1.—2 Lord Raym. 1535.
2.—4 Dall. Rep. 412.
3.—Dougl. Rep. 153.
4.—1 Taunt. Rep. 95.

affixed by some one having authority to affix it. These papers are evidently, from the face of them, torn from some printed book, full of erasures and interlineations not enumerated in the certificate. These printed papers are not connected directly with the seal. The seal is on a distinct piece of white paper, and by a single thread these pretended acts of the legislature are connected with that. Some essential parts are again connected with those through which the thread passes by wafers. Does the seal prove these? If a thread or wafer were now to be used to connect either, or any of these sheets, with a newspaper, it would be equally well authenticated. These acts are not fully given. They do not include the evidence of enactment, nor do they contain the attestation of those officers whose signatures are essential. These are constituent parts of every legislative act. They are all upon the original rolls. The evidence offered is, then, merely of extracts, or parts of the acts, not entire copies.

It is not only essential that the act should be exhibited, but it should also be proved that the company went into existence and continued to 406*] *subsist. The grant of the charter must be accepted by the voluntary consent of those whom it designed to incorporate, otherwise it will be void.[1] The corporation might also have become extinct; it may have been dissolved; the charter may have been forfeited.

As to the question whether a corporation is a person, within the meaning of the act of Congress, the case from Leach and East is the only case which has been referred to, in which the question has occurred in a criminal prosecution. It has been suggested that it is doubtful whether such a question was, in fact, decided. East states it positively. In the last edition of Leach the assertion is reiterated, and it is sanctioned by the last editor of Comyn's Digest, and other authorities.[2]

Mr. Justice Story delivered the opinion of the court:

The first question for consideration is, whether the evidence of the act of incorporation of the Boston Insurance Company, disclosed upon the record, was admissible as a sufficient verification thereof. It is matter of most serious regret that an exemplification so loose and irregular should have been permitted to have found its way into any court of justice. As it has, it is our duty to decide upon its 407*] legal sufficiency. It *is under the seal of the state, and verified by the signature of its secretary.

It is said that this is not enough, and that it ought to be shown that the secretary had authority to do such acts. This objection must be decided by an examination of the act of Congress of the 26th of May, 1790, prescribing the mode in which the public acts, records and judicial proceedings of each state shall be authenticated, so as to take effect in every other state. That act provides "that the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto." No other or further formality is required; and the seal itself is supposed to import absolute verity. The annexation must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof, and competent authority to do the act. We know, in point of fact, that the constitution of Massachusetts has declared "that the records of the commonwealth shall be kept in the office of the secretary." But our opinion proceeds upon the ground that the act of Congress requires no other authentication than the seal of the state.

The other objections to the exemplification are, that the acts are printed copies, with erasures and written interlineations, not so annexed as to afford perfect certainty that they are the identical copies to which the secretary's certificate was originally annexed. We think these objections cannot be maintained in point of law. *The copies must be pre- [*408 sumed to be the original copies, in the same state in which they were originally annexed. Any subsequent alteration or subtraction would be a public crime of high enormity; and the commission of a crime is not to be presumed. The certificate of the secretary, taken together, shows that he did not mean to state that the printed copies had not been varied by writing, so as to be true copies, for he adds the phrase, "they are now true copies of the original acts." The original print is still visible throughout, and the alterations in writing are mere verbal alterations, not in the slightest degree varying the sense or effect of any single clause in which they occur; and, to afford additional proof of identity, the secretary has on each copy annexed his own signature, with an attestation of its being a true copy. There is therefore no presumption, from the face of the papers, or otherwise, of any alteration or addition since the seal of the state was annexed. The annexation of the usual attestation of the enactment and signatures to the acts was not necessary. It is sufficient that their existence and time of legal enactment is shown.

Our opinion, therefore, upon this question is, that the papers were properly admitted in evidence.

The next question is, whether before the policy of insurance underwritten by the Boston Insurance Company could be given in evidence, it was necessary to prove that the subscription to the stock, and the payment of such subscription, *as required by the act of incor- [*409 poration, had been made. In our opinion it was not. This is not the case where a suit is brought by the corporation to enforce its rights, where, if the fact of its legal existence is put in controversy upon the issue, the corporation may be called upon to establish its existence. The case of Henriquez and Van Moyses v. The Dutch West India Company, cited in 2 Lord Raym. 1535, as decided before Lord King, whatever may be its authority, was of that sort, and therefore carries with it an obvious distinction; nor is this the case of a quo warranto, where the government calls upon the company to establish its legal corporate powers and organization. The case here is of a public prosecution for a crime, where the corporation is no party, and is merely collaterally introduced as

1.—4 Com. Dig. 468, note a, Am. ed.

2.—4 Com. Dig. note t. Russell on Crimes, 1495.

being intended to be prejudiced by the commission of the crime. Under such circumstances we think nothing more was necessary for the government to prove than that the company was de facto organized and acting as an insurance company and corporation. The very procurement of a policy by the prisoner, to be executed by the company, was of itself prima facie evidence for such a purpose. In cases of the murder of officers, it is not necessary to prove that they are officers by producing their commissions. It is sufficient to show that they act de facto as such. In cases of piracy, it has been held sufficient to establish the proprietary title to the ship by evidence of actual possession of the party claiming to be owner. These are 410*] *analogous cases, and furnish strong illustrations of the general principle.

The same answer may be given to another objection, and that is, that the policy ought to have been proved to be executed by the authority of the company in such manner as to be binding on them. The actual execution of the policy by the known officers of the company de facto, is sufficient.

The next question arises upon the instruction of the court "that it was not material whether the company was incorporated or not; and it was not material whether the policy was valid in law or not; that the prisoner's guilt did not depend upon the legal obligation of the policy, but upon the question whether he had wilfully and corruptly cast away the vessel, as charged in the indictment, with intent to injure the actual underwriters." We think this opinion correct. The act of Congress of the 26th of March, 1801, ch. 40, on which this indictment is framed, declares "that if any person shall, on the high seas, wilfully and corruptly cast away, etc., any ship or vessel, of which he is owner, etc., with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy or policies of insurance thereon, etc., the person or persons offending therein, etc., etc., shall suffer death. The law punishes the act when done with an intent to prejudice; it does not require that there should be an actual prejudice. The prejudice intended is to be to a person who has underwritten, or shall underwrite, a policy thereon, which, for aught the prisoner knows, 411*] *is valid; and does not prescribe that the policy should be valid, so that a recovery could be had thereon. It points to the intended prejudice of an underwriter de facto. The case of The King v. Gillson, 1 Taunt. Rep. 95; 2 Leach, 1007, did not turn upon this point. That was an indictment for maliciously setting fire to a house with intent to defraud the London Assurance Company of houses and goods from fire. It was necessary to prove that the household goods in the house had been actually insured for the prisoner by the company. A policy had been executed by the company on these goods, in another house, and subsequently, upon the removal of the prisoner to the house set on fire, a memorandum was indorsed on the policy, agreeing that the removal of the goods should be allowed. This memorandum was unstamped, and by statute was not admissible in evidence. Six judges against five held the evidence inadmissible, upon the ground that the prohibition was intended to be universal. The existence, therefore, of the insurance itself, could not be established. If there had been proof that the policy was executed, the question might have arisen, whether it was necessary further to prove its legal validity in all other respects. The argument at the bar, drawn from the known law as to forgeries, is, we think, pertinent. In those cases, when they depend on the common law, actual prejudice is not necessary to be proved; and of course the validity of the instrument is entirely waived.

*Another question, not raised in the [*412 court below, has been argued here, and upon which, as it is vital to the prosecution, we feel ourselves called upon to express an opinion. It is that a corporation is not a person within the meaning of the act of Congress. If there had been any settled course of decisions on this subject, in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of the act. But there is no such course of decisions. The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons is unquestionable. And the citation from 2 Inst. 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. ch. 7, respecting the erection of cottages, where the word used is, "no person shall," etc., says, "this extends as well to persons politic and incorporate as to natural persons whatsoever." In the case of The King v. Harrison, 1 Leach, 180; 2 East's Pl. Cro. 927, 988, it may perhaps be matter of some doubt, whether the point was actually decided by the court. But if it was, it mainly rested upon a peculiarity of construction which grew out of the statute of 31 George II. ch. 22, s. 78, which professed to cure doubts of the meaning of these words in other antecedent statutes upon similar subjects, leaving that on which the indictment was framed untouched. Finding, therefore, no authority at common *law, which overthrows the doctrine of [*413 Lord Coke, we do not think that we are entitled to engraft any such constructive exception upon the text of the statute.

Upon the whole, it is to be certified to the Circuit Court of Virginia, that the decisions of that court, upon the points of law arising at the trial, were correctly decided.

Certificate.—This cause came on to be heard on the certificate of division of opinions of the judges of the Circuit Court, etc. On consideration whereof, it is adjudged by the court that it be certified to the said Circuit Court that the points of law ruled by the said Circuit Court at the trial of the cause, and upon which the same court, upon a motion for a new trial, were divided in opinion, were, in all respects correctly decided by the said court at the said trial.

[Practice.]

THE ANTELOPE,

The Vice-Consuls of Spain and Portugal, Libellants.

Explanation of the former decree of the court in the same cause, ante, Vol. X. p. 66.

CERTIFICATE.—A mandate having issued to the Circuit Court of the district of Geor- 414*] gia, to *carry into execution the decree of this court pronounced at the February term, 1825, to deliver certain Africans, in the said decree mentioned, to the Spanish consul for Spanish claimants, and the judges of that court having been divided in opinion respecting the mode of designating the said slaves so to be delivered, and separating them from others to be delivered to the United States, whether the same should be made by lot, or upon proof on the part of the Spanish claimant, it is ordered to be certified to the said Circuit Court of Georgia, that in executing the said mandate, the Africans to be delivered must be designated by proof made to the satisfaction of that court.

[Practice.]

WILLIAMS, Plaintiff in Error,

v.

THE PRESIDENT, DIRECTORS, and COMPANY of THE BANK OF THE UNITED STATES, Defendants in Error.

Where there is a joint judgment against several defendants, and one only sues out the writ of error without joining the others, it is irregular; but if the others refuse to join in it, quære, whether the plaintiff may not have summons and severance.

IN this case in which Mr. Wright was for the 415*] *plaintiff in error, and Mr. Webster for the defendants:

Mr. Chief Justice **Marshall** stated that the writ of error must be dismissed, it having issued irregularly. The judgment in the Circuit Court of Ohio was a joint judgment, upon a joint action for money lent, against three defendants; and the writ of error was sued out by one of the defendants, in his own name only, without joining the others. The court was of opinion that the writ of error ought to have been in the name of the three; and if the others should refuse to join in it, that it would deserve consideration whether the present plaintiff might not have summons and severance.

Writ of error dismissed.

[Practice.]

BARNES et al. v. WILLIAMS.

Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a venire facias de novo.

THIS cause was argued by Mr. **Wickliffe** and *Mr. **Talbot** for the plaintiffs, and [*416 by Mr. **White** and Mr. **Isaacks** for the defendant.

Mr. Chief Justice **Marshall** stated that, upon inspecting the record, it had been discovered that the special verdict found in the case was too imperfect to enable the court to render a judgment upon it. The claim of the plaintiffs being founded upon a bequest of certain slaves, it was essential to a recovery at law that the assent of the executor to the legacy should be proved. Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff. So, as to the defendant's defense under the statute of limitations, the special verdict did not find any facts by which the court could ascertain at what time the right of action accrued. It was not stated that the plaintiff and defendant were ever resident in the same state at the same time. Although it was found that E. D. Barnes, one of the plaintiffs, came into the state of Tennessee after he arrived at the age of twenty-one years, and more than three years before the suit was brought, yet it was not found that during any part of that time the defendant, Williams, was resident in that state. The case was, therefore, too imperfectly *stated to [*417 enable the court to decide the questions upon which the opinions of the judges of the Circuit Court were opposed, and the cause was remanded to that court, with directions to award a venire facias de novo.

[Construction of Statute.]

THE UNITED STATES v. KELLY et al.

Although the crimes act of 1790, c. 36, (IX), s. 12, does not define the offense of endeavoring to make a revolt, it is competent for the court to give a judicial definition of it.

The offense consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the goverment and navigation of her, or by transferring their obedience from the lawful commander to some other person.

HE defendants, Kelly and others, were indicted in the Circuit Court for the district of Pennsylvania, for that the defendants, on

the 24th of December, 1824, being seamen on board a merchant vessel of the United States, called the Lancaster, on the high seas, feloniously endeavored to make a revolt in the said vessel, contrary to the act of Congress of the 30th of April, 1790, c. 36, (IX.) s. 12. The defendants were found guilty, and moved the 418*] court in arrest *of judgment, upon the ground "that the act of Congress does not define the offense of endeavoring to make a revolt, and that it was not competent to the court to give a judicial definition of a crime heretofore unknown." The opinions of the judges of the court below being divided upon this motion, the case was certified to this court for determination.

The cause was submitted without argument by the Attorney-General for the United States, no counsel appearing for the prisoners.

Mr. Justice Washington delivered the opinion of the court:

This case comes before the court upon a certificate of a division of opinion of the judges of the Circuit Court for the eastern district of Pennsylvania, upon the following point assigned by the defendants as a reason in arrest of judgment, viz., "that the act of Congress does not define the offense of endeavoring to make a revolt, and it is not competent to the court to give a judicial definition of an offense heretofore unknown."

This court is of opinion that although the act of Congress does not define this offense, it is nevertheless competent to the court to give a judicial definition of it. We think that the offense consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of 419*] *the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.

Certificate accordingly.

[Construction of Statute.]

THE UNITED STATES
v.
TAPPAN et al.

The words "true value," in the 11th section of the duty act of the 20th of April, 1818, c. 361, mean the actual cost of the goods to the importer at the place from which they were imported, and not the current market value of the goods at such place.

If the collector, in fact, suspects that the goods are invoiced below the current market value thereof, at the place from which they were imported, but does not suspect that they were invoiced below the true and actual cost thereof to the importer, the collector has no right to direct an appraisement.

But, whenever, in the opinion of the collector, there is just ground to suspect that the invoice does not truly state the actual cost of the goods, he may direct the appraisement, and is not bound to disclose the grounds upon which he forms that opinion, whether it is formed from his knowledge or in formation of the current market price of the goods, or other circumstances affording grounds to suspect the invoice to be fraudulent.

THIS cause was argued by the Attorney-General and Mr. Blake for the plaintiffs, and by Mr. Webster for the defendant.

Mr. Justice Thompson delivered the opinion of the court:

*This is an action of debt upon a [*420 duty bond, under the act of the 20th of April, 1818. Upon the trial of the cause in the Circuit Court of Massachusetts, the following questions arose:

1. Whether the words "true value" in the 11th section of the act of the 20th of April, 1818, meant the current market value of such goods at the place from which they were imported, or the true and actual cost thereof to the importer at such place.

2. Whether, if the collector did, in fact, suspect that the goods were invoiced below the current market value thereof, at the place from which they were imported, but did not suspect that they were invoiced below the true and actual cost thereof to the importer, the collector had a right to direct an appraisement.

3. Whether, if, in the opinion of the collector, there was just ground to suspect that the goods were invoiced below the current market value of the same, at the place from whence they were imported, then the said collector had a right to direct the same to be appraised in the manner prescribed in the 11th section of the before-mentioned act of Congress.

Upon which questions the judges of the Circuit Court were opposed in opinion, and they are brought up to this court for decision.

It seemed to be admitted on the argument at the bar that the answers to these questions will depend in a great measure, if not entirely, upon a more general inquiry with respect to the basis on which the ad valorem rate of duties is to be *estimated; whether up- [*421 on the actual cost of the goods, or the current market value thereof, at the place from which they were imported. That, prior to the act of 1818, ad valorem duties were to be estimated upon the actual cost of the goods cannot admit of a doubt. In one of the earliest acts of Congress passed on this subject in the year 1789, 2 L. U. S. 22, this was assumed as the basis. The act declares that the ad valorem rates of duty upon goods, wares and merchandise, at the place of importation, shall be estimated by adding twenty per cent. to the actual cost thereof, if imported from the Cape of Good Hope, or from any place beyond the same, and ten per cent. on the actual cost thereof, if imported from any other place or country; exclusive of charges. In the act passed but a few days before, 2 L. U. S. 5, after the enumeration of certain articles subject to an ad valorem duty, it is declared "that on all other goods, wares and merchandise, five per cent. on the value thereof at the time and place of importation" shall be laid. The word "value," as here used, cannot be understood in any other sense than the words "actual cost," in the act passed only twenty-seven days after. It would be unreasonable to suppose that, in the former act market value was established as the basis, and

in the latter a new rule introduced under the terms "actual cost," with a view to any change of the basis. It is more reasonable to suppose that value and actual cost were intended to import the same meaning. And, in other parts 422*] of the laws on *this subject, where these terms are used in reference to the rule by which the duties are to be estimated, they are to be taken in the same sense, and to be understood as a varied mode of conveying the same idea. 2 L. U. S. 22; 3d vol. ed. 185. In the act of 1799, the same basis, actual cost, is expressly adopted as the rule by which ad valorem duties are to be estimated, 3 L. U. S. 193; and that such was the rule previous to the act of 1818 was not denied on the argument, as it certainly could not be with the least color of plausibility. And if this be so, there ought to be a very clear expression of the legislative will, before a rule which had governed the practice on this subject for nearly thirty years should be considered as abolished and a new one adopted. And we think the act of 1818, 6 L. U. S. 300, will not justify such a conclusion. If any parts of the act, when separately considered, would seem to warrant such a construction, the whole, when taken together, admits of no such interpretation, and would, indeed, be directly at variance with the fourth section of this act which, in terms, adopts the rule first laid down in the act of 1789, and which has been continued in all the subsequent laws, "that the ad valorem rates of duties, upon goods, wares and merchandise, shall be estimated by adding twenty per cent. to the actual cost thereof, if imported from the Cape of Good Hope, or from any island, port or place beyond the same, and ten per cent. on the actual cost thereof, if imported from any other place, etc. It has been 423*] contended, however, on the *part of the United States, that, by the terms "true value," as used in several parts of the act of 1818, and particularly in the 11th section, it was intended to substitute the current market value instead of actual cost as the basis upon which ad valorem duties are to be estimated. The subject-matter of this section is, to provide for the detection of fraudulent invoices, and fix the rule by which the duties are to be estimated when the invoice price is below the actual cost. The law requires, 3 L. U. S. 437, that the invoices of all goods imported into the United States, and subject to an ad valorem duty, shall contain a true statement of the actual cost of such goods. And no entry of the goods can be made unless the original invoice is produced, and oath made that it contains a just and true account of the cost of such goods. 3 L. U. S. 172. And to enforce a compliance with these injunctions, by putting into the hands of the collectors more efficient means of detecting all evasions of the law, was one of the principal objects of this 11th section of the act of 1818. It requires the collector, whenever, in his opinion, there shall be just grounds to suspect that goods, subject to an ad valorem duty, had been invoiced below their true value, at the place from which they were imported, to have them appraised. This power is, to act upon a supposed case of fraud, attempted to be practiced on the government, by making out the invoice below the actual cost. The great object to which the attention of the collector is directed, is to ascertain *the [*424 cost, that being the basis on which the duties are to be estimated. And if the invoice is false, the proper inquiry to detect it is as to the market value of the goods, and to compare that with the invoice price. And for the purpose of ascertaining such market value, the collector is authorized to appoint appraisers, who are sworn to report, according to the best of their knowledge and belief, the true value of the goods when purchased, at the place from whence the same were imported. The appraisers have, however, no concern with the actual cost of the goods. Their duty is confined to the value thereof, at the place of importation. And the law has declared what shall be the effect of a variance between the value so reported, and the invoice price. A small difference will not draw after it any penalty. The appraised value must exceed the invoice price 25 per cent., or no addition to the ratio of duty is imposed. The appraised value is of necessity assumed as the price upon which the duties are to be estimated, where the difference between that and the invoice price is 25 per cent. In that case the invoice is deemed fraudulent and to be laid out of view; and of course no evidence of the cost of the goods. And the 12th section expressly declares that the appraised value, in such case, shall be considered the true value upon which the duty is to be estimated. Or, in other words, so far as respects the rule by which the duties are to be ascertained, the true value, as found by the appraisers, shall be deemed the actual *cost. [*425 Where the appraised value shall be less than the invoice value, the duty is to be charged on the invoice value, in the same manner as if no appraisement had been made.

So, also, in the oath required by the 5th section of this act, true value imports nothing more nor less than actual cost. Any other construction would place it out of the power of any man to take the oath, where the goods were purchased at a rate at all differing from the market price. The law requires the invoice to be made out according to the actual cost, and this to be sworn to; and if true value means anything else than actual cost, the oath could not be taken. This is not a separate and distinct oath from that which is required by the act of 1799, and which is to accompany the invoice. The act declares it to be, not an additional oath, but facts in addition to the oath now required by law, which addition is, that "the invoice produced by him exhibits the true value of such goods, wares or merchandise in their actual state of manufacture, at the place from which the same were imported." There can be but one invoice and one oath, and that invoice must be made out according to the actual cost, and it necessarily follows that true value imports the same thing under a varied mode of expression. If it was permitted to make out two invoices of the same goods, one according to the actual cost, and the other according to the market value, and distinct oaths annexed to each, it might remove the difficulty *suggested. But that is [*426 not allowable. And no statute ought to receive a construction that will render it nugatory, or which prescribes a rule utterly impracticable, without incurring the guilt of perjury. If

then, the basis upon which ad valorem duties are to be estimated has not been changed by the act of 1818, from the actual cost to the market value of the goods at the place of importation, as we are satisfied it has not, the answer to the first question certified to this court will be, that the words "true value," in the 11th section of the act of 1818, import the same thing as actual cost.

And this, as was conceded on the argument, will dispose of the other questions, and require that they should be answered in the negative so far as, from the form in which they are propounded, they will admit of a direct answer.

In explanation, however, of this answer, it is proper to observe that the 11th section of the act to which the questions are pointed, is intended to clothe the collector with enlarged powers to guard against fraudulent invoices. Whenever, in his opinion, there shall be just grounds to suspect that the invoice does not truly state the actual cost of the goods, he may direct an appraisement. How, or by what means, that opinion is made up, no one has authority to inquire, or a right to control. Ordinarily, it will be found from his own knowledge, or the information he gets from others, of the market price of the goods, and if that should differ widely from the invoice prices, it will 427*] afford grounds for suspecting *the invoice to be fraudulent. For, as a general course of business, it is to be presumed that goods are purchased at the common market price. The authority of the collector to direct an appraisement is regulated, however, entirely by his own suspicion that the invoice is untrue, and does not state the actual cost of the goods as required by law. Whether this suspicion is well founded or not, is not matter of inquiry. So far as respects the authority of the collector to direct the appraisement, he is governed altogether by his own opinion of the grounds of suspicion. Whether these suspicions were well or ill founded, and the consequences resulting therefrom, will depend upon after inquiry before the appraisers and their decision thereupon. But the collector cannot be called upon to avow, or show the grounds upon which his suspicion rests. The law has vested him with an uncontrolled discretion on this subject, to be regulated and governed by his own opinion, of the sufficiency of the grounds on which he suspects the invoice to be below the true value or actual cost of the goods.

These answers must, accordingly, be certified to the Circuit Court, upon the questions submitted to this court.

Certificate.—This case came on to be heard on the certificate of the difference in opinion of the judges, etc. On consideration whereof, this court is of opinion, and directs it to be certified to the said Circuit Court, that the 428*] words "true *value," in the 11th section of the act of Congress of the 20th of April, 1818, do mean the actual cost thereof to the importer at the place from which the same was imported: and that the second question, upon which the opinions of the said judges were opposed, viz., whether, if the collector did, in fact, suspect that the goods were invoiced below the current market value thereof, at the place from which they were imported, but did not suspect that they were invoiced below the true and actual cost thereof to the importer, the collector had a right to direct an appraisement, be answered in the negative; and do also direct it to be certified that the third question, on which the opinions of the said judges were opposed, viz., whether, if, in the opinion of the collector, there was just ground to suspect that the goods were invoiced below the current market value of the same, at the place from whence they were imported, then the said collector had a right to direct the same to be appraised in the manner prescribed in the 11th section of the before mentioned act of Congress, be likewise answered negatively.

[*Practice.] [*429

CHACE et al., Appellants,
v.
VASQUEZ, the Consul-General of Portugal, Respondent.

On a libel in personam for damages, if the court decrees that damages be recovered, and that commissioners be appointed to ascertain the amount thereof, no appeal will lie from such a decree until the commissioners have made their report; this not being a final decree.

APPEAL from the Circuit Court of Maryland.

The libel in this case was in personam against the owners of the private armed vessel La Fortuna, stated to be owned by American citizens, for the recovery of damages for the illegal seizure, etc., of the Portuguese ship Monte Alegre and cargo, which, by a previous decree of the court, had been restored to the libelants, no damages having been claimed in the libel in rem.[1] A decree pro forma was taken for the libelants in the Circuit Court, and commissioners were ordered to be appointed to assess the damages; but the appeal was taken before the commissioners were appointed, upon the ground that no libel could be sustained in personam in such cases.

*Mr. D. Hoffman, for the respondent, [*430 stated that the appeal might be considered as well taken. The case of The Palmyra,[2] was distinguishable from this, as the damages there claimed were a part only of an entire decree in rem and in personam; but that here the sole inquiry is, whether any libel in personam could be sustained, which was an objection that covered the whole libel, and the entire decree; that, although the report of the commissioners, when made, might be appealed from, yet the inquiry was only as to the amount; and that if no libel could be sustained, an expensive and tedious investigation would be saved by first establishing the point that a libel in personam cannot be sustained in such cases.

The court were of opinion that the case was embraced by the principle decided in the case of The Palmyra, since an appeal would still lie from the damages when ascertained; but that,

1.—Ante. Vol. VII. p. 520.
2.—10 Wheat. Rep. 502.

had the decree of the Circuit Court dismissed the libel, such decree would have been final.

Appeal dismissed.

431*] [*Promissory Note.]

MILLS, Plaintiff in Error,
v.
THE PRESIDENT, DIRECTORS and COMPANY of THE BANK OF THE UNITED States, Defendants in Error.

No precise form of notice to the indorser of a promissory note is necessary; and it is not necessary to state, in the notice, who is the holder; nor will a mistake as to the date of the note vitiate the notice, if it conveys to the party a sufficient knowledge of the particular note which has been dishonored.

It is not necessary that the notice should contain a formal allegation that it was demanded at the place where payable. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity.

By the general law, demand of payment of a bill or note must be made on the third day of grace; but where a note is made for the purpose of being negotiated at a bank, whose custom is to demand payment and give notice on the fourth day, that custom forms a part of the law of the contract; and it is not necessary that a personal knowledge of the usage should be brought home to the indorser for that purpose.

The general rule of law, requiring proof of the title of the holders of a note, may be modified by a rule of court, dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him.

THIS cause was argued by Mr. Wright for the plaintiff in error, and by Mr. Webster for the defendants in error.

Mr. Justice Story delivered the opinion of the court:

432*] *This is a suit originally brought in the Circuit Court of Ohio, by the Bank of the United States, against A. G. Wood and George Ebert, doing business under the firm of Wood & Ebert, Alexander Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for $3,600, money lent and advanced. During the pendency of the suit, Reed and Adair died. Mills filed a separate plea of non-assumpsit, upon which issue was joined; and upon the trial, the jury returned a verdict for the Bank of the United States for $4,641; upon which judgment was rendered in their favor. At the trial a bill of exceptions was taken by Mills, for the consideration of the matter of which the present writ of error has been brought to this court.

By the bill of exceptions, it appears that the evidence offered by the plaintiffs in support of the action "was, by consent of counsel, permitted to go to the jury, saving all exceptions to its competence and admissibility, which the counsel for the defendant reserved the right to insist in claiming the instructions of the court to the jury on the whole case."

The plaintiffs offered in evidence a promissory note signed Wood & Ebert, and purporting to be indorsed in blank by Peter Mills, Alexander Adair and Horace Reed, as successive indorsers, which note, with the indorsements thereon, is as follows, to wit: "Chilicothe, 20th of July, 1819. $3,600. Sixty days after date I promise to pay to Peter Mills, or order, at the office *of discount and [*433 deposit of the Bank of the United States, at Chilicothe, three thousand six hundred dollars, for value received. Wood & Ebert." Indorsed: "Pay to A. Adair or order. Peter Mills." "Pay to Horace Reed or order. A. Adair." "Pay to the President, Directors and Company of the Bank of the United States, or order. Horace Reed." On the upper right-hand corner of that note is also indorsed: "3185. Wood & Ebert, $3,600, Sep. 18, '21." It was proven that this note had been sent to the office at Chilicothe to renew a note which had been five or six times previously renewed by the same parties. It was proven by the deposition of Levin Belt, Esq., mayor of the town of Chilicothe, that on the 22d day of September, 1819, immediately after the commencement of the hours of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note, but there was no person there ready or willing to pay the same, and the said note was not paid, in consequence of which the said deponent immediately protested the said note for the non-payment and dishonor thereof, and immediately thereafter prepared a notice for each of the indorsers respectively, and immediately

NOTE.—See note to Slacum v. Pomeroy, 6 Cranch, 221, as to the law of the place which governs the remedies on, and the liability of parties to, promissory notes.

See note to Fenwick v. Sears, 1 Cranch, 259, as to protest and certificate of notary as evidence of the facts stated therein, and as to the time and place of presentment, and as to the time of giving notice to the indorser of a bill or note.

As to presentment of bill for acceptance, and when unnecessary, see note to Brown v. Barry, 3 Dall. 365.

As to when notice of demand and non-payment must be given, see note to Bussard v. Levering, 6 Wheat. 102.

Custom. Controlling time of demand.

By the custom of the banks in the District of Columbia, payment of a promissory note is to be demanded on the fourth day after the time limited for the payment thereof, in order to charge the indorser, contrary to the general law merchant, which requires a demand on the third day. Renner v. Bk. of Columbia, 9 Wheat. 581.

A general usage and course of trade may be given in evidence, although such usage is founded on the laws or edicts of the government where the usage prevails. The usage may be proved by parol, and its effect is the same whether it originated in an edict, or in instructions given by a government to its officers. Livingston v. Mar. Ins. Co. 7 Cranch, 506.

A usage to control a general principle should be uniform and general; it is not sufficient that a few instances can be produced. The usage must be so well settled that persons engaged in trade must be considered as contracting with reference to the usage. Trott v. Wood, 1 Gall. 443.

When a usage is so proved as to leave no doubt of its existence, it becomes part of the law, and the court will recognize it as such without requiring it to be proved again. Consequa v. Willing, 1 Peters' C. C. 225.

In doubtful cases usage may be safely resorted to, to ascertain the meaning of the legislature. Polk v. Hill, 2 Overt. 118.

The usage of a bank to deposit notice in the post-office, has been held to be binding upon those dealing with it. But it should be proved with certainty

on the same day deposited one of said notices in the post-office, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy: "Chilicothe, 22d of September, 1819. Sir, you will hereby take no-
434*] tice *that a note drawn by Wood & Ebert, dated 20th day of September, 1819, for $3,600, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States at Chilicothe, and on which you are indorser, has been protested for nonpayment, and the holders thereof look to you. Yours, respecfully, Levin Belt, mayor of Chilicothe." Peter Mills, Esq. It was further proven by the plaintiffs that it had been the custom of the banks in Chilicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes and bills of exchange on the day after the last day of grace (that is, on the 64th day); that the branch bank, on its establishment at Chilicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place ever since. No evidence was given of the handwriting of either of the indorsers. The court charged the jury, (1) that the notice being sufficient to put the defendant upon inquiry, was good, in point of form, to charge him, although it did not name the person who was holder of the said note, nor state that a demand had been made at the bank when the note was due. (2) That if the jury find that there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by defendant, except the note in controversy, the mistake in the date of the note made by the notary in the notice given to that defendant does not impair the liability of the
435*] said defendant, and the plaintiffs *have a right to recover. (3) That should the jury find that the usage of banks, and of the office of discount and deposit in Chilicothe, was to make demand of payment, and to protest and give notice on the 64th day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the court to instruct the jury "that before the common principles of the law relating to the demand and notice necessary to charge the indorser can be varied by a usage and custom of the plaintiffs, the jury must be satisfied that the defendant had personal knowledge of the usage or custom at the time he indorsed the note; and also, that before the plaintiffs can recover as the holder or indorser of a promissory note, they must prove their title to the proceeds by evidence of the indorsements on the note," which instructions were refused by the court.

Upon this posture of the case, no questions arise for determination here, except such as grow out of the charge of the court, or the instructions refused on the prayer of the defendant's (Mills') counsel. Whether the evidence was, in other respects, sufficient to establish the joint promise stated in the declaration, or the joint consideration of money lent, are matters not submitted to us upon the record, and were proper for argument to the jury.

The first point is, whether the notice sent to the defendant at Chilicothe was sufficient to charge him as indorser. The court was of opinion that it was sufficient, if there was no other *note payable in the office at Chilicothe, [*436 drawn by Wood & Ebert, and indorsed by the defendant.

It is contended that this opinion is erroneous, because the notice was fatally defective by reason of its not stating who was the holder, by reason of its misdescription of the date of the note, and by reason of its not stating that a demand had been made at the bank when the note was due. The first objection proceeds upon a doctrine which is not admitted to be correct; and no authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser who is the holder, as he is equally bound by the notice, whomsoever he may be; and it is time enough for him to ascertain the true title of the holder when he is called upon for payment.

The objection or misdescription may be disposed of in a few words. It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights, or avoid his responsibility. In the present case, the misde-

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and clearness. Gindrat v. Mechanics' Bank, 7 Ala. 324; Chicopee Bank v. Eager, 9 Metc. 583; 1 Am. Lead. Cas. 403; Thorn v. Rice, 15 Me. 263.

By special established usage in a particular locality, the allowance of grace, usually three days, may be denied altogether, or a different number of days may be granted. Wood v. Corl, 4 Met. 203; Kilgore v. Bulkley, 14 Conn. 362; Jackson v. Henderson, 3 Leigh, 107; Bank of Columbia v. Magruder, 6 Har. & J. 172; City Bank v. Cutter, 3 Pick. 414; Morse on Banking, 335; but contra, Woodruff v. Merchants' Bk. 25 Wend. 673; 6 Hill, 174; Bowen v. Newell, 4 Seld. 190; Edwards on Bills, 520, 521.

Courts take judicial notice of the period fixed by the law merchant, and recognize that only, unless the usage varying it is alleged and proved. Jackson v. Henderson, 3 Leigh, 107; Dolfus v. Frosch, 1 Den. 367; Wood v. Corl, 4 Met. 203; Lucas v. Ladew, 28 Mo. 242; 1 Daniels' Neg. Instruments, 461.

In Kentucky it has been held to be a matter of local custom. Goddin v. Shepley, 7 B. Mon. 575.

The usage in the District of Columbia, above noted, extended only to notes discounted in bank. Cookendufer v. Preston, 4 How. 317.

The usages of banks in particular localities, in making demand and giving notice of non-payment, in a manner or at a time varying from the general law merchant, sanctioned. Adams v. Otterbank, 15 How. 539; Renner v. Bk. of Columbia, supra.

First. The usage must be notorious.

Second. When sanctioned by judicial decision, the usage becomes settled law. No further proof is necessary to establish it. Cookendufer v. Preston, 4 How. 317; Edie v. E. India Co. 2 Burr. 1221.

Third. It should apply to a place rather than to a particular bank. Renner v. Bk. of Col. 9 Wheat. 587; Mills v. Bk. of U. S. supra; Adams v. Otterbank, 15 How. 539; Dorchester Bk. v. Milton Bk. 1 Cush. 177.

Fourth. It need not be known to the party dealing with the bank. Mills v. Bk. of U. S. supra; Fowler v. Brantly, 14 Pet. 318; Lime R. Bk. v. Hewett, 52 Me. 531; Morse on Banking, 372-3; 1 Daniels' Neg. Inst. 462.

scription was merely in the date. The sum, the 437*] *parties, the time and place of payment, and the indorsement, were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed that on the 22d of September, a note indorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances the court laid down a rule most favorable to the defendant. It directed the jury to find the notice good if there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptionable in fact?

The last objection to the notice is, that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having 438*] complied *with the requisitions of law against the indorser. In point of fact, in commercial cities, the general, if not universal, practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment.

Upon the point, then, of notice, we think there is no error in the opinion of the Circuit Court.

Another question is, whether the usage and custom of the bank not to make demand of payment until the fourth day of grace, bound the defendant, unless he had personal knowledge of that usage and custom. There is no doubt that, according to the general rules of law, demand of payment ought to be made on the third day, and that it is too late if made on the fourth day of grace. But it has been decided by this court, upon full consideration and argument, in the case of Renner v. The Bank of Columbia, 9 Wheat. Rep. 582, that where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, it is to demand payment and give notice on the fourth day of grace, that custom forms a part of the law of such contract, at least so far as to bind their rights. In the present case, the court is called upon to take one step farther; and upon the principles and reasoning of the former case, it has come to the conclusion that when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal 439*] *knowledge of it or not. In the case of such a note, the parties are presumed by implication to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.

Another question propounded by the defendant is, whether the plaintiffs were entitled to recover without establishing their title to the note, as holders by proof of the indorsements. There is no doubt that, by the general rule of law, such proof is indispensable on the part of the plaintiffs, unless it is waived by the other side. But in all such cases the defendant may waive a rule introduced for his benefit; and such waiver may be implied for circumstances as well as expressly given. It is in this view that the rule of the Circuit Court of Ohio of 1819, which has been referred to at the bar, deserves consideration. That rule declares, "that hereafter, in any actions brought upon bond, bill, or note, it shall not be necessary for the plaintiffs on trial to prove the execution of the bond, bill, or note, unless the defendant shall have filed with his plea an affidavit, that such bond, bill or note, was not executed by him." We think the present case falls completely within the purview of this rule. Its object was to prevent unnecessary expense and useless delays upon objections at trials, which were frivolous and unconnected with the merits. If the rule attempted to interfere with, or control the rules of evidence, it certainly could not be supported. But it attempts no such thing. It does not deny to the party *the right to demand [*440 proof of the execution or indorsement of the note at the trial; but it requires him, in effect, to give notice by affidavit, accompanying the plea, that he means to contest that fact under the issue. If the party gives no such notice, and files no such affidavit, it is on his own part a waiver of the right to contest the fact, or rather an admission that he does not mean to contest it. We see no hardship in such a rule. It subserves the purposes of justice, and prevents the accumulation of costs. It follows out, in an exemplary manner, that injunction of the judiciary act of the 2d of March, 1793. ch. 22, which requires the court of the United States "to regulate the practice thereof, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." As no affidavit accompanied the plea of the defendant in the present case, he had no right to insist upon the proof of the indorsements.

Another objection now urged against the judgment is, that the count demands $3,600 only, and the jury gave damages amounting to $4,641. But there is no error in this proceeding, since the ad damnum is for a larger sum. In all cases where interest, not stipulated for by the terms of the contract, is given by way of damages, the sum demanded in the declaration is less than the sum for which judgment is rendered. The plaintiffs may not recover more, as principal, than the sum demanded as such in *the declaration; but the jury have a [*441 right to add interest, by way of damages, for the delay.

Some other objections have been suggested at the bar, such as, that the jury had no right, without evidence, to presume that there was no other note of Wood & Ebert, in order to help the misdescription; and that the case proved was of several liabilities of the defendants

which would not support a declaration on a joint contract. These questions have been fully argued by counsel, but are not presented by the record in such a shape as to enable the court to take cognizance of them.

Upon the whole, it is the opinion of the court that the judgment ought to be affirmed with costs.

[Local Law.]

MILLER'S HEIRS v. M'INTIRE et al.

Quære. Whether the compact of 1789, between Virginia and Kentucky, restrained the legislature of Kentucky from prolonging the time for surveying one entry to the prejudice of another.

By the construction of the act of Kentucky of 1797, granting further time for making surveys, with a proviso, allowing to infants, etc., three years after their several disabilities are removed to complete surveys on their entries; if any one or more of the joint owners be under the disability of infancy, etc., it brings the entry within the saving of the proviso, as to all of the other owners.

442*] *THIS cause was argued by Mr. Shefley for the appellants, and by Mr. Talbot for the respondents.

Mr. Chief Justice Marshall delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the district of Kentucky, by which the bill of the plaintiffs was dismissed pro forma.

An original bill was filed by Miller's heirs, in the year 1808, to obtain from the defendants therein mentioned the legal title to lands in their possession, to which the plaintiffs claimed the equitable right under a prior entry. The decree made by the court, in that cause, against several of the defendants, was brought before this court by appeal, and in that case the court determined in favor of the entry under which the title of the plaintiffs arose. 2 Wheat. Rep. 316. An amended bill was filed in 1815, against the present defendants in error, who, in their answer, contend, among other things, that the title of the plaintiffs has been forfeited by failing to make their survey within the time prescribed by the laws of Virginia; and that the compact between the two states restrained Kentucky from varying in any manner the laws by which titles originating anterior to the separation are to be governed.

Henry Miller, for whom the entry was made, died in March or April, 1796, having first made his last will in writing, by which he devised his 443*] *lands to be sold for the benefit of all his children, many of whom were minors.

The time allowed for making surveys, by the first law on that subject, had expired, but the time had been prolonged, first by the legislature of Virginia, and afterwards by that of Kentucky, until after the death of Miller, and the act of 1797, which gave still farther time, contained a saving of the rights of infants. In April, 1804, while the saving still existed, the survey was made.

In the case formerly decided in this court it was determined that Miller's heirs came within the saving of the act of 1797, but the compact between the two states was not then brought into view, and the counsel for the appellees insist that it applies to this case, and restrains the legislature of Kentucky from prolonging the time for surveying one entry to the prejudice of another. On this point a difference of opinion exists among the judges. Some think that a second entry is not authorized by the land law of Kentucky, and that no title can be acquired under it. A grant, therefore, that is founded on it is totally void, and the grantee cannot hold the land under it even after the original entry became forfeited. The land, on such forfeiture, became vacant, and it was competent to the legislature to grant it by an original warrant, or to revive or to continue the right held under the first entry.

Others are of opinion that a subsequent entry is not absolutely void, but has been considered as a valid appropriation of the land, unless it shall *be encountered by a better title. [*444 That the removal or extinguishment of that better title leaves the holder of a grant founded on a junior entry the true legal owner of the land it purports to convey. They think the practice of the court, to direct the elder grantee to convey to the person claiming the equitable title, is strong evidence of the prevailing opinion that a subsequent locater acquired a conditional interest, which might be ripened into title by the failure of the person holding the original entry to proceed as directed by law. But they think, also, that this mere possibility could not attach itself absolutely to the land until it became vacant by the laches of the person who had made the first appropriation. Till such vacancy actually occurred, the power remained with the state to give farther time for perfecting titles. Limitations of time, in this respect, were intended chiefly for the benefit of the state, since it was not the course of the government to tax unpatented lands. The state, therefore, might grant indulgences in this respect without giving just cause of complaint to a person whose interest, if he had any, was potential, not vested; was rather a pre-emption to the exclusion of others subsequent to himself, than a positive acquisition which could in any manner interfere with the rights of the person who had made a previous appropriation. Without determining either of the points on which this difference exists, the court is of opinion that Miller's heirs are within the savings of the act giving farther time to the *owners [*445 of lands to survey the same, and for returning plats and certificates to the register's office, passed in the year 1797, and may maintain this suit if no other objection exists to the title.

There seems to have been some confusion at the trial respecting testimony, and, from the manner in which the cause is brought up, the parties are placed under circumstances in this court which throw difficulties in the way of the investigation of the title on its real merits. We do not think such a defense is made out by the defendants as to justify an affirmance of the decree dismissing the bill; nor are we satisfied

that the state of the record is such as to enable this court safely to decree that the defendants shall convey the lands they hold within the patent of the plaintiffs. The decree, therefore, must be reversed, and the cause remanded to the Circuit Court, that farther proceedings may be had therein according to equity.

Decree.—This cause came on, etc. On consideration whereof, this court is of opinion that the right of the plaintiffs was preserved by the act giving further time to the owners of lands to survey the same, and for returning plats and certificates to the register's office, passed in the year 1797, and that the survey on which the patent was founded was made in time. This court doth, therefore, reverse the decree of the Circuit Court, dismissing the bill of the plaintiffs, and doth remand the cause to the said Circuit Court, that further proceedings may be had therein according to equity.

446*] [*Chancery. Award.]

CARNOCHAN & MITCHEL
v.
CHRISTIE et al.

An award must decide the whole matter submitted to the arbitrators; it must not extend to any matter not comprehended in the submission; and it must be certain, final and conclusive of the whole matter referred.

Where the arbitrators determined that the plaintiffs should be entitled to a credit of a certain sum on account of sales of land to the defendant, provided "they shall grant, or cause to be granted, to the said W. C. (the defendant) a clear, unencumbered and satisfactory title" to the lands, without limiting any time within which the title should be made: Held, that the award was void, as not being final and conclusive.

A court of equity either enforces an award as it is made, or sets it aside if in any respect defective; but it is contrary to its practice to confirm the award so far as it extends, and to supply omissions by decree of the court.

Where a bill is filed to set aside an agreement or conveyance, the conveyance cannot be established without a cross bill filed by the defendant.

THIS cause was argued by Mr. Webster and Mr. Berrien for the appellants,[1] and by Mr. *Emmett and Mr. D. B. Ogden for [*447 the respondents.[2]

Mr. Chief Justice **Marshall** delivered the opinion of the court:

Carnochan & Mitchel, the plaintiffs, were merchants in Georgia, who had extensive commercial transactions with the defendant, William Christie, a merchant of Liverpool, in the course of which the former became indebted to the latter to a large amount. In 1819, John Carnochan, one of the firm of Carnochan & Mitchel, visited England, in the expectation of selling immense tracts of land he had purchased in Florida, and, during his residence in that country, his partner, Peter Mitchel, relying, probably, on the sale of lands, continued to draw heavily on the defendant, W. Christie, without making correspondent remittances. Carnochan being unable to sell his lands, and thus to place funds in the hands of Christie, these bills produced great embarrassments, and frequent communications between the parties, in the course of which Carnochan pressed Christie most earnestly to proceed with his acceptances, and promised to secure him by the pledge of his Florida lands, and property in Georgia. At length, deeds of these lands, and other property, were executed, and the accounts settled between the parties. An account was stated, and signed *by them, showing [*448 a balance of £43,293 6 4, due to Christie,

1.—They cited, as to the necessity of a cross bill by the defendants in order to establish the conveyances, 2 Madd. Ch. 329; 2 Atk. 133; 1 Ball and Beatty, 217; 2 Cox, 78. As to the manner in which a court of equity acts upon an award, either by confirming it in toto or rejecting it, 1 Bro. Ch. 389; 3 Bro. Ch. 163; 1 Ves. Jun. 365; 2 Ves. Jun. 22; 4 Bro. Ch. 117, 536. As to the necessity of the award extending to all the matters of reference, 7 East's Rep. 81. As to the uncertainty and inconclusiveness of the award, 7 Term Rep. 69.

2.—To show that an award might be good in part, and void as to the residue, they cited 5 Wheat. Rep. 394; 3 Dessauss. 11; 14 Johns. Rep. 36; Kyd on Awards, 243, 261, and the cases there collected.

NOTE.—Award and arbitrament.

Equity will not specifically enforce an agreement to refer to arbitrators. Tobey v. County of Bristol, 3 Story, C. C. 800.

The authority of referees in a submission, unless specifically limited, extends to questions of law as well as questions of fact; and they may decide on principles of equity and good conscience. Kleine v. Catarn, 2 Gall. 61.

An agreement to refer to arbitration is revocable before the award, and cannot be made by agreement, irrevocable. Tobey v. County of Bristol, 3 Story, C. C. 800; see Masterton v. Kidwell, 2 Cranch, C. C. 669.

Where one arbitrator had expressed an opinion, known to the party who selected him, the award is not binding. Taber v. Jenny, Sprague, 315.

An umpire should not act until the arbitrators have differed, and only on the points on which they differ. Traverse v. Beall, 2 Cranch, C. C. 113; contra, Lutz v. Linthicum, 8 Pet. 165; compare Hobson v. McArthur, 16 Pet. 182.

As to decision by two of three. Hobson v. McArthur, 16 Pet. 182; Kingston v. Kincaid, 1 Wash. C. C. 448.

Arbitrators cannot alter award, after having completed it. Bayne v. Morris, 1 Wall. 97; Talbot v. Hartley, 1 Cranch, C. C. 31.

Award must be delivered in time fixed by the bond. Goldsborough v. McWilliams, 2 Cranch, C. C. 401.

It must be final and conclusive on all the matter submitted and settle the dispute, or it is void. Kingston v. Kincaid, 1 Wash. C. C. 448; Faw v. Davy, 1 Cranch, C. C. 440; Talbot v. Hartley, 1 Cranch, C. C. 31; see Karthaus v. Ferrer, 1 Pet. 222; Kleine v. Katara, 2 Gall. 61; Alexandria Canal Co. v. Swann, 5 How. 83.

Must be certain to be valid. Myers v. York R. Co. 2 Curt. C. C. 28; Lyle v. Rodgers, 5 Wheat. 394; Litz v. Linthicum, 8 Pet. 165; Thornton v. Carson, 7 Cranch, 596; Kingston v. Kincaid, 1 Wash. C. C. 448.

Must not be in excess of submission. Hurst v. Hurst, 1 Wash. C. C. 56; York v. Cumb. R. Co. 18 How. 246; affirming S. C. 2 Curt. C. C. 28.

Evident mistake in law, good objection to report. Kelly v. Johnson, 3 Wash. C. C. 45.

Agreement to refer must be settled and complete. Campbell v. Am. P. L. Ins. Co. 1 McArthur, 246.

In the construction of awards every intendment shall be allowed in order to uphold it. Karthaus v. Ferrer, 1 Pet. 227.

for which sum Carnochan gave the promissory note of Carnochan & Mitchel, dated ———.

Soon after the execution of these deeds, Carnochan returned to Georgia, and considerable payments were made. But, the debt still remaining considerable, the agent of Christie caused the deeds to be recorded, and apprehensions were entertained that he would proceed to sell the property. In June, 1820, Carnochan & Mitchel filed their bill in the Circuit Court of the United States for the district of Georgia, alleging that the account was unfairly settled, to the very great injury of the plaintiffs; that it contains many erroneous charges, and omits to give credits to which the plaintiffs are entitled, and that Carnochan was induced to sign it, and to give the note for the amount, in consequence of his situation, which placed him in the power of the defendant. That the deeds also were executed under duress, and consequent imposition. The bill prays that the account may be resettled, that the deeds may be cancelled, and the defendant enjoined from proceeding under them. The injunction was awarded.

The defendant, Christie, filed his answer, denying all the material allegations of the bill.

Numerous exhibits were filed, and several depositions taken. In December, 1821, the parties agreed to refer the case to arbiters, and the following submission was entered on the record:

449*] *"Carnochan & Mitchel v. William Christie and William Jenner, } In Equity.

"We agree to the reference. The arbitrators to determine all matters in controversy as exhibited in the pleadings, with the understanding that the stated account is not to be opened further than to permit the complainants to establish by proof the errors in the same, as alleged in their bill and exceptions; the items which compose the alleged error of four thousand pounds, to be distinctly stated and specified by the complainants within twenty days from this date. The defendant, William Christie (if he desire it), to have one hundred and twenty days to produce documents or vouchers to answer the said items, upon giving the complainants notice within ten days' after receiving such specification. The parties to proceed in the arbitration upon ten days notice after the expiration of the time allowed the complainants to exhibit their specification above mentioned. This submission to be made an order of court. The arbitrators to make their award within one hundred and twenty days, unless prevented by the requirement of time by the said William Christie as aforesaid, from this date, and return the same to the next term of this court; which award, when so made, shall be final and conclusive between the parties, subject to those exceptions which arise upon awards, or deci-

450*]sions of arbitrators. Claims to *commissions mutually abandoned, and the amount decreed by the arbitrators to be paid in two installments, at six and twelve months from the date of the decree, and sufficient security for the fulfillment of the award be given by Carnochan & Mitchel to William Christie. The arbitrators to have the power of examining witnesses upon oath, and calling for documents which they may deem necessary; but the said William Christie shall be excused from producing any such document if he will depose that the same is not in his possession on this side of the Atlantic. The arbitrator under this submission, chosen and selected by the complainants, is William Gaston, Esq., and the arbitrator chosen and selected by the defendant, William Christie, is Samuel Nicholas, Esq., the said arbitrators, in case of disagreement, to name an umpire. The arbitrators to decide whether William Christie is entitled to a distinct and separate interest in the Florida lands, as he alleges, or to an undivided interest in the proceeds of the same, as alleged by Carnochan & Mitchel. If they decide in favor of complainants upon this point, then the whole property shall be placed in the hands of the trustees mutually appointed by the parties, with authority to sell the same, or such part thereof as may be necessary, and appropriate the proceeds to William Christie on his own account, and to the credit of the balance which shall be found due to him, until the same is extinguished, in the proportion of the respective interests of William Christie and Carnochan & Mitchel. If they *decide in favor of [*451 the defendant upon this point, then it is agreed that an immediate partition of the property shall be made, and the part allotted to Carnochan & Mitchel shall be placed in the hands of such trustees, and the same, or such parts as may be necessary, to be sold, and the proceeds appropriated in like manner to the payment of the balance found due to William Christie by Carnochan & Mitchel, until the same is paid. That, as soon as that balance is paid, the deeds and other encumbrances held by said William Christie, with the settled account and note of Carnochan & Mitchel, are to be delivered up.

"That it shall be referred to the said arbitrators to determine whether the payment of the balance should be made in England at par, or here."

"On the 14th of February, 1822, the following award was returned, and filed in court:

"In the Sixth Circuit Court of the United States, District of Georgia.

"C. and M. v. C. and J. } In Equity.

"Arbitration.—The undersigned arbitrators, chosen and selected by the above-named parties, as will more fully appear by reference to the submission calling them to perform this duty, under date of the twenty-eighth of December, eighteen hundred and twenty-one, beg leave to report and award to the following result, after the most patient hearing of the parties aforesaid, and a *careful examina- [*452 tion of the books, papers, letters and vouchers which have been submitted to their inspection, and also after giving all matters and things in controversy the most mature deliberation:

"1st. That William Christie place to the credit side of his account with the late firm of Carnochan & Mitchel the sum of eighteen thousand, eight hundred and forty-six dollars and fifty-five cents, as an amount paid by said Carnochan & Mitchel, through Mitchel, Nephew & Co., of Havana, to Messrs. John & James

Inerarity, for sixteen shares, or eighty thousand acres of land, bought by Carnochan & Mitchel, by order, and for account of, William Christie, of said John & James Inerarity, lying in the territory of West Florida; that the said Carnochan & Mitchel be also credited with an accumulating interest on said amount from the dates of payment, which precise periods will more fully appear by reference to an affidavit made by Colin Mitchel at Havana, on the nineteenth day of October, eighteen hundred and twenty-one; said interest to be calculated at and after the rate of five per centum per annum; provided, nevertheless, that the said John Carnochan and Peter Mitchel shall grant, or cause to be granted, unto the said William Christie, a clear, unencumbered and satisfactory title to the said sixteen shares, or eighty thousand acres of land lying in West Florida as aforesaid.

"2d. William Christie to place to the credit side of his account with the late firm of Carno- 453*] chan & *Mitchel the sum of ten thousand pounds sterling, or forty-four thousand, four hundred and forty-four dollars and forty-four cents, being in payment to Carnochan & Mitchel for thirty shares, or one hundred and fifty thousand acres of land lying in the territory as aforesaid of West Florida; the said sum of forty-four thousand, four hundred and forty-four dollars and forty-four cents to draw an accumulating interest to the credit of the said Carnochan & Mitchel, at and after the rate of five per centum per annum. The period when said interest shall commence to be calculated shall be from the day of the date of the title, which title is referred to in the provision next following; provided, nevertheless, that the said John Carnochan and Peter Mitchel shall grant, or cause to be granted, unto the said William Christie, a clear, unencumbered and satisfactory title of the said thirty shares, or one hundred and fifty thousand acres of land lying in the territory of West Florida as aforesaid.

"3d. William Christie to place to the credit side of his account with the late firm of Carnochan & Mitchel the one-half amount of the sterling cost of a case of merchandise, marked AP, (56) number fifty-six, shipped to A. H. Putnam & Co., in the year eighteen hundred and sixteen, amounting to the sum of ninety-one pounds, eight shillings and seven pence as the whole cost; one-half to be thus credited is forty-five pounds, fourteen shillings and three pence half penny, or two hundred and three dollars, sixteen cents, without placing any interest what- 454*] ever to the credit *of Carnochan & Mitchel, on this amount, no interest considered as of right accruing on this credit.

"4th. William Christie to place to the credit side of his account with the late firm of Carnochan & Mitchel one-third of the net proceeds of twenty-one bales of cotton, the whole amount of net proceeds of twenty-five bales of cotton, and also the whole amount of net proceeds of thirty-nine bales of cotton, with an accumulating interest from the date when in funds from the sale of same, at and after the rate of five per centum per annum; provided, nevertheless, that the said John Carnochan and Peter Mitchel shall grant to said William Christie the bonds of Bainbridges & Brown, of London, indemnifying the said William Christie against any future claimants whatever for the net proceeds of said twenty-five bales of cotton; and also against all such unascertained charges as now exist, or may hereafter exist, against the thirty-nine bales of cotton as aforesaid.

"5th. William Christie to place to the credit side of his account with the late firm of Carnochan & Mitchel one-half the amount of three hundred and fifty pounds sterling, paid for deeds, etc., one-half to be borne by the said William Christie and the other half by Carnochan & Mitchel, being seven hundred and seventy-seven dollars and seventy-seven cents, with interest at five per centum per annum as aforesaid, from the period of the debit in the books of said William Christie.

"6th. William Christie to place to the credit *side of his account with the late firm [*455 of Carnochan & Mitchel a discount paid by Carnochan & Mitchel on Virginia bank notes received from John Gruve, on account of William Christie, amounting to twenty-two hundred and ten dollars, at two and a half per cent., is fifty-five dollars and twenty-five cents, with interest at five per centum per annum from the date of receipt of said money.

"7th. William Christie to place to the credit side of his account with the late firm of Carnochan & Mitchel the sum of sixty dollars and seventy-five cents, for attaching money in the hands of R. Harvey, of Augusta, with interest of five per centum per annum from the date of such charge in the books of Carnochan & Mitchel.

"8th. William Christie to place to the credit side of his account with the late firm of Carnochan & Mitchel two-thirds amount of the expenses on loading the ships Ocean and Aberdeen, the whole amounting to two hundred and forty-three dollars and seventy-five cents; two-thirds of which, to be credited as aforesaid, is one hundred and sixty-two dollars and fifty cents, with interest as aforesaid, at the rate of five per centum per annum from the date of such charge in the books of Carnochan & Mitchel.

"9th. Carnochan & Mitchel to place to the credit side of their account with William Christie the sum of four pounds sterling, or seventeen dollars and seventy cents, paid by the latter to Captain Munro, with interest as aforesaid, at the rate of five per centum per annum from the *date of such advance, as en- [*456 tered in the books of William Christie.

"10th. Carnochan & Mitchel are to account to William Christie for a Libranza, amounting to three hundred dollars, transmitted to Colin Mitchel, of Havana, for collection; also for a piece of red cloth and some thread remaining on hand unsold.

"11th. The undersigned distinctly award and determine that the amounts expressed in the first, second and fourth preceding items of this instrument of award cannot be considered as sums to the credit side of William Christie's account with Carnochan & Mitchel until all the conditions annexed to those respective items are fulfilled. The amounts expressed in items third, fifth, sixth, seventh and eighth, are without any condition, and are, of course, to

be immediately placed to the credit of Carnochan & Mitchel in the account of William Christie.

"12th. The undersigned arbitrators award, and hereby decide that the interest of William Christie in the Florida lands, meaning thereby the 80,000 acres and 150,000 acres mentioned in items first and second of this instrument of award, is an undivided interest.

"13th. The undersigned arbitrators award, and hereby decide that William Christie is entitled to debit and credit Carnochan & Mitchel, in account, at the rate of five per centum per annum interest annually, as same as heretofore, or shall hereafter become due, so that each 457*] *annual accumulation of interest shall become principal, and be considered as same.

"14th. The arbitrators feel themselves unqualified to decide upon a bill of charges exhibited by William Christie as his expenses in prosecuting this suit, together with other charges that have been incurred incidental to the same, both in England and this country, and would beg leave, with the consent of both parties, to refer the same to his honor, the judge, to decide on whom, in this controversy, such expenses can most properly fall.

"15th. The arbitrators do hereby award and decide that any balance that is now due, or shall be hereafter paid by Carnochan & Mitchel to William Christie, shall be considered as money due and payable in England at par. If, therefore, the sum is paid by Carnochan & Mitchel to William Christie in the United States, it must be in British sterling, at the current rate of exchange between the two countries.

"16th. Whereas William Christie has this day exhibited to the undersigned arbitrators his entire account current with the late firm of Carnochan & Mitchel, with interest calculated thereon up to the sixteenth instant, we have duly examined the same and believe it to be a just and faithful account, showing an amount of thirty thousand four hundred and eighty-three pounds, one shilling and two pence, or one hundred and thirty-five thousand, four hundred and eighty dollars and twenty-five cents, 458*] due him from Carnochan *& Mitchel, and which sum we do hereby award unto the said William Christie as the basis upon which a final settlement of accounts shall take place between him and the said Carnochan & Mitchel. It is to be distinctly understood by both parties in this controversy, that this amount of thirty thousand, four hundred and eighty-three pounds, one shilling, two pence sterling, or one hundred and thirty-five thousand, four hundred and eighty dollars, and twenty-five cents, as now awarded to William Christie is subject to all such deductions as are mentioned in the preceding items of this instrument of award; namely, the unconditional items to be immediately deducted; the conditional items to be deducted as the provisions of those conditions shall be removed by Carnochan & Mitchel, as will more fully appear is intended by the arbitrators, by reference to the eleventh item of this instrument of award; provided, nevertheless, that such amounts as are awarded to the credit of Carnochan & Mitchel in the preceding items of this instrument of award, as are hereby credited in the account current, as aforesaid, of William Christie, shall be considered always as settled by being placed in said account to the credit of Carnochan & Mitchel, and, of course, cannot be deducted again, as might be inferred, without this explanation, under the name of a provision to this item the sixteenth.

"17th. This item the arbitrators beg leave to introduce as explanatory, rather than having any specific award or decision thereon, affecting the *parties in controversy, by ob- [*459 serving that the actual amount that it may be desirable to ascertain may be due from Carnochan & Mitchel to William Christie, at any future day, arising from the account now referred to of William Christie, and also the deductions to be made from the same, growing out of this instrument of award, may be known by ascertaining whether Carnochan & Mitchel have removed the conditions annexed to items first, second and fourth; and, if found to be removed, then the whole amount now awarded in their favor (under conditions) will be placed to their credit in the account of William Christie; which, on supposition of being removed and placed at their credit at this period of time, would leave a balance due from Carnochan & Mitchel to William Christie, of a sum within the amount of seventy thousand dollars.

(Signed,)

"Sam Nicholas,
"Wm. Gaston.

"Savannah, February 13th, 1822."

Exceptions were taken to this award; and on the 23d of December, 1822, an interlocutory decree was pronounced by the Circuit Court, affirming the award, and referring the cause to the register, "to report the precise amount due the defendant, absolutely, according to the principles established by the award; also the amount due hypothetically, should the complainants fail to fulfil the conditions imposed by the award; in which undertaking he shall be at liberty to invoke the aid of the arbitrators, or either of them. *He must also [*460 report to the court the titles proposed to be given by the complainants to the defendant, Christie, for the several purchases of the Florida lands, should any difficulty arise between the parties on the legal sufficiency of the titles."

The court also directed the parties to join in a transfer of the Florida lands to trustees, for the purpose of raising the money due under the award, when instructed to do so under order of the court.

The report of the register was made, showing the sum due according to the award, should a title be made to Christie for the Florida lands he had purchased; and also the sum which would be due should no such deeds be made.

At the same term, on the return of this report, a final decree was pronounced, affirming the award, and affirming also the register's report; and directing the parties to join in a transfer of their whole interest in the Florida lands to trustees, "in trust to hold the same in pursuance of the terms of the said submission, and the award made thereon." The injunction was dissolved, and the bill dismissed.

The plaintiffs appealed from this decree, and contend that the award ought to be set aside, because,

1st. The arbitrators have not decided the whole matter that was submitted to them.

2d. They have decided and awarded what was not submitted.

3d. The award is uncertain.

461*] *1. In support of the exception founded on the failure of the arbitrators to decide on the whole matter submitted to them, it is alleged by the plaintiffs that the duress under which the deeds of trust, executed in England, were obtained, constituted a very essential part of the controversy, on which the award is entirely silent.

It is undoubtedly true that this is a "matter in controversy as exhibited in the pleadings," and would be submitted to the arbitrators by the general words of the first sentence, describing the extent of the submission, if it were not withdrawn from them in a subsequent part of the same instrument. But we think it is withdrawn. After directing that the arbitrators shall ascertain the balance due on the account, the agreement of submission, adds, "that as soon as that balance is paid, the deeds and other encumbrances held by the said William Christie, with the settled account and note of Carnochan & Mitchel, are to be delivered up."

This is, we think, a waiver of any objection to the manner in which those deeds were obtained, and an admission that they should remain in the hands of Christie as a security for the debt, until it should be discharged.

2. The second omission with which this award is charged, is the failure to decide on the claim of the plaintiffs to a credit for Christie's proportion of the expenses incurred in the settlement of the Florida lands.

This, too, was undoubtedly a matter of controversy. But we think it has been decided.

462*] The *arbitrators have allowed to the plaintiffs several credits claimed by them, but have not expressed their rejection of any item which may have been made and disallowed. Instead of introducing into the award the several items which may have been claimed and disallowed, they award a specific sum to the defendant, with a declaration that the several items enumerated in the preceding part of the award as credits to which the plaintiffs are entitled are to be deducted therefrom. This is, we think, a rejection of all credits not enumerated.

3. The failure to decide on the allegation made in the bill, and denied in the answer, that 50,000 acres, part of the interest in the Florida land sold to the defendant, was a mere donation, made under expectations which were entirely disappointed.

This also is, we think, decided in the award. The 2d article directs a credit of £10,000 sterling to be give to Carnochan & Mitchel, being in payment of them for thirty shares, or 150,000 acres of land lying in the territory of West Florida. This, we think, asserted the title of the said Christie to the whole quantity of land, and negatives the right of the plaintiffs to reclaim any part of it.

The second objection to the award is, that the arbitrators have exceeded their power, in requiring the plaintiffs to give a clear unencumbered title to the Florida lands.

The plaintiffs are not required to give a title. This is not a substantive and independ-

463*] ent part *of the award, directing them to do a particular act, for the neglect of which they would be liable to damages, or for the enforcing of which an attachment might issue. This part of the award is not compulsory. If the plaintiffs choose to waive the credit for the purchase money, they are left a liberty to do so, and to withhold the title, in which case the award affords the defendant no coercive means to compel a conveyance.

But had this article of the award been preemptory, it is by no means clear that the arbitrators would have exceeded their power in making it. That power extends to all matters in controversy, as exhibited in the pleadings, unless it be restrained by other parts of the submission. The title which the defendant might rightfully demand was one of these matters. The plaintiffs contend in their bill that the defendant was perfectly acquainted with the state of the title, and was bound to take it, such as it was; and there are strong circumstances to support their pretensions, at least as far as respects the 80,000 acres purchased from the Inerarity's. The defendant insists that they were bound to make him a clear title, and relies to prove this on a memorandum at the foot of a stated account, in these words:

"Memorandum.—From the balance due to me on this account as per contra, there is to be deducted, as agreed on between Messrs. Carnochan & Mitchel and myself, in lieu of 150,000 acres, or 30 shares of their purchase of Apalachicola lands, held in trust for them by Mr. Colin *Mitchel, on his and their [*464 executing to me a proper title for the same, the sum of £10,000."

The memorandum proceeds in like manner to state, that on a title for the 80,000 acres, there shall be deducted the sum of £6,583 8 6.

The question, what was a proper title, was for a court to decide under all the circumstances of the contract, and was transferred to the arbitrators by the submission, unless it be withdrawn from them by a subsequent clause of that instrument.

The plaintiffs contend that it is withdrawn by the provision, that, if the arbitrators should decide that Christie was entitled to an undivided interest in the proceeds of the Florida lands, then the whole property shall be placed in the hands of trustees, "with authority to sell the same, or such part thereof as may be necessary, and appropriate the proceeds to William Christie on his own account, and to the credit of the balance which shall be found due to him until the same is extinguished in the proportion of the respective interests of W. Christie and Carnochan & Mitchel."

The 12th article of the award decides that the interest of W. Christie in the Florida lands is an undivided interest. The plaintiffs insist that the parties have themselves provided for the state of things produced by this decision. They have directed that all the lands shall be placed in the hands of trustees, to be sold by them so far as may be necessary for the payment of the debt due to Christie. They have agreed on what *shall be done if the [*465 lands were held in common, and that on which they have agreed is inconsistent with what the arbitrators have done.

There is, undoubtedly, some confusion in this part of the submission, which renders the

construction difficult. It directs that the interest of Christie, as well as that of Carnochan & Mitchel, shall be sold, and the proceeds applied to the individual credit of Christie, and to the credit of Carnochan & Mitchel on their debt to Christie, in proportion to their respective interests in the land. This may be readily done, should the lands be sufficient to discharge the debt. Should they be insufficient, and should the insufficiency arise from want of title in Carnochan & Mitchel, Christie gives the credit absolutely, although he had contended that the right of the plaintiffs to the credit depended on the validity of the title they sold. This consideration may enter into the construction of the submission, if the words be doubtful, but cannot control the arrangement of the parties if that be intelligible. We rather incline to the opinion that as the whole property, including the interest of Christie, was to be placed in the hands of trustees to be sold on joint account, that the conveyance of a title to Christie could not be contemplated as a preliminary measure. But it is unnecessary to give any positive opinion on this point, because we think the award must be set aside because it is uncertain, and not final in a very material point.

The arbitrators have determined that Carno-
466*] chan & *Mitchel are entitled to a credit of $63,290.99, on account of the sales of lands to Christie, provided they "shall grant, or cause to be granted, to the said W. Christie a clear, unencumbered and satisfactory title" to the said lands. No time is limited by which this title shall be made. The question, then, whether this credit is to be allowed, or disallowed, is left indefinitely open. Consequently, the award is not final. It does not settle the accounts between the parties.

If it be said that the court may prescribe some time by which the title shall be made, the answer is, that if the arbitrators could refer that question to the court, they have not done so. They have left it entirely open. But the award ought itself to settle finally and conclusively the whole matter referred to them. It is contrary to the principle of a general reference that the court should take the award as far as it goes, and supply all omissions by its decree. The award ought to be in itself a complete adjustment of the controversies submitted to the arbitrators.

This award, therefore, ought to be set aside, and the decree affirming it reversed, and the cause remanded to the Circuit Court. The case will, then, stand before that court as it did previous to the submission. The court may dissolve the injunction so far as it should be perfectly satisfied that the plaintiffs are indebted to the defendant; and Christie may
467*] either avail himself *of the deeds he has received, or file a cross bill praying the aid of the court.

Decree.—This cause came on, etc. On consideration whereof, this court is of opinion that there is error in the decree of the Circuit Court in affirming the award made by the arbitrators in this cause, which said award ought to have been set aside, because the same is not certain and final. It is therefore decreed and ordered that the said decree be reversed and annulled, and that the cause be remanded to the Circuit Court, with directions to set aside the said award, and to take such further proceedings in the said cause as may be equitable and just.

[Constitutional Law.]

THE UNITED STATES v. ORTEGA.

An indictment under the crimes act of 1790, c. 36, (IX.). s. 37, for infracting the law of nations by offering violence to the person of a foreign minister, is not a case "affecting ambassadors, other public ministers and consuls," within the 2d section of the 3d article of the constitution of the United States.

The circuit courts have jurisdiction of such an offense under the 11th section of the judiciary act of 1789, c. 20.

Quære, Whether the jurisdiction of the Supreme Court is not only original, but exclusive of the Circuit Court, in "cases affecting ambassadors, other public ministers and consuls," within the true construction of the 2d section of the 3d article of the constitution.

*MR. JUSTICE WASHINGTON de- [*468
livered the opinion of the court:

The defendant, Juan Gualberto de Ortega, was indicted in the Circuit Court of the United States for the eastern district of Pennsylvania, for infracting the law of nations, by offering violence to the person of Hilario de Rivas y Salmon, the charge d'affaires of His Catholic Majesty the King of Spain in the United States, contrary to the law of nations, and to the act of the Congress of the United States in such case provided. The jury having found a verdict of guilty, the defendant moved in arrest of judgment, and assigned for cause "that the Circuit Court has not jurisdiction of the matter charged in the indictment, inasmuch as it is a case affecting an ambassador or other public minister." The opinions of the judges of that court upon this point being opposed, the cause comes before this court upon a certificate of such disagreement.

The questions to which the point certified by the court below gives rise, are, first, whether this is a case affecting an ambassador or other public minister within the meaning of the second section of the third article of the constitution of the United States. If it be, then the next question would be, whether the jurisdiction of the Supreme Court in such cases, is not only original, but exclusive of the circuit courts, under the true construction of the above section and article.

The last question need not be decided in the present case, because the court is clearly of

NOTE.—Foreign ministers.

An ambassador is not liable in any case, according to the law of nations, to answer either criminally or civilly before any court of the foreign nation to which he is sent. 1 Op. Att.-Gen. 77; U. S. v. Benner, 1 Baldw. 234; Ex parte Cabrera, 1 Wash. C. C. 232.

If a foreign minister commit an offense in our country, it belongs to the President, not to an individual citizen, to take notice of it. 1 Op. Att.-Gen. 71.

In an indictment for an assault and battery on a foreign minister, the first assault by the minister

469*] *opinion that this is not a case affecting a public minister, within the plain meaning of the constitution. It is that of a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations, and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States and the individual whom they seek to punish: but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution or in the costs attending it.

It is ordered to be certified to the Circuit Court for the eastern district of Pennsylvania, that that court has jurisdiction of the matter charged in the indictment, the case not being one which affects an ambassador or other public minister.

Certificate accordingly.[1]

1.—The constitution of the United States provides (art. 3, sec. 2) that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of 470*] different *states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." And that, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

The crimes act of 1790, c. 36 (IX.) s. 25, enacts, "That if any writ or process shall at any time be sued forth or prosecuted by any person or persons in any of the courts of the United States, or in any of the courts of a particular state, or by any judge or justice therein respectively, whereby the person of any ambassador, or other public minister, of any foreign prince or state, authorized and received as such by the President of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized or attached, such writ or process shall be deemed and adjudged to be utterly null and void, to all intents and purposes whatsoever (S. 26.) That in case any person or persons shall sue forth or prosecute any such writ or process such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the law of nations, and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court." The same section also contains a proviso, excepting from the operation of the preceding sections, any citizen or inhabitant of the United States, who shall have contracted debts before entering into the service of such minister, and requiring the name of such servant to be previously registed in the office of the Secretary of State, etc. The 27th section provides, "that if any person shall violate any safe conduct or passport duly obtained, and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court."

The judiciary act of 1789, c. 20, s. 9, provides, "That the *district court shall have, exclu- [*471 sively of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." "And shall also have jurisdiction, exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid."

The same act (s. 11) provides that the circuit courts "shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts, of the crimes and offenses cognizable therein." It also provides (s. 13) that the Supreme Court "shall have, exclusively, all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party."

The question whether the jurisdiction of the Supreme Court in "all cases affecting ambassadors,

will excuse the defendant as much as in an ordinary case. U. S. v. Liddell, 2 Wash. C. C. 205; U. S. v. Ortega, 4 Wash. C. C. 531.

Domestic servants of a foreign minister are not liable to the ordinary tribunals of the country, for misdemeanors. U. S. v. La Fontaine, 4 Cranch, C. C. 173.

It is a breach of diplomatic privilege for an officer of justice to enter the dwelling-house of a secretary of legation and there to seize a runaway slave; and for so doing the officer will be removed. U. S. v. Jeffers, 4 Cranch, C. C. 704.

But such privilege does not extend to the minister's garden. 1 Op. Atty.-Gen. 141.

The persons and household goods of foreign ambassadors and those attached to their respective legations, are exempt from lawful arrest, seizure, or molestation, as well by the law of nations, as by the act of Apr. 30, 1790. 5 Op. Att.-Gen. 69.

Proof that the person is received and recognized as an ambassador by the executive of the United States is conclusive as to his public character; courts cannot inquire whether a foreign minister was duly appointed by his government. U. S. v. Liddle, 2 Wash. C. C. 205; U. S. v. Ortega, 4 Wash. C. C. 531; 8 Op. Att.-Gen. 471.

An attaché to a foreign legation is a public minister within the act of Congress protecting foreign ministers from arrest. U. S. v. Benner, Baldw. 234.

The exemption from the municipal law of the country to which he is accredited, is not personal. It cannot be waived. It is the privilege of the country or government which he represents. Ibid. Davis v. Packard, 7 Pet. 276.

The executive department cannot redress injuries by private persons to foreign ministers. Their only remedy is through the judicial tribunals of the country. 5 Op. Att.-Gen. 69; 9 Id. 7.

Any person who executes process on a foreign minister is to be deemed an officer under sec. 25 of the act of 1790, which protects such minister from arrest. U. S. v. Benner, Baldw. 234.

To support an indictment under the act of 1790 against an officer for arresting foreign ministers, it is not necessary that the defendant should know the person arrested to be a foreign minister. Ib.

Where an outrage has been committed upon the dwelling-house of a foreign minister, to constitute it an offense against the law of nations, and the 27th section of the act of Congress of April 30th 1790, ch. 36, it must be made to appear that the party knew the house on which the attack was made to be the domicile of the minister, otherwise it is merely an offense against the municipal law. U. S. v. Hand, 2 Wash. C. C. 435.

An assault upon a foreign minister, not known as such to the aggressor, is not a violation of the laws of nations, under the act of Congress. Ibid.

other public ministers and consuls" is exclusive as well as original, under the constitution, so as to preclude Congress from vesting in any other tribunal jurisdiction over such cases, has never been decided in terms by this court. But it was held, as early as the year 1793, in the Circuit Court for the district of Pennsylvania, by Wilson and Peters, J. J. (Iredell, J., dissenting), that the jurisdiction in a criminal prosecution against a foreign consul, who was indicted for a misdemeanor at common law, was constitutionally vested in that court, under the 11th section of the judiciary act of 1789, c. 20. The United States v. Ravara, 2 Dall. Rep. 297. It has, however, been expressly determined by this court that the clause of the constitution giving the Supreme Court appellate jurisdiction in all other cases than those in which original jurisdiction is granted, does not exclude the court from exercising appellate jurisdiction in cases "arising under the constitution, laws, and treaties of the Union," 472*] *and in "cases of admiralty and maritime jurisdiction," although an ambassador, other public minister or consul, may be a party. If, for example, a foreign minister is sued in a state court by an individual, and that court should take jurisdiction, and give judgment against the minister, the Supreme Court of the United States may revise the judgment under the appellate powers given to it by the 25th section of the judiciary act of 1789, c. 20. So, where the inferior courts of the Union take cognizance, as courts of admiralty and maritime jurisdiction, of suits brought by foreign consuls in maritime causes in which their fellow-citizens are interested, the appellate power of this court has been constantly exercised. [See the judgment of this court in the case of Cohens v. Virginia, ante, Vol. VI. pp. 396-401, in which the previous case of Marbury v. Madison, 1 Cranch's Rep. 174, is revised and explained.] But where the jurisdiction depends merely upon the character of the consul, and not upon the nature of the case, the question has never been determined by this court, whether Congress could invest any other tribunal than the Supreme Court with the original jurisdiction.

It has been decided by the Supreme Court of Pennsylvania that the state courts have no jurisdiction of any suit brought against a foreign consul or vice-consul. Mannhardt v. Soderstrom, 1 Binn. Rep. 138. There seems to be no reason to doubt the correctness of this adjudication, the constitution giving to the national judiciary cognizance of "all cases affecting consuls," and Congress having, by the 9th section of the judiciary act of 1789, c. 20, vested the district courts of the Union with jurisdiction of various matters both of a criminal and civil nature, in some of which their jurisdiction is exclusive of the state courts, and, in others, concurrent with them; and towards the latter part of the section, the district courts being vested with jurisdiction "exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid." The word "suits" includes those both of a civil and criminal nature; and the exception of "offenses above the description aforesaid" refers to a description in the first part of the section, viz., offenses where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.

473*] *The circuit courts of the Union have jurisdiction concurrently with the district courts, of offenses within that description, in cases affecting consuls; and the circuit courts have exclusive jurisdiction of offenses above that description, in cases affecting consuls. It has also been determined by the Supreme Court of Pennsylvania that this last jurisdiction of the circuit courts is not only exclusive of the district courts, but of the state courts. Upon this ground, an indictment for a criminal offense under the laws of Pennsylvania, against the Russian Consul-General, was quashed for want of jurisdiction by that court, in 1816. Commonwealth v. Kosloff, 5 Serg. & Rawle, 545. In delivering the judgment of the court in that case, Mr. Chief Justice Tilghman also examined the question as to the nature and extent of the privileges of consuls under the law of nations, and decided that the privilege of immunity from criminal prosecutions was not conferred on them by that law. It had been previously determined by the English Court of K. B., in 1814, that they were not privileged as public ministers from arrest in civil cases. Vivian v. Beeker, 3 Maul. & Selw. 284. And the authorities, cited from the text-writers on the law of nations in these two cases, show that consuls are in no respect privileged as public ministers.

It results from the above provisions of the constitution, the acts of Congress, and the judicial expositions which have been given to them,

1. That no civil suit or criminal prosecution can be commenced against a foreign ambassador, other public minister or consul, in any state court.

2. That such ambassador, public minister or consul may, at his election, commence a suit in a state court (in other respects of competent jurisdiction) against an individual.

3. That an ambassador, or other public minister, cannot be proceeded against in any civil case, by compulsory process, in any court whatever.

4. That a consul may be sued, or proceeded against, civilly or criminally, in the courts of the Union, in the same manner as a private individual.

5. That in civil suits against a consul, and in criminal prosecutions against him, within the limits of the criminal jurisdiction of the district courts, the district courts have jurisdiction of such suits or prosecutions.

*6. That in criminal prosecutions against [*474 consuls, for offenses above the description of those cognizable in the district courts, the circuit courts have exclusive jurisdiction, and concurrent jurisdiction with the district courts in the other cases cognizable therein.

7. That the Supreme Court has original and exclusive jurisdiction of such suits or prosecutions against ambassadors, and other public ministers, as any court of justice can exercise consistently with the law of nations.

8. That the Supreme Court has original, but not exclusive, jurisdiction of suits brought by ambassadors, or other public ministers, or in which a consul is a party.

9. That the Supreme Court has appellate jurisdiction of all cases, in which a minister or consul is a party, arising in the state courts, and involving the construction of the national constitution, or the validity and construction of the laws and treaties of the Union, under the restrictions mentioned in the 25th section of the judiciary act of 1789, c. 20.

10. That the Supreme Court has appellate jurisdiction of all civil suits brought in the courts of the Union, having original jurisdiction of the suit, where a minister or consul is a party, and the matter in dispute exceeds the sum of two thousand dollars.

In criminal cases arising in the courts of the Union, no writ of error, or other appellate process, to remove the cause to the Supreme Court, has been provided by Congress; and the only mode in which such cases can be revised in this court is upon a certificate where the opinions of the judges of the Circuit Court are opposed. United States v. La Vengeance, 3 Dall. Rep. 297; United States v. More, 3 Cranch's Rep. 159; Ex parte Kearney, ante, Vol. VII., p. 42. Consequently, a criminal case affecting a consul can only be revised in this court upon a division of opinions of the judges of the court below, certified under the 6th section of the judiciary act of the 29th of April, 1802, c. 291. (XXXI.)

The question as to what is the law by which cases affecting ambassadors, other public ministers and consuls, are to be determined in the courts of the Union, in the absence of any legislative provisions by Congress applicable to the particular case, would lead into too wide a field of discussion to be embraced by the present note. It is obvious that the law of nations would, in some *in- [*475 stances, form the rule of decision; in others, such as civil causes arising out of contract, and questions of property, the laws of the several states would form the rule; but in what manner the jurisdiction of the national courts is to be exercised in prosecutions against consuls for offenses not declared penal by any act of Congress, is a subject on which a great contrariety of opinions has prevailed. In its more general application, this has been stated as a question, whether the United States, as a national government, have any common law, or, in other words, whether the courts of the United States have any common law jurisdiction. In a late essay upon the nature and extent of the jurisdiction of the courts of the United States, Mr. Duponceau has proposed a very elegant and ingenious solution of this problem, by assuming a distinction between the common law as a source of power, and as a means for its exercise. From the common law, considered in the first point of view, he contends that in this country no jurisdiction

can arise; while in the second, every lawful jurisdiction may be exercised through its instrumentality, and by means of its proper application. He denies its capacity to confer any powers on the courts of the Union which they do not possess by the written code of the national government; but he insists that, as a system of jurisprudence, it is the national law of the Union, so far as it has not been altered by the constitution, or by acts of Congress. Thus, in the case of consuls, it is the constitution which gives the jurisdiction in personam, but it is the local law of the state (whether common or statute), which must furnish the rule of decision in the absence of any regulation by Congress applicable to cases affecting them. And, in this view, the learned author insists that the 34th

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section of the judiciary act of 1789, c. 20, making the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise provide, rules of decision in trials at common law in the courts of the Union, in cases where they apply, includes both criminal and civil cases. But the question, for all practical purposes, is settled in this court according to the authority of the case in The United States v. Hudson and Goodwin, 7 Cranch's Rep. 32, in which it was determined that the courts of the Union cannot exercise a common law jurisdiction; although it is still considered as open for discussion, whenever a case shall arise rendering it necessary to reconsider that decision. See The United States v. Coolidge, ante, Vol. I., p. 415.

Wheat. 11.

ROSE'S NOTES

COMPLETELY REVISED EDITION

1917

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NOTES

ON THE

UNITED STATES REPORTS.

XI WHEATON.

11 Wheat. 1–58, 6 L. Ed. 405, THE MARIANNA FLORA.

Circuit Courts, upon appeal in admiralty, may allow amendments where public justice and substantial merits require.

Cited in The Haytian Republic, 59 Fed. 478, 15 U. S. App. 288, following rule; The Meteor, 17 Fed. Cas. 184, where new counts were added, testimony was in and summing up concluded.

Distinguished in The Philadelphia, 60 Fed. 426, 21 U. S. App. 90, holding amendments in matters of substance on appeal in instance cases cannot be allowed in the Circuit Court of Appeals; Megher v. Stewart, 6 Mo. App. 502, holding the practice peculiar to admiralty proceedings; Poole v. Nixon, 9 Pet. App. 781, 9 L. Ed. 309, 19 Fed. Cas. 1000, amendments cannot be made in the Supreme Court; United States v. Three etc., 28 Fed. Cas. 122, amendments cannot be made on the exchequer side of the court.

Attack upon United States public vessel by armed foreign vessel, upon supposition that it was piratical cruiser, is not piratical aggression.

Cited in United States v. Brig Malek Adhel, 2 How. 235, 11 L. Ed. 250, cargo owned by innocent parties in ship condemned for piratical aggression is not subject to forfeiture; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 432, 12 L. Ed. 503, to point that most admiralty libels for torts are for such as were caused by force.

Right to search and seize vessels of another nation is strictly belligerent right, allowed by general consent of nations in time of war.

Cited in Dole v. Insurance Co., 2 Cliff. 421, Fed. Cas. 3966, holding captures made under commission, issued under a regularly organized de facto government, engaged in open and actual war, is not piracy.

American ships offending against our laws and foreign ships offending within our jurisdiction may be seized upon the ocean.

Cited in Maxwell v. Griswold, 10 How. 256, 13 L. Ed. 411, sustaining action for repayment of illegal customs duties, demanded by the collector, and paid under protest; Crapo v. Kelly, 16 Wall. 633, 21 L. Ed. 439, defining American ships as ships of nation and not of any subdivision of it; United States v. Wren, 28 Fed. Cas. 786, condemnation of vessel, having no papers, commanded by a Confederate officer, who was under directions to deliver her to Confederate agent, was justified.

In cases of marine torts, admiralty courts give or withhold damages upon enlarged principles of justice and equity.

Approved in The Max Morris, 137 U. S. 13, 34 L. Ed. 589, 11 Sup. Ct. 32 (s. c., 24 Blatchf. 143, 28 Fed. 882, 24 Fed. 863), where damages were allowed, although contributory negligence was shown; The Martha, Blatchf. & H. 166, Fed. Cas. 9144, but refusing to extend the practice to case where libel was instituted before cause of action accrued; Olsen v. Flavel, 13 Sawy. 234, 34 Fed. 479, apportioning damages in case of contributory negligence, according to equity and justice; The City of Carlisle, 14 Sawy. 187, 39 Fed. 813, 5 L. R. A. 59, seaman, injured in service, has right to be cared for at least to the end of the voyage; The Explorer, 20 Fed. 138, 139, where amount of damages to injured seaman were reduced on account of contributory negligence; United States v. Reindeer, 27 Fed. Cas. 768, claimants of vessel discharged on the merits, not held for costs.

Where vessels are captured by United States war-ship, probable cause of seizure is bar to claims for damages or costs.

Approved in The Palmyra, 12 Wheat. 17, 6 L. Ed. 536, holding irregular commission, want of order and command on board and unjustifiable acts against other vessels, prima facie case of piratical aggression and bar to damages; La Manche, 2 Sprague, 214, Fed. Cas. 8004, where ship was taken upon high seas under mistaken supposition that she had violated the blockade; The James Andrews, 2 Sprague, 123, Fed. Cas. 7189, where property was captured under circumstances showing a clear case of enemies' property; The Ambrose Light, 25 Fed. 415, 417, holding seizure of Colombia rebel vessel of war as piratical was valid, belligerency of rebel government being unrecognized, and costs must fall upon the vessel; The Malaga, 16 Fed. Cas. 538, there being reasonable ground for supposing vessel seized was slave trader.

Where vessel of one nation commits a tort upon a vessel of another nation, the jurisdiction is concurrent in both.

Cited in Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 447, 32 L. Ed. 794, 9 Sup. Ct. 474, an action in admiralty in personam, arising from breach of contract, holding question where British law differed from our own, not open.

11 Wheat. 59–78, 6 L. Ed. 419, ETTING v. BANK OF UNITED STATES.

Where effect of written instrument depends, in part, upon extrinsic facts, inferences of fact are for jury.

Approved in M'Ghee v. Campbell, 101 Fed. 941, holding in an action to recover for death of railroad foreman who was killed while riding on a hand-car before daylight, where it was shown to be against the orders of the company to so ride after dark, the inference and facts surrounding a telegram as to whether deceased had to go on track earlier than usual were for the jury; Rapp v. H. Linebarger & Son, 149 Iowa, 438, 128 N. W. 559, reversing decision sustaining demurrer to guaranty contract for uncertainty as to terms, since such terms might be rendered certain by extrinsic evidence; Berry v. Jones, 106 Miss. 119, 122, 63 South. 342, in action between adjoining owners over construction of dividing line fence, evidence of good character of defendant not admissible; Rittenhoffer v. Cutter, 83 N. J. L. 616, **Ann. Cas. 1914B, 880,** 83 Atl. 874, evidence of reputation of defendant as to peacefulness not admissible in civil action for assault and battery; dissenting opinion in Aetna Indemnity Co. v. Crowe Coal & Min. Co., 154 Fed. 574, 83 C. C. A. 431, majority holding where doubt and uncertainty concerning effect of correspondence on employer's liability bond, doubt must be resolved in favor of sustaining contract; Barreda v. Silsbee, 21 How. 168, **16 L. Ed. 93,** holding it proper for the jury to determine, from all the evidence, the real contract, where a vessel was chartered at a rate subject to change by an advance in freight; Pence v. Langdon, 99 U. S. 581, **25 L. Ed. 421,** where trial court instructed jury that, in determining disputed agency, they were to construe letters and telegrams between parties; West v. Smith, 101 U. S. 270, **25 L. Ed. 812,** where jury was permitted to judge of alleged admission of a contract contained in a letter, in the light of extrinsic facts; M'Namee v. Hunt, 87 Fed. 301, where the effect of an excavation contract depended upon evidence of defendant's knowledge as to the character of the ground; Benning v. Nelson, 23 Ala. 805, holding evidence tending to show fraud in a deed relevant, and its weight a matter for the jury; Beverly v. McBride, 9 Ga. 447, **54 Am. Dec. 356,** holding a question of adverse possession is exclusively for the jury to decide; Roberts v. Bonaparte, 73 Md. 200, **10 L. R. A. 690,** 20 Atl. 920, if contract has to be made out partly by documents and partly by parol evidence, the question of what the contract was is for the jury; Coquillard v. Hovey, 23 Neb. 627, **8 Am. St. Rep. 138,** 37 N. W. 481, where contract for payment of obligations of another dependent upon proof of extrinsic facts, these questions of fact were submitted to the jury; Rosewater v. Hoffman, 24 Neb. 234, 38 N. W. 862, following rule; Rosenthal v. Ogden, 50 Neb. 223, 69 N. W. 780, follows practice in contract for services; Muller v. Mayor, 63 N. Y. 360, holding that whether the just inference from language of agreement and the circumstances was that it was intended to submit question of compensation to decision of another, was question for the jury; Bank v. Dana, 79 N. Y. 116, leaving construction of a note with collateral circumstances to jury;

Taylor v. McNutt, 58 Tex. 73, holding a note depending upon attending facts and circumstances for proper construction must be left to jury; Sheehy v. Duffy, 89 Wis. 17, 61 N. W. 298, holding question as to whether contract was rescinded by later correspondence was for the jury; Holman v. Crane, 16 Ala. 578, Sayres v. State, 30 Ala. 18, arguendo, Grand etc. Bank v. Wright, 53 Neb. 598, 74 N. W. 90, discussing whether wife contracted with reference to her separate estate.

Distinguished in Goddard v. Foster, 17 Wall. 142, **21 L. Ed. 595**, holding no error in charge to jury that certain correspondence showed an agreement distinct from prior written agreement, it being province of court to construe instrument introduced collaterally; United States v. Shaw, 1 Cliff. 322, Fed. Cas. 16,266, holding if a contract is to be shown by correspondence, it is for the court alone to determine its existence; Sewall v. Henry, 9 Ala. 31, where a bill of sale for a negro and a separate agreement for a resale upon a certain date, held that the interpretation of the writings was for the court; Holman v. Crane, 16 Ala. 580, where meaning was to be determined from written instruments, without the aid of extrinsic proof.

Though trial judge may refuse instruction on a hypothetical question of law, yet if given, and it is erroneous, appellate court will set aside verdict, if the erroneous instruction can have influenced the jury.

Approved in Insurance Co. v. Baring, 20 Wall. 162, **22 L. Ed. 252**, sustaining court in refusing hypothetical instructions; United States v. Morgan, 11 How. 159, **13 L. Ed. 645**, to point that neither party can complain of the form of instructions, if no objection is made; Dibble v. Treeluck, 11 Fla. 141, 143, holding in absence of a proper bill of exceptions the instructions of the court are presumed to be applicable to the facts; Snyder v. Laframboise, Breese, 346, **12 Am. Dec. 190**, reversing judgment, because charge may have had an improper effect upon the jury; Taylor v. Hillyer, 3 Blackf. 435, **26 Am. Dec. 432**, reversing judgment when trial judge refused to give relevant instructions; Carson v. Lucove, 1 G. Greene, 38, holding, where instructions do not improperly influence the jury, they are presumed to be applicable, though not entirely so in fact; Packer v. Cockayne, 3 G. Greene, 114, holding court need not give an instruction, unless applicable to some point at issue; State v. Chandler, 5 La. Ann. 491, **52 Am. Dec. 602**, reversing judgment, where court in an abstract charge misled the jury; State v. Brette, 6 La. Ann. 662, holding if trial judge gives an erroneous instruction, it may be revised in the court above; Loring v. Willis, 4 How. (Miss.) 385, holding court in error, where charge was without reference to the evidence and in general terms; Magee v. Harrington, 13 Smedes & M. 405, refusing to disturb the verdict of a jury, because of irrelevant instructions given or refused, where jury was not misled; Brantley v. Carter, 26 Miss. 285, where plaintiff was not entitled to recover under the evidence, held that he could not have been prejudiced by instructions of court; Davison v. Schooley, 10 N. J. L. 147, holding judgment not reversible because of failure to make an irrelevant charge;

Territory v. Griego, 8 N. M. 140, 42 Pac. 83, a declaration that, upon a recommendation of clemency, the judge would consider it in fixing punishment for murder in the first degree, was reversible error; Haliday v. McDougall, 22 Wend. 273, holding a court may refuse to give an instruction upon an abstract point of law; White v. Thomas, 12 Ohio St. 317, **80 Am. Dec. 351**, holding an abstract charge tending to mislead jury in action for breach of promise reversible error; Hunt v. Toulmin, 1 Stew. & P. 180, it is not ground for reversal that the charge was too general.

Proper subject of instructions and to what extent judges may comment upon evidence. Note, **72 Am. Dec. 541.**

Where Supreme Court is equally divided in opinion upon writ of error, judgment of court below is to be affirmed.

Approved in Hertz v. Woodman, 218 U. S. 213, **54 L. Ed. 1005**, 30 Sup. Ct. 621, affirmance of judgment by equally divided court, while binding on parties, not binding as precedent; Westhus v. Union Trust Co., 168 Fed. 618, 620, 94 C. C. A. 95, judgments affirmed by equally divided appellate court do not control inferior courts; Territory v. Gaines, 11 Ariz. 276, 93 Pac. 282, applying rule in suit against public officers to collect taxes; City of Kalamazoo v. Crawford, 154 Mich. 59, **16 Ann. Cas. 110**, 117 N. W. 572, applying rule in holding void special assessment for sprinkling streets; Charlottesville etc. Ry. Co. v. Rubin, 107 Va. 752, 60 S. E. 101, denying petition to rehear where judgment affirmed by divided court; Crompton v. Beedle, 83 Vt. 295, **Ann. Cas. 1912A, 399, 30 L. R. A. (N. S.) 748**, 75 Atl. 334, holding principal case not authority upon question of what representations amounted to fraud because question determined by divided court; dissenting opinion in Walling v. Brown, 9 Idaho, 748, 76 Pac. 321, majority declining to reopen question of validity of statute where interests have become settled under prior decisions; Durant v. Essex Co., 7 Wall. 112, **19 L. Ed. 157** (s. c., 8 Allen, 108, **85 Am. Dec. 688**) following rule; Bridge Co. v. Stewart, 3 How. 424, **11 L. Ed. 663**, affirming that practice is settled; Ayres v. Bensley, 32 Cal. 623, upon an equal division upon question of granting rehearing, rehearing is denied; Frazer v. Willey, 2 Fla. 117, follows rule; Northern R. R. Co. v. Concord R. R. Co., 50 N. H. 176, where court divided in equity proceeding, held no judgment could be rendered; Durham v. Railroad Co., 113 N. C. 241, 18 S. E. 208, following uniform practice and confirming judgment below; Bridge v. Johnson, 5 Wend. 372, 375, affirming judgment below, court being equally divided; Morse v. Goold, 11 N. Y. 285, **62 Am. Dec. 105**, holding affirmance of judgment denying any effect to an act in respect to contracts made previous to its passage cannot be considered as a precedent but leaves question open; practice followed in Ex parte Elliott, 33 S. C. 604, 12 S. E. 426, where appellate court was divided; McFarland v. Railway Officials, 5 Wyo. 147, **63 Am. St. Rep. 45, 27 L. R. A. 55**, 38 Pac. 677, decision below affirmed because of divided appellate court cannot be considered as settling principle involved; Bird v. Insurance Co., 3 Fed. Cas. 436, to the same effect.

Distinguished in Kinney v. Conant, 166 Fed. 721, 92 C. C. A. 410, Circuit Court of Appeals of one circuit will follow decisions of other circuits, even though rendered by equally divided court; Goddard v. Coffin, 2 Ware (Dav.), 385, Fed. Cas. 5490, holding where judgment can be rendered only upon motion of prevailing party, court, being of divided opinion, must dismiss case.

Doctrine of stare decisis as applicable to decision by divided court. Note, 16 Ann. Cas. 113.

Stare decisis. Note, 27 Am. Dec. 633.

Writ of error. Note, 91 Am. Dec. 195.

Principal case assumed doctrine that corporation is liable for false representation of its agent, but it is not laid down in decision.

Approved in Sehrman v. Harbin, 125 Iowa, 182, 100 N. W. 631, where fidelity bond of president of mutual life association filed pursuant to statute and society not called on by surety for information concerning president's past conduct, association not guilty of fraudulent concealment; Bank v. Bank, 59 Fed. 341, where bank, through its cashier, made fraudulent representations to another bank of the financial responsibility of a customer; Railroad Co. v. Quigley, 21 How. 211, 16 L. Ed. 76, holding railroad liable for libel which it authorizes its officers to publish; Baldwin v. Collins, 9 Rob. (La.) 472, where a common carrier gave notice that the value of goods must be disclosed or no responsibility would be assumed, held shipper of jewelry having notice cannot recover; Lapish v. Wells, 6 Me. 189, when purchaser received deed to tract of land, one acre of which had already been conveyed, held that receiving deed to whole tract concealing knowledge of prior conveyance of part, is fraud and vitiates that deed; Bank v. Cooper, 36 Me. 195, elaborately discussing the validity of a surety bond signed through misapprehension and fraud; Stettheimer v. Killip, 75 N. Y. 287, holding one making a contract with full opportunity of knowledge of circumstances, is not entitled to relief, there being no fraud; Bank v. Brownell, 9 R. I. 175, 11 Am. Rep. 237, holding in order to avoid bond on ground of fraud on part of the bank, there must be a fraudulent concealment of something material for the surety to know; Warren v. Branch, 15 W. Va. 34, where there was a concealment of immaterial facts; Wood v. Boynton, 64 Wis. 272, 54 Am. Rep. 614, 25 N. W. 45, holding in sale where value of thing was open to investigation of both parties, neither of which knew its value, there was no fraud though the price was inadequate.

Distinguished in United States v. Wright, 28 Fed. Cas. 795, holding defaulting postmaster's sureties not discharged by forbearance on the part of the government.

Liability on guaranty or surety obligation obtained by fraud. Note, 21 L. R. A. 411.

Inadequate price as ground for setting aside sale. Note, 54 Am. Rep. 615.

11 Wheat. 78–102, 6 L. Ed. 423, BROOKS v. MARBURY.

Certified copy of registered deed is inadmissible if party might produce original, unless by statute authenticated copy is made evidence.

Approved in Longworth v. Close, 1 McLean, 285, Fed. Cas. 8489, where certified copy of deed recorded twenty-six years after execution was refused admission as evidence; Thompson v. Ives, 11 Ala. 243, where copy of registered deed was refused admission as evidence, it not being shown by plaintiff that it was not within his power to produce original; Trammell v. Thurmond, 17 Ark. 215, to the point that a certified copy of deed may be introduced as secondary evidence; Samuels v. Borrowscale, 104 Mass. 209, where deed not made to or presumed to be in the custody of either party was proved by office copy; Manhattan M. Co. v. Sweteland, 14 Mont. 272, 36 Pac. 84, holding admission of certified copy of patent, without showing loss or inability to produce original, reversible error.

Validity of assignment for benefit of preferred creditors, made with view of preventing prosecution for felony.

Approved in Stowe v. Belfast Sav. Bank, 92 Fed. 93, holding recording assignment in Maine by Massachusetts debtor which did not show assent of creditors, who subsequently assented, did not affect assignment or prevent record from operating as notice to creditors attacking, after consent was given; Billings v. Parsons, 17 Utah, 27, 31, 53 Pac. 732, 733, holding assignment by debtor to plaintiff, his employee, and payment to him of salary and gift of one hundred dollars' worth of goods to wife, which were not removed from store, and that transfers were made with intention of assignment, did not show fraud; Sutton v. Simon, 91 Tex. 641, 45 S. W. 560, holding where trustee participated in intent to defraud creditors, if accepting creditors were not parties to the fraud they had a valid lien upon the property; Billings v. Parsons (Utah), 53 Pac. 732, refusing to hold void an assignment for assignor's fraud.

Participation in debtor's fraudulent intent invalidating transfer. Note, 31 L. R. A. 615.

Notice of trustee or agent is notice to the cestui que trust or to his employer.

Approved in Platt v. Oliver, 2 McLean, 316, Fed. Cas. 11,115, holding one purchasing trust property through the unauthorized act of his agent must be presumed to have full knowledge of facts.

Debtor has a legal right to prefer one or more creditors over others, when transaction is bona fide.

Approved in Fechheimer v. Hollander, 21 D. C. 85, assignment preferring certain creditors made with intent on part of assignor to defraud other creditors is void, though preferred creditors did not participate in fraud; Droop v. Ridenour, 11 App. D. C. 241, mere fact that relationship of man and wife exists between grantor and grantee not prima facie presumption

of fraud against creditors; Tompkins v. Wheeler, 16 Pet. 118, 10 L. Ed. 908, where fraud in assignment was charged but not substantiated; Wilkinson v. Yale, 6 McLean, 20, Fed. Cas. 17,678, where a partner of debtor was preferred with the consent of other creditors; Adams v. Blodgett, 2 Wood. & M. 237, Fed. Cas. 46, where creditors met and agreed to take an assignment of debtor's property, the assignment held to be valid against creditor not present; Fellows v. Bank, 6 Rob. (La.) 253, holding that a creditor may make an assignment for benefit of certain creditors; United States v. Bank, 8 Rob. (La.) 405, holding natural person may make assignment for benefit of certain creditors; State v. Bank of Maryland, 6 Gill & J. 219, 26 Am. Dec. 564, holding bank has right to make assignment for benefit of creditors, and thereby the State is deprived of its right to priority; Waterbury v. Sturtevant, 18 Wend. 365, sustaining deed to preferred creditor, although made by debtor with fraudulent intent; Harden v. Wagner, 22 W. Va. 366, holding it no objection to the principle that a majority of the creditors may be defeated of their legal remedies; Paul v. Baugh, 85 Va. 958, 9 S. E. 330, holding trust deed for benefit of preferred creditors valid; Ashby v. Steere, 2 Wood. & M. 357, Fed. Cas. 576, where debtor sold property to creditor several months before applying for benefit of bankruptcy law; Pettit v. Parsons, 9 Utah, 227, 33 Pac. 1039, the fact that a preferred creditor is a brother of assignee is not fraud per se; Hollister v. Loud, 2 Mich. 313, voluntary assignment valid and deemed to be founded on a valuable consideration; Smith v. Jones, 18 Neb. 484, 25 N. W. 625, holding assignee for benefit of creditors may maintain trust against subsequent attaching creditor.

Distinguished in Stewart v. Spenser, 1 Curt. 165, 166, Fed. Cas. 13,437, holding where there was fraud upon the part of debtors and a deed of assignment made with intent to execute that fraud, it was void as to preferred creditors; dissenting opinion in Robinson v. Rapelye, 2 Stew. 106, holding deed fraudulent where there was a reservation of property by debtor not mentioned in deed; Oakley v. Hibbard, 1 Pinn. 682, 683, holding assignment might be revoked by assignor not in failing circumstances, as against creditor having no notice of assignment; Cleveland v. La Crosse R. R. Co., 5 Fed. Cas. 1035, lease for an indefinite time void as against creditors.

Deeds absolutely void cannot be foundation of title, nor can cestui que trust claim under deed fraudulently obtained by trustee.

Cited in Hinton v. Nelms, 13 Ala. 230, where a father purchased slaves and took conveyance in name of his son, held that son had no title to defeat father's creditors; Lytle v. State, 17 Ark. 641, holding parties claiming under fraudulent title may not maintain it, though themselves not parties to fraud; Foley v. Bitter, 34 Md. 655, holding assignor's deed void on account of fraud, and distinguishing facts in principal case; Harney v. Pack, 4 Smedes & M. 256, holding deed of trust void when made with fraudulent intent, though without the knowledge of trustee or cestui que trust.

Opinion in particular case, founded upon its special circumstances, is not applicable to cases under circumstances essentially different.

Approved in Northern Pac. Ry. Co. v. North American Tel. Co., 230 Fed. 355, 360, in condemnation proceedings by telegraph company for right of way over railroad right of way, elements of compensation considered; Schaap v. United States, 210 Fed. 856, 127 C. C. A. 415, applying rule in holding that act prohibiting introduction of intoxicating liquors into Indian Territory in force so far as it affects introduction of said liquors from without State of Oklahoma; Evans v. Victor, 204 Fed. 367, 122 C. C. A. 531, applying rule in determining question as to whether property formerly held by Indian's title is immaterial to right to search such property for intoxicating liquors; Douglas County v. Vinsonhaler, 82 Neb. 818, 118 N. W. 1061, applying rule in action against county judge for failure to report fees in excess of amount allowed him as compensation earned as to interpretation of word "earned"; Harwood v. Wentworth, 4 Ariz. 401, 42 Pac. 1031, journals of two houses are inadmissible to show that parts of bill, as passed by two houses were omitted from enrolled bill, as signed by presiding officers and Governor; dissenting opinion in Kemmerer v. Midland Oil & Drilling Co., 229 Fed. 884, majority holding that in suit by agricultural lessee against oil land lessee, temporary injunction will be dissolved where injury shown trifling; Lyons v. Woods, 5 N. M. 350, 21 Pac. 354, refusing to follow as authority substantially differing in facts from the one under consideration.

Assignment for creditors is valid although assent not given at time of its execution, if they subsequently assent.

Approved in Cook v. Robinson, 194 Fed. 762, 114 C. C. A. 473, where debtor deposited gold-dust in bank to credit of creditor, creditor's assent to deposit in payment of debt presumed; Lovell v. Isidore Newman & Son, 192 Fed. 760, 113 C. C. A. 39, title to cotton sold to spinners by bankrupt held to be in them as against trustee by their acceptance of same, even though contract of sale not complied with; Smith v. Herrell, 11 App. D. C. 430, assignment by debtor to creditor of fund due him under contract with directions to assignee to distribute residue after paying his own claim creates trust for creditors named, though some had no knowledge of transaction and did not assent thereto; Webster v. Harkness, 3 Mackey, 222, assent of creditors will be presumed where assignment is made by debtor to third person as trustee; Fearey v. O'Neill, 149 Mo. 476, 477, 73 Am. St. Rep. 444, 445, 50 S. W. 920, holding evidence that deed of trust for benefit of certain creditors was made to agent of three of largest creditors and accepted by him as agent is sufficient proof of acceptance in replevin by writ against attaching officer; Kingman & Co. v. Cornell-Tebbitts Mach. & Buggy Co., 150 Mo. 309, 310, 51 S. W. 734, holding where trust deed of stock of goods is given to secure separate debts of several defendants, it is good as to those accepting before unsecured attaching creditors intervene, but not as to those who have not accepted; Grove v. Brien, 8 How. 440, 12 L. Ed. 1147, holding goods consigned to A for de-

livery to B became property of B upon shipment, and no assent to transfer was necessary upon his part; Wiswall v. Ross, 4 Port. 328, holding trust deed conveys legal title to trustee immediately without consent of beneficiaries; Kenward v. Thompson, 12 Ala. 491, holding absolute bona fide deed for benefit of creditors not subject to defeat at instance of one of them; Danner v. Brewer, 69 Ala. 202, holding assignment vests interest in creditors immediately and they cannot be divested without their consent; Ex parte Conway, 4 Ark. 351, 360, holding creditor may make valid assignment to trustee for benefit of creditors but cannot recall deed; Hempstead v. Johnson, 18 Ark. 131, **65 Am. Dec. 464**, holding it unnecessary for creditors to sign trust deed made for their benefit; Baldwin v. Porter, 12 Conn. 481, holding executor under will with trust codicil presumed to have accepted special trust; Brown v. Chamberlain, 9 Fla. 478, holding assent of creditors presumed to verbal assignment to trustees, for their benefit; Bank v. Armstrong, 11 Iowa, 519, holding agent may accept assignment, and principal's assent at the time is unnecessary; Oliver v. Lake, 3 La. Ann. 82, holding creditors taking by assignment need not show previous assent, as against other creditors; State v. Bank of Maryland, 6 Gill & J. 230, **26 Am. Dec. 573**, assuming assent of beneficiaries of assignment; Fox v. Willis, 1 Mich. 323, to point that beneficiaries may compel execution of trust though not previously assenting to it; Schoolfield v. Hirsh, 71 Miss. 60, **42 Am. St. Rep. 453**, 14 South. 529, holding assignment of judgment for use of preferred creditors valid as against garnishing creditor; Duvall v. Raisin, 7 Mo. 450, holding it unnecessary for beneficiaries under trust deed to execute deed; Valentine v. Decker, 43 Mo. 585, holding creditor taking under assignment may not afterward disclaim it; Cunningham v. Freeborn, 3 Paige, 560, 1 Edw. Ch. 263, holding that assent is not necessary on part of beneficiaries to trust; Ingram v. Kirkpatrick, 6 Ired. Eq. 475, **51 Am. Dec. 436**, holding creditor secured but not privy to trust deed may compel trustee to execute trusts as declared; Smith v. Millett, 11 R. I. 533, holding assignment to trustee for benefit of creditors executing releases valid; Tennant v. Stoney, 1 Rich. Eq. 253, **44 Am. Dec. 218**, holding bond and mortgage executed for creditors' benefit valid in favor of those afterward accepting its terms, though ignorant of the transaction at the time; Cannon v. Deming, 3 S. D. 431, 53 N. W. 865, general rule followed and question of assent declared to be one of fact; Tompkins v. Bamberger, 3 Lea, 580, 582, approves principle that acceptance by beneficiary need not be made at time of execution of deed, but held it necessary within a reasonable time; Halsey v. Whitney, 4 Mason, 213, Fed. Cas. 5964, an assignment in trust for certain preferred creditors held valid; Emerson v. Senter, 118 U. S. 10, **30 L. Ed. 51**, 6 Sup. Ct. 984, assignment by partner of firm's assets not invalidated by his fraudulently withholding certain schedules; Billings v. Parsons (Utah), 53 Pac. 733, following rule.

Distinguished in dissenting opinion in Robinson v. Rapelye, 2 Stew. 103, where deed was conditional upon creditors' executing it; Borland v.

Walker, 7 Ala. 268, holding general rule not applicable where deed was conditional upon extension of time to pay debts; Townsend v. Hartwell, 18 Ala. 305, holding assent of creditors not presumed when assignment was made to defraud them; Bank v. Webster, 44 N. H. 269, holding where, in accordance with agreement to sell, grantor executed and recorded deed, there was no valid delivery without acceptance by grantee; Milling Co. v. Eaton, 86 Tex. 406, 409, 24 L. R. A. 381, 25 S. W. 615, creditors' assent necessary to validity of conveyance as against attachment; Hall v. Denison, 17 Vt. 316, 317, holding debts constitute consideration and estate immediately vests in trustee, who may be compelled to execute trust; Skipwith v. Cunningham, 8 Leigh, 286, 31 Am. Dec. 650, holding deed of trust executed by grantor and trustee intercepts lien of judgment; Johnson v. Farley, 45 N. H. 510, consent of creditors to assignment not presumed, when they would thereby have been deprived of a beneficial settlement.

Denied in Copeland v. Weld, 8 Me. 414, holding attaching creditors preferred to those claiming under assignment, not actually assented to, prior to attachment.

Revocation of assignments for benefit of creditors. Note, 90 Am. Dec. 507.

Voluntary trusts arising from declaration of trustor. Note, 34 Am. St. Rep. 219.

Validity of assignment for benefit of creditors as affected by non-assent of some or all of them. Note, Ann. Cas. 1913A, 820.

Necessity for acceptance of assignment or deed of trust for creditors. Note, 24 L. R. A. 378, 379, 380.

Possession by grantor does not affect validity of deed if continued at request or for the benefit of assignees.

Cited in Fowler v. Merrill, 11 How. 394, 13 L. Ed. 743, discussing whether possession of personal property by mortgagor is conclusive of fraud; In re Husman, 2 Bank. Reg. 141, 12 Fed. Cas. 1076, to the point that possession by vendor is conclusive of fraud as against creditors; Merrill v. Dawson, Hempst. 616, Fed. Cas. 9469, to question whether sound distinction may not exist at time between mortgage and sale, as regards retention of possession.

Retention of possession by assignor for benefit of creditors. Note, 29 Am. Rep. 789.

Miscellaneous. Cited in Blanton v. United States, 213 Fed. 326, Ann. Cas. 1914D, 1238, 130 C. C. A. 22, instruction refused relating to circumstantial evidence, where all evidence, covered thereby not circumstantial; Coney Island Co. v. Dennan, 149 Fed. 692, no error to refuse requested instruction which is not entirely correct; Huckabee v. Billingsly, 16 Ala. 417, 50 Am. Dec. 183, to define powers of trustees; Allen v. Booker, 2 Stew. 27, 19 Am. Dec. 37, as construing the statute of frauds; Bank of United States v. Huth, 4 B. Mon. 436, cites principal case and appended note as collecting au-

thorities upon fraudulent conveyances; in Bank v. Blanchard, 90 Va. 29, 17 S. E. 744, to point that bona fide purchaser of a legal title is not affected by any latent equity of which he had no notice; Cunningham v. Ward, 30 W. Va. 579, 5 S. E. 650, in collection of authorities in discussion of trust deeds.

11 Wheat. 103–134, 6 L. Ed. 429, HARDING v. HANDY.

The material facts upon which the plaintiff relies must be so distinctly alleged as to put them in issue.

Approved in Haller v. Clark, 21 D. C. 133, exceptions to auditor's report leaving the court in doubt as to the point raised will not be considered; York v. Tyler, 21 D. C. 271, mere general exceptions to findings of auditor without specification of grounds therefor are insufficient on appeal; Malden & Melrose Gaslight Co. v. Chandler, 209 Mass. 358, 95 N. E. 792, in action by corporation against officers for buying land for it at excessive prices, inquiry may not be confined to price actually paid to vendor as alleged; Lockhart v. Leeds, 10 N. M. 594, 63 Pac. 51, holding bill which alleged that complainant and P. entered into partnership to prospect for minerals, and that P. located a claim, posted notice, but did not record same within ninety days on account of fraudulent agreement with defendant, that complainant thereafter filed copy of notice, but defendant took possession, does not state a cause of action; Dormitzer v. German Sav. & Loan Soc., 23 Wash. 191, 62 Pac. 881, holding in action to foreclose mortgage on ward's property, fraudulent release by guardian could be set aside; Boone v. Chiles, 10 Pet. 209, 9 L. Ed. 399, holding deed to which no reference was made in pleadings not admissible to prove contract of purchase; dissenting opinion in Harrison v. Nixon, 9 Pet. 512, 513, 514, 9 L. Ed. 212, 213, holding averment by heirs that executor wrongfully refuses to pay over money sufficient if supported by proof; and pp. 516, 537, 9 L. Ed. 213, 221, averment of citizenship is sufficient averment of domicile; United States v. Telephone Co., 128 U. S. 356, 32 L. Ed. 458, 9 Sup. Ct. 93, holding allegations that patents were obtained through fraud, sufficient if sustained; Railway Co. v. Johnston, 133 U. S. 577, 33 L. Ed. 687, 10 Sup. Ct. 393, holding omission to specifically state in pleading degree of insolvency which rendered bank's conduct fraudulent not fatal; Tilghman v. Executors, 1 Bald. 491, Fed. Cas. 14,045, where one setting up a written agreement was not permitted to reform it by evidence of oral agreement; Smith v. Burnham, 2 Sumn. 624, Fed. Cas. 13,018, holding confessions and admissions of defendant need not be charged in bill to entitle plaintiff to use them as proof of facts charged; Brodie v. Skelton, 11 Ark. 134, reversing decree finding fraud, there being no allegation of fraud in the bill; Byers v. Fowler, 12 Ark. 288, 54 Am. Dec. 289, holding no proofs sufficient to sustain title, vendee's answer failing to aver no notice of fraud; Trapnall v. Burton, 24 Ark. 381, requiring cross-bill to be complete within itself, reference to pleadings in original suit does not bring those matters before the court; Colegate v. Owings' Case, 1 Bland Ch. 405, 17 Am. Dec.

342, the facts in dispute being in issue, a cross-bill held unnecessary; Hatherly v. Hadley, 4 Or. 19, where proper service was not alleged, proof of service not permitted.

Verdict is not conclusive in equity cases, and jury unnecessary unless it be case where court would be satisfied with verdict.

Cited in Garsed v. Beall, 92 U. S. 695, 23 L. Ed. 690, holding findings of jury influential but not conclusive; Johnson v. Harmon, 94 U. S. 378, 24 L. Ed. 273, to point that issues may be directed to inform chancellor as to doubtful facts; Fitton v. Assurance Co., 23 Blatchf. 111, 23 Fed. 4, holding issues may be tried by jury; Chase v. Winans, 59 Md. 480, holding it within discretion of judge whether or not a question of fact should be submitted to jury; Clark v. Society, 45 N. H. 336, refusing a new trial upon question of fact merely because chancellor is of opinion that verdict is against evidence; Raymond v. Flavel, 27 Or. 231, 40 Pac. 161, sustaining discretion of the court in refusing to submit a question of fact to a jury; Keagy v. Trout, 85 Va. 395, 7 S. E. 332, sustaining refusal of Circuit Court to submit question of fraud to a jury, the evidence being clear; Loftus v. Maloney, 89 Va. 605, 16 S. E. 759, where the evidence was clear and decisive; State v. Lichtenberg, 4 Wash. 555, 30 Pac. 659, to point that judge may submit facts to decision of jury.

Equity will set aside deeds obtained by undue influence over one whose mind had ceased to be safe guide of his actions.

Approved in Walling v. Thomas, 133 Ala. 430, 31 South. 983, holding conveyance by decedent while her mind was unsound for one-fourth the land, by person in whom she reposed great confidence, will be set aside; Jefferson v. Rust, 149 Iowa, 605, 128 N. W. 957, evidence held to show that undue influence influenced conveyance of land from imbecile son-in-law though no fraud or duress shown; Shevlin v. Shevlin, 96 Minn. 412, 105 N. W. 262, applying rule in action to set aside contract for transfer of stock made by younger brother with elder brother on ground of fraud; Paulter v. Manuel, 25 Okl. 68, 108 Pac. 753, where grantor so mentally weak that she does not fully realize price and quantity of the land sold, sale will be set aside where price is grossly inadequate; Zeigler v. Shuler, 87 S. C. 6, 68 S. E. 819, equity will set aside deed given to one by his half-brother, who was mentally weak, for an inadequate consideration; Wille v. Wille, 57 S. C. 426, 35 S. E. 809, holding where woman ignorant, infirm and seventy-five years old who had previously made a will in favor of her grandson made a deed to her son with understanding that he would live with her, repair the premises and bury her, and son did not comply with terms of deed, the mother was entitled to cancel the deed; Heath v. Capital Savings Bank & Trust Co., 79 Vt. 305, 64 Atl. 1127, bank may be enjoined from proceeding to collect note signed by incompetent and discounted by bank with knowledge of the fraud; dissenting opinion in Stringfellow v. Hanson, 25 Utah, 500, 71 Pac. 1058, majority holding in action to set aside deed from father to daughter for undue influence, fraud

and want of consideration, a decree canceling deed should not be set aside for newly discovered evidence that father leased the land to daughter for life; Allore v. Jewell, 94 U. S. 511, **24 L. Ed. 264**, setting aside conveyance, grantor being unable to understand the nature of transaction; Kelly v. McGuire, 15 Ark. 598, setting aside deed of infirm, incompetent inmate of poorhouse; Hightower v. Nuber, 26 Ark. 612, setting aside deed obtained, without consideration, from bedridden old man having no other property; Moore v. Moore, 56 Cal. 94, sustaining plea of undue influence in deed obtained without consideration from one suffering great mental anguish; Jones v. Thompson, 5 Del. Ch. 391, canceling deed obtained, without consideration, from person whose mind was weakened from age; Ikerd v. Beavers, 106 Ind. 490, 7 N. E. 330, refusing to enforce specific performance of contract for sale of land obtained under circumstances showing undue influence; Ashmead v. Reynolds, 134 Ind. 144, **39 Am. St. Rep. 242**, 33 N. E. 764, declaring void, deeds for inadequate consideration from one enfeebled in body and mind; Yount v. Yount, 144 Ind. 140, 43 N. E. 138, holding it unnecessary to allege that grantor was of unsound mind or entirely incapable of making a contract; Oakey v. Ritchie, 69 Iowa, 71, 28 N. W. 449, annulling deed obtained without consideration by one having great influence over grantor, man of weak intellect; Owings' Case, 1 Bland Ch. 391, **17 Am. Dec. 328**, reinstating suit dismissed, through undue influence of defendant, by a person in her dotage, and setting aside deed made under like circumstances; Billings v. Mann, 156 Mass. 204, 30 N. E. 1137, holding equity court has jurisdiction to declare void the deed of an insane person, obtained under duress; Turner v. Insurance Co., 10 Utah, 74, 37 Pac. 94, setting aside assignment made by person mentally weak through age and sickness; Kennedy v. Currie, 3 Wash. 452, 28 Pac. 1031, setting aside conveyance of aged person mentally unsound, circumstances showing undue influence and inadequate consideration; Cole v. Getzinger, 96 Wis. 572, 71 N. W. 79, deed presumed to be fraudulent under similar state of facts.

Distinguished as to facts in Conley v. Nailor, 118 U. S. 133, **30 L. Ed. 114**, 6 Sup. Ct. 1004; Ralston v. Turpin, 129 U. S. 670, **32 L. Ed. 750**, 9 Sup. Ct. 423, where it did not appear that grantor was incapable of exercising a discriminating judgment; Fish v. Benson, 71 Cal. 440, 12 Pac. 459, where deed was obtained by fraud, but the grantor was mentally competent.

Rescissions of contracts in equity. Note, **15 Am. Dec. 574.**

Insanity, when a defense to contracts. Note, **21 Am. Rep. 34.**

Grantee of deed, set aside by grantor's heirs on grounds of undue influence, may charge estate with advances to grantor and improvements made.

Approved in Atkins v. Atkins, 195 Mass. 132, **122 Am. St. Rep. 221**, **11 L. R. A. (N. S.) 273**, 80 N. E. 809, where reconveyance of land ordered for fraud, taxes paid by holder must be repaid; Veazie v. Williams, **8 How. 161, 12 L. Ed. 1029**, permitting deed to stand upon grantor paying

to grantee amount obtained by puffing and fraud at auction; Martin v. Broadus, 1 Freem. Ch. 39, where an illegal contract for sale of negroes was set aside, the vendor was permitted to recover his property; Waterbury v. Andrews, 67 Mich. 288, 34 N. W. 578, holding rescission unnecessary upon action to set aside fraudulent contract, the complainant having received nothing to return.

Distinguished in Randel v. Brown, 2 How. 423, 11 L. Ed. 324, holding defendant can have no lien upon property arising out of a violation of his trust; Ross v. Madison, 1 Ind. 280, where the one declared to hold property as trustee had not made improvements nor paid any purchase money; McCaskey v. Graff, 23 Pa. St. 326, 62 Am. Dec. 339, one guilty of actual fraud in the purchase of property is not entitled to reimbursement; Anthony v. Hutchins, 10 R. I. 176, refusing to set aside deed as void, given to avoid criminal prosecution, but allowing it to stand as security for amount actually due.

Master's report is received as true when no exception is taken, and it is not province of court to investigate items of account.

Approved in Fordyce v. Omaha etc. R. R. Co., 145 Fed. 557, following rule; Butler v. Georgia etc. Ry. Co., 119 Ga. 961, 47 S. E. 321, neglect of party excepting to master's report to point out by reference to auditor's brief of evidence those portions of evidence relied on is sufficient reason for disapproval of exceptions; Mt. Pleasant v. Beckwith, 100 U. S. 528, 25 L. Ed. 702, holding master's report conclusive when no error is assigned; Green v. Bishop, 1 Cliff. 192, Fed. Cas. 5763, holding error must be specifically alleged; Bridges v. Sheldon, 18 Blatchf. 510, 7 Fed. 38, holding difference of opinion as to weight of evidence does not constitute grounds for setting aside report; Jaffrey v. Brown, 29 Fed. 479, holding presumptions in favor of master's report; Jones v. Lamar, 39 Fed. 586, 587, holding exceptions to master's report must be supported by the special statements of master, or reference to particular testimony; Farrar v. Bernheim, 74 Fed. 438, sustaining master's report, there being no reference to evidence in allegations of error; Farrar v. Bernheim, 75 Fed. 139, sustaining master's report where there was no special statement of the evidence; Darrington v. Borland, 3 Port. 39, refusing to examine into evidence, where no exception was taken to master's report; Pearson v. Darrington, 32 Ala. 238, objection to special register's report not sustained, the truth of objection not appearing upon the face of the proceedings; Mahone v. Williams, 39 Ala. 223, 225, sustaining referee's report, to which no objection was made, although referee had committed error; Vaughan v. Smith, 69 Ala. 95, refusing to sustain general objection to referee's report; May v. May, 19 Fla. 389, to the point that it is unnecessary to refer accounts to a master unless they are long and complicated; White v. Hampton, 10 Iowa, 243, disregarding general objections to master's report; Miller v. Whittier, 36 Me. 585, refusing to regard exception to an item, there being nothing in the report indicating error by the mas-

ter; Jones v. Keen, 115 Mass. 181, disregarding objection to amount allowed by master to receiver and counsel, as fees; Butterfield v. Beardsley, 28 Mich. 423, sustaining commissioner's report, to which no exception was taken in the court below; Barbour v. Tompkins, 31 W. Va. 418, 7 S. E. 5, defense of usury not being urged before commissioner, an exception upon that ground will not be sustained; Dean v. Emerson, 102 Mass. 482, every reasonable presumption in favor of master's conclusion upon matters of fact; Newcomb v. White, 5 N. M. 442, 23 Pac. 673, refusing to investigate accounts reported by master; Warren v. Lawson, 117 Ala. 343, 23 South. 66, chancellor's ruling on exceptions to register's report, sustaining his conclusions on the evidence, will not be disturbed on appeal; Newcomb v. White, 5 N. M. 442, 23 Pac. 673, refusing motion for rehearing upon master's report.

Distinguished in dissenting opinion in Markey v. State, 47 Fla. 64, 37 South. 62, majority holding where order appoints one to take testimony in divorce, but fails to designate him by any official title, he has authority to administer oaths.

In bill in equity those having interests inseparable from interests before the court must be made parties.

Approved in Minnesota v. Northern Securities Co., 184 U. S. 237, 46 L. Ed. 516, 22 Sup. Ct. 322, holding in bill by State against corporation of another State to enjoin corporation from interfering with the management or from holding any stock of either of two railroad corporations of complainant, the domestic corporations are necessary parties; Camp v. Bonsal, 203 Fed. 919, 122 C. C. A. 207, tenant in common of legal title may sue in equity with relation to his undivided interest without joining cotenants; In re Syracuse Paper & Pulp Co., 164 Fed. 280, trustees of bankrupt corporation may bring suit against directors making cotrustee party defendant; Makay v. Gabel, 117 Fed. 878, holding grantor in deed is not indispensable party to suit by third party claiming to be equitable owner, to set aside deed, where the deed conveyed all the title of grantor; Shields v. Barrow, 17 How. 140, 141, 15 L. Ed. 160, 161, dismissing bill where indispensable parties were outside of the court's jurisdiction; Barney v. Baltimore, 6 Wall. 285, 18 L. Ed. 826, construing act of 1839 as enactment of foregoing principle; Rateau v. Bernard, 3 Blatchf. 248, Fed. Cas. 11,579, holding jurisdiction not affected by joining alien, not a material party; Conolly v. Wells, 33 Fed. 208, holding joint executor a necessary party in suit for accounting against executrix and other executor; Eddie v. Parke, 31 Mo. 515, sustaining demurrer to petition for contest of a will, where the devisees were not made parties; Young v. Bilderback, 3 N. J. Eq. 206, in action to set aside deed, all parties claiming under it must be joined; Colt v. Lasnier, 9 Cow. 334, permitting necessary party to be joined at hearing after answer and proofs; Hallett v. Hallett, 2 Paige Ch. 19, where separate legacies are charged upon real estate, the legatees cannot be diverted by sale under decree to which they are not

parties; Horsford v. Gudger, 35 Fed. 393, stating persons having no legal or equitable interest are not indispensable parties.

Distinguished in Harrison v. Urann, 1 Story, 66, Fed. Cas. 6146, holding aliens need not be joined when matter can be adjudicated without prejudice; Bank v. Lee, 11 Conn. 121, 27 Am. Dec. 717, permitting persons, not parties to a bill, to be joined, if the court deems them necessary; dissenting opinion in Coles v. Kelsey, 2 Tex. 564, judgment should not be reversed where no objection was taken to the sufficiency of the petition excepting on appeal.

Miscellaneous. Cited in Murphy v. Southern Ry. Co., 115 Fed. 259, holding that to sustain particular finding reference to entire evidence is sufficient; Anthony v. Peay, 18 Ark. 33, to point that party to a bill of equity, availing himself of a defense for the first time in appellate court, shall be taxed with costs.

11 Wheat. 134–171, 6 L. Ed. 438, CASSELL v. CARROLL.

Agreement for settlement of title, which is confirmed by legislative enactment at request of parties is binding.

Cited in Campbell's Case, 2 Bland Ch. 233, 20 Am. Dec. 374, holding, where devisees of person were authorized by legislative act to mortgage his real estate, the rights of creditors shall not be altered or affected thereby.

An assignment by the husband of debt actually due and payable to wife divests, in equity, the title in wife.

Approved in Bayerque v. Haley, McAll. 101, Fed. Cas. 1135, husband assigning chose in action due to his wife; Wade v. Grimes, 7 How. (Miss.) 434, holding wife's choses in action not reduced to possession during coverture vest in her upon death of husband; Story v. Baird, 14 N. J. L. 268, in general discussion of a wife's choses in action.

Miscellaneous. Cited in Cunningham v. Browning, 1 Bland Ch. 305, in discussion as to origin of land titles in Maryland; People v. Russell, 4 Wend. 575, but not in point.

11 Wheat. 171–183, 6 L. Ed. 443, BANK OF THE UNITED STATES v. SMITH.

A case brought to Supreme Court upon writ of error brings whole record under consideration of court.

Approved in Warner v. Baker, 36 App. D. C. 510, question of validity of judgment where declaration does not state cause of action may be raised in appellate court in first instance by writ of error; Dred Scott v. Sandford, 19 How. 403, 566, 15 L. Ed. 700, 767, holding plea of abatement and judgment part of the record of court below, and subject to review; Marionneaux's Case, 1 Wood, 39, 13 Bank. Reg. 224, Fed. Cas. 9088, refusing

to reverse for error, whole record showing petitioner had no case; in argument, Fisher v. Ice Co., 62 Fed. 575, 17 U. S. App. 514, no opinion being filed; Garwood v. Simpson, 8 Cal. 109, where verdict could not be reviewed. whole record not being properly before the court; Jones v. O. D. C. M., 82 Va. 147, **3 Am. St. Rep.** 97, arguendo; Suydam v. Williamson, 20 How. 436, **15 L. Ed. 981**, in discussion of methods of incorporating evidence into record at trial; Railway Co. v. Lowery, 74 Fed. 469, 43 U. S. App. 408, in elaborate discussion of insufficiency of evidence.

Right to question sufficiency of complaint for first time on appeal. Note, **3 Ann. Cas. 545.**

Any fact necessary to be proven must be stated in declaration, but unnecessary facts need not be stated.

Approved in Garrett v. Louisville etc. R. Co., 235 U. S. 312, **59 L. Ed.** 244, 35 Sup. Ct. 32, in action under Employers' Liability Act, damage for death of adult son must be pleaded to admit proof thereof; Hall v. Campbell, 161 Ind. 411, 68 N. E. 894, specifications of contract in election contest must show that contested ballots were protested, so as to be preserved and returned to clerk of court; Lapsley v. Public Service Corp., 75 N. J. L. 268, 68 Atl. 1113, provision of statute for recovery for wrongful death, requiring such action be commenced within twelve months after death occurred, requires allegation of such fact in complaint; Wilder v. McCormick, 2 Blatchf. 34, Fed. Cas. 17,650, holding grant of patent sufficient evidence that all steps required by law were taken; Bank v. Dent, 12 Ala. 190, rejecting unnecessary allegations as surplusage; Barrett v. Wills, 4 Leigh, 116, **26 Am. Dec. 316**, note made negotiable at bank is not, therefore, payable there, and averment of presentation was immaterial and need not be proved; Moore v. Wade, 8 Kan. 390, in collection of authorities upon sufficiency of petition; World's Col. Exp. Co. v. Republic of France, 91 Fed. 69, holding record on appeal must show a cause of action.

Distinguished in Harris v. Clark, 10 Ohio, 8, admitting proof of notice and demand upon note, in action thereon for money had and received, these facts not being alleged in pleading.

Demand of payment is not necessary to charge maker of note or acceptor of bill of exchange; but contra as to indorser.

Approved in Central Nat. Bank v. Stoddard, 83 Conn. 336, 76 Atl. 473, where notes owned by a bank were payable at its banking-house, no formal demand for payment required; Havlin v. Continental Nat. Bank, 253 Mo. 301, 161 S. W. 743, arguendo; Wallace v. McConnell, 13 Pet. 144, 145, 149, **10 L. Ed. 99, 101**, holding demand of payment of promissory note, at a particular place, unnecessary as against drawer; Cox v. National Bank, 100 U. S. 715, **25 L. Ed. 742**, demand at place of payment binds indorser of bill, although acceptors reside in different place; Brown v. Noyes, 2 Wood. & M. 84, Fed. Cas. 2023, where notes were payable at bank, collecting cases

and holding maker bound although there was no presentment; Irvine v. Withers, 1 Stew. 242, no special demand being made at place of payment, defect, if any, is cured by verdict; Woodcock v. Campbell, 2 Port. 460, not necessary to demand payment of bond at bank specified, in order to charge assignor, upon contract of indorsement made prior to passage of act subjecting bonds to law-merchant; Roberts v. Mason, 1 Ala. 375, place of presentment having ceased to exist, indorsee of promissory note is not bound to call upon makers for payment in order to hold indorsers; Bond v. Storrs, 13 Conn. 416, holding maker of note bound, although there was no evidence of presentment at time and place set forth; Allen v. Smith, 4 Harr. 237, formal demand upon bank where note is payable, unnecessary as against maker; Butterfield v. Kinzie, 1 Scam. 446, **30 Am. Dec. 657**, following rule; Wood & Co. v. Trust Co., 41 Ill. 270, maker of note not discharged by presentment at bank, which soon after failed, there being no payment of note by bank; Springfield v. Hickox, 2 Gilm. 250, applying rule to order drawn by mayor on city treasurer; Gaines v. Manning, 2 G. Greene, 253, extending rule to notes or contracts payable in specific articles; Wright v. Sewall, 9 Rob. (La.) 129, maker liable on note although no demand made at place of payment; Bacon v. Dyer, 12 Me. 22, holding maker of note liable, and averment of demand unnecessary; Bowie v. Duvall, 1 Gill & J. 182, averment of demand of payment unnecessary, where note was payable at house of payee and plaintiff; Glasgow v. Pratte, 8 Mo. 338, **40 Am. Dec. 144**, acquiescence of indorser in extension of time for payment of note, not sufficient to bind him, indorsee failing to present note at place of payment; Henshaw v. Insurance Co., 9 Mo. 339 (335), no demand necessary upon note payable in currency taken in at certain office upon certain day; Clough v. Holden, 115 Mo. 344, **37 Am. St. Rep. 397**, 21 S. W. 1073, presentment at place of payment sufficient, although not presented to maker; Weed v. Van Houten, 9 N. J. L. 191, **17 Am. Dec. 470**, averment of presentment at particular place unnecessary to bind maker; Parker v. Stroud, 98 N. Y. 384, **50 Am. Rep. 686**, in note payable on demand, a demand by letter is insufficient and statute of limitations runs in favor of indorser, from time of personal demand, only; Eastman v. Potter, 4 Vt. 315, **24 Am. Dec. 609**, where indorsee demanded payment of maker at the time and place designated, without having the note with him, the indorser was released from liability, upon refusal of payment; Terbell v. Downer, 27 Vt. 512, **65 Am. Dec. 214**, demand at place of payment unnecessary to bind acceptor of bill of exchange, collecting authorities; Bank v. Railway Co., 45 Wis. 177, where contract is payable at a certain place, it is not necessary for plaintiff to make a demand at the place named.

Distinguished in Harker v. Anderson, 21 Wend. 386, holding action does not lie on a bank check, against the drawer, until after notice of presentment and nonpayment; Apperson v. Bynum, 5 Cold. 348, where indorsee found place of payment closed, he was excused from making further demand, to charge the indorser; Smith v. Woods, 4 Vt. 404, where notes

were paid to holder's agent at time and place specified, and agent refused to turn money over to principal, action must be for an accounting and not on notes; Broun v. Hull, 33 Gratt. 28, indorsement after maturity is assignment merely.

If bank where note is payable is holder, and maker has no funds there, demand is unnecessary to bind indorsers.

Approved in Hallowell v. Curry, 41 Pa. St. 325, holding demand sufficient, note being deposited for collection in office of payment, at which maker had no funds at note's maturity; Bank v. Flagg, 1 Hill (S. C.), 180, the holder being bank of payment, indorser was bound without proof of formal demand.

Application of deposit by bank to depositor's debt. Note, **23 Am. Rep. 52.**

A demurrer to evidence admits every fact which the jury may reasonably infer from the evidence.

Approved in Killey v. Strouse, 116 Ga. 886, 43 S. E. 206, holding when petition is so defective that there can be no recovery thereon, an oral motion to dismiss may be made at any time; Reeves v. Jackson, 113 Ga. 184, 38 S. E. 315, holding under evidence of this case, motion for nonsuit should have been denied; Cameron v. G. N. Ry. Co., 8 N. D. 130, 77 N. W. 1018, holding a question for jury whether employers furnished reasonably safe and adequate machinery and appliances, and whether employee was in the exercise of due care; State v. Mankin, 68 W. Va. 774, 70 S. E. 765, after defendants' demurrer to evidence sustained, defendant cannot cross-assign as error upon plaintiff's writ of error that demurrer to declaration was overruled; dissenting opinion in Slocum v. New York Life Ins. Co., 228 U. S. 414, **Ann. Cas. 1914D, 1029, 57 L. Ed. 900**, 33 Sup. Ct. 523, majority holding Circuit Court of Appeals cannot set aside verdict for plaintiff by directing verdict for defendant, but must grant new trial; Pleasants v. Fant, 22 Wall. 121, **22 L. Ed. 783**, where court instructed jury that there was no evidence to prove partnership; Van Stone v. Stillwell etc. Co., 142 U. S. 134, **35 L. Ed. 963**, 12 Sup. Ct. 183, sustaining court in overruling general demurrer to evidence, there being some evidence supporting plaintiff's contention; Johnson v. United States, 5 Mason, 436, Fed. Cas. 7419, following rule; Dearing v. Smith, 4 Ala. 437, upon demurrer to evidence, jury was permitted to infer a fact from evidence showing its probability; McLean v. Life Assur. Soc., 100 Ind. 135, objections to pleadings not waived by demurrer to evidence; State v. Soper, 16 Me. 297, **33 Am. Dec. 667**, sustaining plaintiff's refusal to join in general demurrer, there being a matter of fact in controversy; Boland v. Railroad Co., 36 Mo. 491, instruction, that upon the evidence, plaintiffs could not recover, is in the nature of a demurrer to the evidence; Linkous v. Hale, 27 Gratt. 671, upon demurrer to evidence, the court must make the same inference as jury would have been warranted in making; **Booth**

v. Cotton, 13 Tex. 362, plaintiff need not join in demurrer where facts are disputed; Fowle v. Common Council, 11 Wheat. 324, 6 L. Ed. 486, reversing judgment founded upon defective demurrer; Pino v. Hatch, 1 N. M. 131, reversing judgment upon demurrer where the facts were in dispute; Chaves v. Chaves, 3 N. M. 219, 5 Pac. 332, where jury did not find facts warranted by the evidence; Miller v. B. O. R. R. Co., 17 Fed. Cas. 305, in definition of demurrer to evidence; Cameron v. Great Northern Ry. (N. D.), 77 N. W. 1018, holding motion to dismiss has same effect.

Distinguished in Slocum v. New York Life Ins. Co., 228 U. S. 390, Ann. Cas. 1914D, 1029, 57 L. Ed. 891, 33 Sup. Ct. 523, Circuit Court of Appeals cannot set aside verdict for plaintiff by directing verdict for defendant, but must grant new trial; Pickel v. Isgrigg, 10 Biss. 233, 237, 6 Fed. 679, holding it exclusive province of jury to weigh the evidence; Copeland v. Insurance Co., 22 Pick. 140, where plaintiffs joined in demurrer to evidence, there still being a dispute of fact at issue, demurrer was irregular; Pino v. Hatch, 1 N. M. 132, reversing judgment upon demurrer to evidence, it appearing that the facts in question were disputed; Insurance Co. v. Wilson, 29 W. Va. 558, 561, 2 S. E. 904, where protest states that notice was addressed to the indorsers at a certain place, the court will not infer that such place was residence of indorser.

In absence of evidence to contrary, it will be presumed that notary made proper presentment and gave proper notice of dishonor.

Approved in Legg v. Vinal, 165 Mass. 557, 43 N. E. 519, holding presentment sufficient where note was not shown to maker, he making no demand that it be exhibited; People's Bank v. Scalzo, 127 Mo. 187, 29 S. W. 1038, inferring receipt, by indorser, of notice mailed to his address.

Protest as evidence. Note, 96 Am. Dec. 610.

11 Wheat. 184–191, 6 L. Ed. 448, UNITED STATES v. VANZANDT.

Law requiring government officers to make settlements at certain periods is directory, and forms no part of contract with sureties.

Approved in Lake Co. v. Neilon, 44 Or. 20, 74 Pac. 214, failure of tax collector to turn over collections to treasurer as required by law does not raise presumption of conversion; Bank of United States v. Dandridge, 12 Wheat. 81, 89, 6 L. Ed. 558, 561, holding directory a provision in by-laws requiring cashier's bond to be accepted as "satisfactory," and sureties bound, though there was no record of such approval; United States v. Cutter, 2 Curt. 625, Fed. Cas. 14,911, sureties liable upon defalcation of navy agent, who was not specially directed by the President to pay out the money, as required by law; Postmaster-general v. Reeder, 4 Wash. 680, Fed. Cas. 11,311, omission to commence suits against defaulting postmaster within the prescribed time does not release sureties; Postmaster-general v. Munger, 2 Paine, 197, Fed. Cas. 11,309, neglect of postmaster-general to remove defaulting postmaster, as required by statute, does not release sureties; Woolridge v. McKenna, 8 Fed. 662, provision requiring

filing of transcript of record of State court upon certain day not condition precedent to jurisdiction, but directory as mode of practice; Meads v. United States, 81 Fed. 688, a rule of land office regulating receipt of moneys is directory to officer, and sureties are liable for misappropriation of money received in violation of rule; Pickering v. Day, 3 Houst. 532, 95 Am. Dec. 305, 2 Del. Ch. 378, the giving of a bond by revenue collector not a condition precedent to his authority, but directory to proper officer of treasury department; Bond v. Bank, 2 Ga. 108, regulations in bank charter limiting loans are directory, and are no defense in action for loan contrary to regulations; Stern v. People, 102 Ill. 550, failure of county board to remove defaulting treasurer no defense in action against sureties; Kindle v. State, 7 Blackf. 589, laws regulating time of settlement for county treasurers is directory, and no part of surety's contract; Boone Co. v. Jones, 54 Iowa, 703, 2 N. W. 990, failure of supervisors to indorse their approval upon a bond does not affect its validity, statute being directory; State v. Hayes, 7 La. Ann. 121, constitutional provision that tax collector is not eligible to any office until he obtains discharge is directory, and sureties of one holding office contrary thereto are liable; State v. Dunn, 11 La. Ann. 551, statute whereby auditor might require district attorney to proceed against sheriff for former default directory merely; Young v. State, 7 Gill & J. 263, failure to attest sheriff's bond, as required by statute, does not invalidate it so as to release sureties; Milburn v. State, 1 Md. 19, statute requiring bonds to be approved by commissioners is a duty imposed upon them, but not part of sureties' contract; Detroit v. Webber, 26 Mich. 290, ordinance requiring monthly examination of treasurer's accounts is for protection of city and not of sureties; Green v. Brandon, Walk. (Miss.) 372, act of legislature extending time for a tax collector to make returns does not release his sureties; State v. Atherton, 40 Mo. 217, failure of bank officials to comply with by-laws requiring examinations of its affairs does not discharge sureties of embezzling teller: Converse v. Porter, 45 N. H. 399, neglect of clerk to record doings of selectmen in accordance with statute does not affect validity of their actions; Canal v. Van Vorst, 21 N. J. L. 117, holding sureties liable when by-laws of company requiring periodical examination of cashier's accounts were not complied with; Church v. Vedder, 14 Wend. 171, by-laws of corporation requiring treasurer to account at stated periods mere private regulation, and neglect to enforce it no defense for sureties; In re M. & H. R. R. Co., 19 Wend. 143, election of directors will not be set aside because inspectors were not sworn in the form prescribed by statute; Mayor v. Blache, 6 La. 517, sureties on new bond not released because of failure of council to call treasurer to account for defalcations of preceding term; Looney v. Hughes, 26 N. Y. 519, 522, sustaining action against sureties, treasurer failing to issue warrant against delinquent within required time; Village v. King, 116 N. Y. 362, 22 N. E. 561, extension of time for tax collector to return warrant does not release his sureties; Railway Co. v. Shaeffer, 59 Pa. St. 357, failure of corporation to enforce rule requiring

regular statements from cashier does not release his sureties; Commonwealth v. Holmes, 25 Gratt. 775, 776, extension of time allowed by law for collector to account does not affect liability of sureties; Railroad Co. v. Kasey, 30 Gratt. 229, where corporation failed to enforce rule for settlement against general agent, authorities collected; Crown v. Commonwealth, 84 Va. 287, **10 Am. St. Rep. 842**, 4 S. E. 724, failure of county treasurer to account, as required by law, does not release his sureties; State v. Hill, 17 W. Va. 463, sheriff's bond not vitiated by failure to add condition required by statute; Bethune v. Dozier, 10 Ga. 239, holding surety not bound outside of his contract; United States v. Potter, 27 Fed. Cas. 603, statute authorizing salary of an officer to be held in arrears forms no part of contract with sureties.

Distinguished in Boon Co. v. Railroad Co., 139 U. S. 693, **35 L. Ed. 323**, 11 Sup. Ct. 690, holding doctrine does not extend to municipal corporation where county officers consented to release of railroad company from payment of taxes; United States v. De Visser, 10 Fed. 648, as to warehouse bonds, holding statutes modifying the ordinary rights of sureties must be regarded as part of the contract of suretyship; State v. Roberts, 68 Mo. 237, **30 Am. Rep. 791**, act of legislature extending time for settlement of county collectors releases sureties upon bonds executed before the change.

Release of sureties on official bond by legislative extension of time. Note, **45 Am. Rep. 408**.

Laches is not imputable to government, and it is not responsible for the laches of its officers.

Approved in United States v. Beebe, 180 U. S. 354, **45 L. Ed. 570**, 21 Sup. Ct. 375, holding laches in not attacking compromise judgment in favor of government is not shown where judgment was entered five years before motion to set it aside was made, and this was done because no one having authority to act knew of the facts; United States v. Sisk, 176 Fed. 888, 100 C. C. A. 355, United States not responsible for negligence of internal revenue officer by reason of which spirits seized for nonpayment of tax are lost; United States v. Campbell, 170 Fed. 319, 95 C. C. A. 114, right of United States to recover on bond of defaulting officer not defeated by laches of its other officers permitting such officer to remain in office after knowledge of defalcation; United States v. Noojim, 155 Fed. 379, right of United States not barred by laches of its officers in failing to have execution issued on judgment on appearance bond for more than ten years; Pond v. United States, 111 Fed. 996, holding failure of officers of treasury department to give notice to surety company immediately upon defalcation of collector of internal revenue is no defense to surety, because failure to give immediate notice will not discharge surety (25 Stat. 387), and because government is not liable for laches of officers; Stoeckle v. Lewis, 8 Del. Ch. 165, 170, 38 Atl. 1062, 1063, 1064, 1066, failure of levy court to remove defaulting tax collector before he collects

other taxes does not release sureties on his bond; State v. Jahraus, 117 La. 289, 116 Am. St. Rep. 208, 41 South. 557, in action by State against tax collector for failure to account for taxes, fact that auditor and district attorney delayed in demanding settlement does not estop State; Chippewa Supervisors v. Bennett, 185 Mich. 565, 153 N. W. 814, in suit by county against county treasurer for accepting worthless checks as cash, delay in bringing suit until limitations run against checks does not estop plaintiff from recovery; Myers v. Miller, 45 W. Va. 616, 31 S. E. 983, holding sureties on official bond of sheriff upon making good default will become subrogated to position of State in respect to securities and priorities for purpose of reimbursement; United States v. Nicholl, 12 Wheat. 509, 6 L. Ed. 710, holding sureties responsible for moneys retained by their principal after the termination of his office; Dox v. Postmaster-general, 1 Pet. 325, 7 L. Ed. 163, sureties not discharged by failure of postmaster-general to commence suit against defaulting pastmaster within the time prescribed by law; United States v. Boyd, 15 Pet. 208, 10 L. Ed. 713, sureties not discharged by failure of treasury department to enforce regulations for the payment of money received, against defaulting receiver; Jones v. United States, 18 Wall. 663, 21 L. Ed. 868, sureties of defaulting postmaster liable, although postmaster was permitted to remain in office after notice of defalcation; Hart v. United States, 95 U. S. 318, 24 L. Ed. 480, sureties liable on distiller's bond, where revenue collector permitted liquor to be removed without payment of tax, contrary to law; Minturn v. United States, 106 U. S. 444, 445, 27 L. Ed. 210, 211, 1 Sup. Ct. 408, 409, obligors liable on bond for payment of duties, where custom officials neglected to collect the same, upon withdrawal of goods; United States v. Buchanan, 8 How. 106, 12 L. Ed. 1006, holding losses sustained by purser in consequence of commodore's order, no setoff in suit upon purser's bond; United States v. Military Road Co., 140 U. S. 632, 35 L. Ed. 571, 11 Sup. Ct. 998, defense of laches cannot be set up to defeat title of United States to lands granted upon conditions not fulfilled by grantees; German Bank v. United States, 148 U. S. 579, 37 L. Ed. 569, 13 Sup. Ct. 705, government not liable for registered bonds, canceled without authority of law, by the register of the treasury; Raymond v. United States, 14 Blatchf. 52, Fed. Cas. 11,596, alleged negligence upon the part of government officials no bar to recovery upon a paymaster's bond; United States v. City of Alexandria, 19 Fed. 611, 4 Hughes, 549, government can enforce agreement to deliver stock, although the Secretary of Treasury was negligent in making demand; United States v. Adams, 54 Fed. 116, failure to present claim against estate of United States marshal no defense to action against sureties, authorities collected; Woodruff v. Berry, 40 Ark. 260, State not bound by contract made by her officers contrary to statute; Pickering v. Day, 3 Houst. 536, 95 Am. Dec. 308, failure of treasury official to discharge defaulting collector, if negligent, does not bar action against sureties; State v. Smith, 16 Fla. 188, State entitled to recover from collector's sureties, even though the Governor had failed to remove him from office

upon learning of his breach; Bass v. State, 34 La. Ann. 502, a citizen has no recourse against State for damage sustained by levee improperly constructed by State board; Newark v. Stout, 52 N. J. L. 49, 18 Atl. 948, failure of council to examine into conduct of treasurer no defense to action against sureties; Seymour v. Van Slyck, 8 Wend. 422, neglect of an official, receiving note as collateral security for debt due the State, to perform duties incident to thus receiving note, is no defense for debtor; Supervisors v. Otis, 62 N. Y. 95, sureties upon bond of county treasurer, not released by official neglect of supervisors in examining accounts; Commonwealth v. Baldwin, 1 Watts, 55, **26 Am. Dec.** 34, judgment lien of favor of the commonwealth not lost by failure to enforce within time allowed by statute; Commonwealth v. Brice, 22 Pa. St. 214, **60 Am. Dec.** 80, sheriff's sureties not discharged by commissioners' neglect to retain money paid to sheriff; Hoge v. Brookover, 28 W. Va. 310, in discussion as to whether failure to docket judgment lien will affect judgment in favor of State; Jackson v. Simonton, 4 Cr. C. C. 261, Fed. Cas. 7147, arguendo; United States v. Hosmer, 26 Fed. Cas. 377, government security cannot be destroyed by the laches of its officers; United States v. Minturn, 26 Fed. Cas. 1273, sureties liable on bond for goods released from warehouse before duties were paid in full; United States v. Wright, 28 Fed. Cas. 794, forbearance, on the part of the government, does not discharge sureties of defaulting postmaster; Myers v. Miller (W. Va.), 31 S. E. 983, arguendo.

Distinguished in McHaney v. Crabtree, 6 T. B. Mon. 107, dictum to the effect that in equity a surety will be released when his risk is increased without his consent; Hayden v. Agent etc., 1 Sand. Ch. 198, neglect of State prison agent to enforce levy on an execution, satisfied his judgment as to a junior lien on real estate; United States v. Sowers, 27 Fed. Cas. 1277, decision of collector of the port, upon "rate and amount of duties," final unless an appeal is taken to Secretary of Treasury within ten days.

On the estoppel of a county or municipal corporation to contest illegal claims or expenditures. Note, **137 Am. St. Rep. 363.**

Liability of surety on official bond not affected by neglect or omission of other officer. Note, **2 Ann. Cas. 170.**

Discharge of surety on fidelity bond by failure of employer to notify surety of delinquency of employee. Note, **11 Ann. Cas. 1035.**

Sureties are not liable for the acts of their principal after the termination of his office.

Approved in Board of County Commrs. v. Dickey, 86 Minn. 342, 90 N. W. 780, holding county was not estoppel from recovering from clerk of District Court fees collected by him for statements furnished commercial agencies, although he was acting on advice of district attorney and county commissioners acquiesced; Wells, Fargo & Co's. Express v. Walker, 9 N. M. 189, 50 Pac. 360, holding surety on note given for money embezzled when the embezzlement was unknown to the surety but was known to

plaintiff cannot be held liable; Bank v. Barrington, 2 Penr. & W. 44, holding office of cashier terminated by forfeiture of charter, and original sureties not bound by acts committed after revival of charter.

Miscellaneous. Cited in Wells-Fargo etc. v. Walker (N. M.), 50 Pac. 360, as to when sureties are bound for an agent's wrongful acts.

11 Wheat. 192-199, 6 L. Ed. 452, OTIS v. WALTER.

Not cited.

11 Wheat. 199-215, 6 L. Ed. 454, HINDE'S LESSEE v. LONGWORTH.

Certificate of acknowledgment is insufficient to prove execution of deed unless it shows with reasonable certainty that the acknowledgment properly made.

Cited in Jacoway v. Gault, 20 Ark. 194, 73 Am. Dec. 496, holding certificate invalid where important statutory words were omitted; Edwards v. Thom, 25 Fla. 255, 5 South. 713, proof by subscribing witness that he saw mortgagor sign and acknowledge instrument, not sufficient proof of execution; Den v. Geiger, 9 N. J. L. 231, certificate sufficient, the requirements of the statute being substantially complied with.

In examining admissibility of testimony, party excepting is to be confined to specific objection taken at trial.

Approved in Carmody v. Capital Traction, 43 App. (D. C.) 251, exception failing to point out portion of instruction objected to insufficient; Burton v. Driggs, 20 Wall. 133, 22 L. Ed. 301, holding objection to copy of deposition "that it was not the original" too indefinite to let in argument that witness was alive, and secondary evidence inadmissible; Van Gunden v. V. A. I. Co., 52 Fed. 840, 8 U. S. App. 229, criticising counsel for failure to observe rule of court in accordance with this practice; Rush v. French, 1 Ariz. Ter. 126, holding general objection that testimony offered is inadmissible without specifying grounds does not raise an issue; Board of Education v. Keenan, 55 Cal. 645, where a part of a mass of complex evidence was admissible, it was error to exclude whole; Doane v. Cummins, 11 Conn. 159, the court would not presume that certain book entries were made without defendant's authority, there being no objection to that effect; Gale v. Shillock, 4 Dak. 194, 29 N. W. 666, where record of an instrument offered in evidence did not show notarial seal, an objection cannot be raised in appellate court; Jamison v. Bagot, 106 Mo. 256, 16 S. W. 701, evidence admitted in another trial for same purpose, parties cannot urge a specific objection against it; Allen v. Smith, 12 N. J. L. 168, refusing to examine exception to declaration not raised at trial; Oliver v. Phelps, 20 N. J. L. 183, general exceptions not considered, authorities collected and reviewed; Fowler v. Stonum, 6 Tex. 74, no objection having been taken to admission of verdict without the judgment, there was no error; Norton v. Mitchell, 13 Tex. 51, where objection made

to admission of a document, without stating any grounds, court inferred that no objection had been taken; McNulty v. Batty, 2 Pinn. 59, refusing to permit specific objections to the admission of a document objected to in general terms below; dissenting opinion in Harrison v. Nixon, 9 Pet. 535, 9 L. Ed. 220, objecting to remanding bill to Circuit Court for amendment, no objection having been made to omission; dissenting opinion in Coles v. Kelsey, 2 Tex. 562, declaring judgment should not have been reversed because of insufficient petition to which there was no objection below; State v. Hope, 100 Mo. 355, 8 L. R. A. 612, 13 S. W. 492, no error in overruling general objection; Den v. Geiger, 9 N. J. L. 238, objection to verdict on the ground that illegal evidence had been admitted.

Distinguished in S. C. D. R. R. Co. v. Murray, 3 N. M. 419, 9 Pac. 373, where objection was made to evidence at a later stage in the proceedings, after it had been submitted to the jury.

Judgments against a grantor are admissible to impeach a deed as fraudulent.

Approved in Johnston v. Gill, 27 Gratt. 597, where a voluntary deed to wife of grantor was attacked for fraud.

While judgment is not evidence of indebtedness earlier than date thereof, indebtedness may be shown by accounts upon which judgment founded.

Approved in Hickox v. Elliott, 11 Sawy. 645, 27 Fed. 844, holding proceedings, prior to conveyance of property by creditor, competent evidence to prove indebtedness; Arnett v. Coffey, 1 Colo. App. 38, 27 Pac. 615, where fact that a debt existed prior to judgment was established by the pleadings; Jamison v. Bagot, 106 Mo. 255, 16 S. W. 701, arguendo.

Distinguished in Eggleston v. Sheldon, 85 Wash. 431, 434, 148 Pac. 578, 579, complaint, answer and findings upon which judgment was based not competent evidence against bona fide grantee of judgment debtor.

Parol evidence as to consideration of deed. Note, 20 L. R. A. 110; 14 E. R. C. 754.

A voluntary deed may be declared void as to antecedent, but not subsequent, creditors unless made with fraudulent intent.

Approved in Walter v. Lane, 1 McAr. (D. C.) 282, voluntary conveyance to wife by husband of most of his property void as against subsequent creditors, there being intentional fraud on part of grantor in creation of future debts; Offutt v. King, 1 McAr. (D. C.) 317, one indebted in small amount and doing good business may make conveyance to wife and children which cannot be impeached for want of consideration; Columbia Nat. Bank v. Baldwin, 64 Neb. 747, 90 N. W. 894, 895, holding where deed is assailed by third parties as fraudulent, grantee may show by parol evidence real consideration; Ilfeld v. De Baca, 13 N. M. 39, 79 Pac. 725, in absence of actual fraud, wife's total rights in property is sufficient consideration to support deed from husband as against antecedent creditors; Eggleston v. Sheldon, 85 Wash. 432, 148 Pac. 578, pleadings in suit in which judgment

rendered not competent evidence of indebtedness to establish rights of subsequent creditors; Parish v. Murphee, 13 How. 100, 14 L. Ed. 68, setting aside settlement upon wife and children, by one heavily indebted at the time; Humes v. Scruggs, 94 U. S. 28, 24 L. Ed. 53, setting aside deed to wife, grantor being in state of bankruptcy; Sedgwick v. Place, 5 Ben. 186, 5 Bank. Reg. 168, Fed. Cas. 12,620, holding valid, as against subsequent creditors, conveyance for benefit of wife, husband being solvent, and without fraudulent intent; In re Rainsford, 5 Bank. Reg. 383, 20 Fed. Cas. 189, conveyance to relative for nominal consideration, by one heavily indebted, invalid, and debtor's discharge in bankruptcy annulled; Smith v. Kehr, 2 Dill. 59, Fed. Cas. 13,071, 7 Bank. Reg. 104, setting aside deed of trust in fraud of creditors for benefit of wife, and admitting subsequent creditors; Cato v. Easley, 2 Stew. 221, setting aside as fraudulent, voluntary settlement in favor of children; Bertrand v. Elder, 23 Ark. 500, 502, declaring void as to creditors, a deed of gift by a person largely indebted; Driggs v. Norwood, 50 Ark. 47, 7 Am. St. Rep. 81, 6 S. W. 324, declaring fraudulent and void as to subsequent creditors, a voluntary deed made by an insolvent, there being other circumstances showing fraudulent intent; Benton v. Jones, 8 Conn. 191, deed of a person without fraudulent intent for benefit of creditors, valid against a subsequent creditor; Converse v. Hartley, 31 Conn. 379, a deed not fraudulent in fact valid as to subsequent creditors; Emerson v. Bemis, 69 Ill. 540, holding void, as to existing creditors, conveyance of embarrassed debtor to his wife; Patterson v. McKinney, 97 Ill. 47, conveyance by person, while in embarrassed condition, void, but his conveyance founded upon agreement to convey, while perfectly solvent, valid as to creditors; O'Brien v. Coulter, 2 Blackf. 424, setting aside deed to children made with intent to defraud creditors; Alston v. Rowles, 13 Fla. 141, voluntary conveyance to wife prima facie evidence of fraud, and void as to representatives of deceased partner, as well as to general creditors; Worthington v. Shipley, 5 Gill, 457, a voluntary conveyance of negro slaves by one loaded with debts void; Henry v. Fullerton, 13 Smedes & M. 635, a voluntary conveyance in fraud of subsequent creditors void; Catchings v. Manlove, 39 Miss. 668, voluntary assignment of chose in action by person in state of insolvency is void; Carlisle v. Rich, 8 N. H. 48, voluntary deed by one solvent, but liable as surety on bond, is fraudulent; Coolidge v. Melvin, 42 N. H. 526, a conveyance with a secret trust reserved to vendor, fraudulent; Carpenter v. Roe, 10 N. Y. 230, voluntary deed of trust fraudulent, grantor being heavily indebted and engaged in perilous speculation; Brice v. Myers, 5 Ohio, 125, voluntary conveyance fraudulent, the property being necessary to secure creditor; Crumbaugh v. Kugler, 2 Ohio St. 378, 379, setting aside voluntary conveyances made by one largely indebted; Phillips v. Wooster, 36 N. Y. 414, sustaining conveyance procured for wife, by husband not indebted, as against subsequent creditors; Hunters v. Waite, 3 Gratt. 41, 64, voluntary settlement by one greatly involved void as to existing creditors; Johnston v. Zane, 11 Gratt. 558, 561, voluntary deed for benefit of grantor's

family, valid as to subsequent creditors, in absence of fraud; Lochard v. Beckley, 10 W. Va. 103, setting aside voluntary conveyance upon proof of actual fraud; Pike v. Miles, 23 Wis. 169, 99 Am. Dec. 150, sustaining, as against subsequent creditors, voluntary settlement upon wife, the same being reasonable and without fraudulent intent; Candee v. Lord, 2 N. Y. 276, 51 Am. Dec. 297, approving generally doctrine that fraudulent judgment is void as to subsequent creditors; Cosby v. Ross, 3 J. J. Marsh. 290, 20 Am. Dec. 140, deed transferring nothing which creditors might claim; Beverly v. Burke, 9 Ga. 447, 54 Am. Dec. 356, State v. Brette, 6 La. Ann. 662, Malloney v. Horan, 49 N. Y. 121, 10 Am. Rep. 341, arguendo.

Distinguished in Clarke v. White, 12 Pet. 198, 9 L. Ed. 1055, sustaining deed to children, as against creditors who made a composition with full knowledge of the conveyance; Barker v. Barker's Assignee, 2 Wood, 90, Fed. Cas. 986, 12 Bank. Reg. 477, holding no actual fraud in deed by person in easy circumstances to son, but deed set aside for constructive fraud, it not being recorded as required by statute; Clayton v. Brown, 17 Ga. 220, possession by husband of personal property conveyed to trustee for benefit of wife and children, no evidence of fraud; Peppo v. Carter, 11 Mo. 544, voluntary conveyance of a lot by parent in possession of much valuable property no proof of fraud against subsequent creditors.

Conveyance without valuable consideration is presumptive, but not conclusive evidence of fraud against existing creditors.

Approved in Polk Co. Nat. Bank v. Scott, 132 Fed. 900, 66 C. C. A. 51, refusing to set aside conveyance from husband and wife for recited consideration of one dollar, where shown that there was no fraudulent intent; Lloyd v. Fulton, 91 U. S. 485, 23 L. Ed. 365, upholding conveyance where creditor retained property greatly exceeding the amount of his debts; Magniac v. Thompson, 1 Bald. 356, 359, Fed. Cas. 8956, a bona fide conveyance in consideration of marriage, valid against existing creditors; Morgan v. Hecker, 74 Cal. 542, 16 Pac. 318, a reasonable gift from husband to wife, made while solvent and without fraudulent intent, is valid; Weed v. Davis, 25 Ga. 686, sustaining charge of court below, that a person in debt may in good faith make voluntary conveyance of part of his property; Moritz v. Hoffman, 35 Ill. 556, sustaining deed in trust for wife upon proof of donor's solvency and circumstances showing absence of fraudulent intent; Carson v. Foley, 1 Iowa, 527, where grantor by voluntary conveyance had sufficient property to pay his debts, no fraud was presumed; Clayton v. Brown, 17 Ga. 220, possession by husband of personal property conveyed to trustee for benefit of wife, no evidence of fraud; Howe v. Ward, 4 Me. 205, evidence showing fraudulent intention properly admitted, and judgment ordered on the verdict; Hapgood v. Fisher, 34 Me. 408, 56 Am. Dec. 665, sale, where contract for future support was a part consideration, not fraudulent, vendor having retained sufficient property to pay his debts; French v. Holmes, 67 Me. 190, in gift of personal property to wife and son, presumption of fraud rebutted by evidence showing property to be of insignificant value, and absence of fraudulent intent; Atkin-

son v. Phillips, 1 Md. Ch. 510, voluntary conveyance to grantor's wife set aside upon proof that he was largely indebted, no proof being offered that he retained sufficient means to pay; Williams v. Banks, 11 Md. 227, the burden of proof is upon the grantee to show absence of fraud; Briggs v. Parkman, 2 Met. 364, 37 Am. Dec. 91, presumption of fraud in mortgage of personal property, mortgagor retaining possession, rebutted by evidence that agreement was bona fide; Lerow v. Wilmarth, 9 Allen, 386, voluntary conveyance from father to child is not fraudulent per se; Michigan Trust Co. v. Adams, 109 Mich. 183, 66 N. W. 1095, fraud not sustained by failure of wife to record deed from husband, it appearing that he retained sufficient to pay his debts, and recording was omitted through inadvertence; Filley v. Register, 4 Minn. 402, 77 Am. Dec. 529, whether a voluntary deed, not fraudulent upon its face, is in fraud of creditors is a question of fact for jury; Wilson v. Kohlheim, 46 Miss. 366, 372, sustaining deed from father to son where circumstances did not establish fraud; Lane v. Kingsbury, 11 Mo. 409, every circumstance tending to show grantor's pecuniary condition at time of conveyance is admissible; Pomeroy v. Bailey, 43 N. H. 124, a conveyance in consideration of blood and affection by one not in embarrassed circumstances valid, if bona fide, which is question for jury; Seward v. Jackson, 8 Cow. 423, 434, 451, presumption of fraud in voluntary settlement upon children may be rebutted, and question of fraud is for jury; Jackson v. Peck, 4 Wend. 303, sustaining conveyance, there being no proof of fraud nor that grantor was embarrassed by debt; Pell v. Tredwell, 5 Wend. 696, a family settlement will not be set aside in favor of creditor by whose advice it was made, and who was secured for money due him; Babcock v. Eckler, 24 N. Y. 630, 631, 634, conveyance to wife valid, grantor being in prosperous circumstances and indebted to wife; Dygert v. Remerschnider, 32 N. Y. 642, 648, conveyance made in consideration of marriage valid as against creditor of husband; Dunlap v. Hawkins, 59 N. Y. 346, presumption of fraud overcome by evidence of solvency and ability to pay debts; Chambers v. Spencer, 5 Watts, 408, sustaining conveyance to daughters, the father retaining sufficient to pay his debts at the time; Townsend v. Maryland, 45 Pa. St. 200, sustaining settlement upon wife before debt existed, where jury found there had been no fraud; Preston v. Jones, 50 Pa. St. 65, a conveyance by a father to his sons in consideration of an agreement on their part to pay his debts is not void as to subsequent creditors; Conley v. Bentley, 87 Pa. St. 47, property accumulated by industry of a wife, and retained as her own with husband's consent, is a valid gift, as against his creditors; Vance v. Smith, 2 Heisk. 351, where a person conveyed all his property for the benefit of his creditors, the surplus to go to his wife, held valid against subsequent creditors; Bryant v. Kelton, 1 Tex. 424, possession of property by vendor is not fraud per se, whether there was fraud a question for the jury; Brackett v. Waite, 4 Vt. 399, grantor by voluntary deed, retaining property greatly in excess of his liabilities, not presumed to intend fraud; dissenting opinion in Van Wyck v. Seward, 18 Wend. 401, where

assignor of judgment made a voluntary conveyance, presumption of fraud should be rebutted by fact that property against which judgment was lien was of greater value than amount of judgment; Jones v. Clifton, 2 Flipp. 194, Fed. Cas. 7457, voluntary deed to wife by husband free from debt, and not contemplating bankruptcy, is valid, although power of revocation was reserved; Stewart v. Johnson, 18 N. J. L. 90, holding wife competent to impeach husband's deed as fraudulent; the dissenting opinion in 4 Hill 309, 312, possession of property by vendor fraudulent, and burden of proof upon person claiming by sale; Botts v. Cozine, 1 Hoff. Ch. 85, where bill was not framed so as to justify decree upon grounds of fraud; Thompson v. Hammond, 1 Edw. Ch. 499, it being determined that by reason of other facts grantee under voluntary conveyance had no title, if said conveyance were valid; Carr v. Breese, 81 N. Y. 591, as supporting this principle.

Distinguished in Smith v. Lowell, 6 N. H. 70, holding evidence that conveyance was given as securtiy not sufficient to rebut presumption of fraud arising from the circumstances; Hutchison v. Kelley, 1 Rob. 132, 39 Am. Dec. 255, where jury found fraud in fact.

Denied in Lockhard v. Beckley, 10 W. Va. 99, holding a voluntary conveyance absolutely void as to existing creditors.

Voluntary conveyances as fraudulent. Note, 14 Am. Dec. 705.

Voluntary conveyances. Note, 14 Am. St. Rep. 746.

Attacks by creditors on conveyances made by husbands to wives. Note, 90 Am. St. Rep. 517.

Where deed assailed for fraud, it may be sustained by parol proof of other consideration, not inconsistent with consideration expressed.

Approved in Southard v. Arkansas Valley etc. Ry. Co., 24 Okl. 412, 103 Pac. 751, consideration stated in promissory note given to aid in construction of railroad could not be varied by parol in absence of fraud; Graham v. Lockhart, 8 Ala. 24, admitting evidence showing a difference between thing described as the consideration and that upon which deed was based; Gordon v. Tweedy, 71 Ala. 210, where it was shown that consideration was notes instead of cash and different stock from that recited; Bennett v. Solomon, 6 Cal. 137, where an assignment of mortgage recited money consideration, parol evidence admitted to prove assignment was made in consideration of marriage; Goward v. Waters, 98 Mass. 599, admitting parol evidence to fix compensation for services under an agreement to sell property; Scoggin v. Schloath, 15 Or. 383, 15 Pac. 636, where deed was for a money consideration, evidence admissible to prove that larger sum was in fact paid.

Distinguished in McGhee v. Rump, 37 Ala. 658, admitting parol evidence showing a contract to be an exchange and not sale; Burrage v. Beardsley, 16 Ohio, 442, 445, 47 Am. Dec. 383, 385, deed purporting to be executed for a valuable consideration cannot be supported by consideration of love and affection.

It is no fraud upon creditors for a debtor to have paid one and left others unpaid.

Approved in Rowland v. Plummer, 50 Ala. 196, where husband transferred a security to his wife, she being a bona fide creditor for debts due her separate estate.

Miscellaneous. Cited in Mulford v. Peterson, 35 N. J. L. 135, to point that courts of law will set aside deeds in fraud of creditors.

11 Wheat. 215–225, 6 L. Ed. 458, LITTLEPAGE v. FOWLER.

In entering public lands, locative calls should be specific, so as to enable subsequent locator to identify them by using ordinary diligence.

Approved in McNeel v. Herold, 11 Gratt. 314, ordering a new trial that jury might determine whether the land might be identified by the objects named in the description; Wakeman v. Sherman, 9 N. Y. 93, arguendo.

Sense in which enterer of public lands uses reference to distance may be gathered from language, or inferred from habits of men and state of country.

Approved in Kimball v. Semple, 25 Cal. 451, holding question as to whether distance should be measured in straight or meandering line should be determined by intention of parties at time.

11 Wheat. 226–236; 6 L. Ed. 460, TAYLOR v. OWING.

Entry must describe with sufficient accuracy to be found and known by others, and to differentiate claim from other lands.

Cited in Jackson v. Adams, 7 Wend. 368, but not in point.

11 Wheat. 237–257, 6 L. Ed. 463, PERKINS v. HART.

Assumpsit lies if special agreement has been wholly performed, or its execution prevented by defendant, or by consent.

Approved in Prudence Coal Co. v. Perkins, 217 Fed. 575, 133 C. C. A. 421, under statute permitting assumpsit on sealed contracts, lessor may bring assumpsit on lease of coal mines for royalties due thereon; Humbert v. Chopy, 216 Fed. 552, where defendant puts it out of his power to perform special contract, plaintiff may sue on quantum meruit; Fordyce v. Dillaway, 212 Mass. 411, 99 N. E. 167, deviation from voyage contracted for is ground for rescission of contract and suit in quantum meruit for wages; Cook v. Gallatin R. R., 28 Mont. 518, 73 Pac. 133, holding where plaintiff contracted to haul ties for defendant and received payment on the fifteenth of each month refusal to pay by defendant justified plaintiff in refusing to deliver; Davis v. Ayres, 9 Ala. 293, holding party might recover on contract of service, employer refusing without sufficient cause to permit the services to be rendered; Dukes v. Lowie, 13 Ala. 459, plaintiff entitled to recover upon special parol contract of sale by indebitatus assumpsit; Richmond v. Railroad Co., 33 Iowa, 494, right of recovery accrued at once upon refusal of railroad to give elevator company handling of

grain as per contract; Ridgeley v. Crandall, 4 Md. 441, plaintiff entitled to recover in accordance with award made by commissioners appointed to divide property, having executed deeds as required; Moulton v. Trask, 9 Met. 580, a person contracting to labor for a year for a fixed sum, being discharged without sufficient cause, may recover for time served; Buffkin v. Baird, 73 N. C. 293, a party to contract for sale of land who prevented its performance is liable to the other party for labor and expense incurred; Newman v. McGregor, 5 Ohio, 352, 24 Am. Dec. 295, where special contract for services was waived by parties plaintiff, entitled to recover for value of his labor; dissenting opinion in Welsh v. Welsh, 5 Ohio, 433, claiming assumpsit should lie for labor and improvements made upon land by one holding under indefinite parol agreement to purchase; The Isaac Newton, Abb. Adm. 31, Fed. Cas. 7089, where consideration was to be paid by installments as the work advanced.

Distinguished in Givham v. Dailey, 4 Ala. 340, agreement of overseer to serve for a year for a certain consideration is a condition precedent, and upon his death his personal representative cannot recover pro rata; Railroad Co. v. Pressley, 45 Miss. 71, action in indebitatus assumpsit in case of executory special contract; Sanborn v. Emerson, 12 N. H. 62, an express contract of indemnity containing nothing more than the law would imply may be declared in indebitatus assumpsit or upon special contract; Haigh v. United States Building & Loan Assn., 19 W. Va. 802, upon withdrawal of member, the common counts held sufficient for recovery of money paid in; Jackson v. Cleveland, 15 Wis. 112, where it appeared from terms of contract for railroad work that an entire performance was not a condition to compensation, contractor might recover for work done.

Wrongfully discharged servant's remedy as to services rendered. Note, 5 L. R. A. (N. S.) 581.

Where agreement embraces number of distinct subjects, capable of being separately executed, each matter considered as separate agreement after it is closed.

Approved in Stephens Lumber Co. v. Cates, 62 Fla. 388, 56 South. 300, where there is acceptance by defendant of part of articles contracted for, their value may be recovered under general assumpsit; Woodside v. Insurance Office, 84 Fed. 284, construing insurance policy on personal effects as severable contract upon which insurer may recover for each article lost; Highman v. Harris, 108 Ind. 256, 8. N. E. 260, where contract of settlement contained independent matters, injured party retains his rights as to them, though impeaching account for fraud; Dibol v. Minott, 9 Iowa, 406, contract for painting certain number of houses at so much per house is severable contract; Richmond v. D. & S. C. R. R. Co., 33 Iowa, 494; Insurance Co. v. York, 48 Kan. 493, 30 Am. St. Rep. 316, 29 Pac. 588, contract of insurance embracing dwelling and furniture divisible; Broumel v. Rayner, 68 Md. 50, contract for grading certain streets divisible; Merrill

v. Agricultural Ins. Co., 73 N. Y. 464, **29 Am. Rep. 193**, policy on distinct classes of property, separately valued, a divisible contract; Coleman & Co. v. Insurance Co., 49 Ohio St. 324, **34 Am. St. Rep. 571, 16 L. R. A. 177**, 31 N. E. 281, to the same effect; Wolf v. Welton, 30 Pa. St. 204, partner's contract to pay partnership debts severable, and separate actions may be brought upon each breach; Smith v. Crosby, 47 Tex. 129, a contract to locate and secure patents to land upon several certificates divisible, one certificate being invalid and no patent obtained thereon; Canton Ins. Office v. Woodside, 90 Fed. 304, a marine policy on personal effects should be applied distributively, and a stipulation warranting free from all average does not exempt insurer merely because few articles were saved.

Distinguished in Stokes v. Baars, 18 Fla. 660, holding contracts to deliver a certain quantity of timber, subject to certain conditions, an entire and not severable agreement.

Where assumpsit brought upon special agreement, agreement may be given in evidence by defendant for purpose of lessening damages.

Approved in Mug v. Ostendorf, 49 Ind. App. 82, 96 N. E. 784, where plaintiff rescinding contract for breach sues on quantum meruit for value of services, defendant may show mitigation of damages under general denial; Schwartzel v. Karnes, 2 Kan. App. 787, 44 Pac. 42, where attorney sued for services, producing testimony fixing certain value, defendant permitted to show contract for a lesser amount.

A settled account is only prima facie evidence of its correctness, and may be impeached by proof of fraud or mistake.

Approved in Chicago etc. Ry. Co. v. Clark, 92 Fed. 987, holding a party to whom an account is rendered is not concluded by acquiescence or settlement from proving incorrectness of account unless statutes of limitations has barred his rights or he is estopped in pais or there is an agreement between the parties; Gutshall v. Cooper, 37 Colo. 215, **6 L. R. A. (N. S.) 820**, 86 Pac. 126, reversing judgment for failure to receive evidence in support of cross-complaint showing breach by plaintiff of contract for labor; Colorado Fuel & Iron Co. v. Chappell, 12 Colo. App. 392, 55 Pac. 609, holding where defense was that on settlement balance was due him and paid and plaintiff replied admitting account but averring that balance was fraudulent the defendant's demurrer should have been overruled; Gordon v. Frazer, 13 App. D. C. 387, defense to action on account stated must relate to it and not matters of anterior liability; Davidson Grocery Co. v. Johnston, 24 Idaho, 346, **Ann. Cas. 1915C, 1129**, 133 Pac. 932, an account stated, must show on its face that it was intended to be a final settlement; State v. Illinois Cent. R. Co., 246 Ill. 241, 242, 92 N. E. 837, where no fraud shown but only errors and omissions in account stated, correction will be confined to those errors; Kenneth Inv. Co. v. Bank, 96 Mo. App. 135, 70 S. W. 176, holding retention of bank-book duly balanced and canceled checks for unreasonable time without objection, the balance becomes account stated, but depositor may show payment of forged checks;

Newhall v. Field, 13 N. M. 88, 12 Ann. Cas. 979, 79 Pac. 713, defense of account stated not good to action on note where note was not included in the account; dissenting opinion in Camp v. Wilson, 97 Va. 274, 33 S. E. 594, majority holding under a contract providing for monthly accounts, such accounts are, in the absence of fraud or mistake, final unless it was understood that one party was to be responsible for certain damages; Wiggins v. Burkham, 10 Wall. 132, 19 L. Ed. 886, holding an account rendered and not objected to within a reasonable time, admitted to be prima facie correct; Oil Co. v. Van Etten, 107 U. S. 334, 27 L. Ed. 322, 1 Sup. Ct. 185, instructions in accordance with above rule proper, the jury finding mistake in settlement; Baker v. Biddle, 1 Bald. 419, 423, Fed. Cas. 764, rendered account closed, there being no fraud and plaintiff acquiescing until statute of limitations barred his remedy at law; Pulliam v. Pulliam, 10 Fed. 56, Fed. Cas. 11,463a, executor's account no bar to devisee's recovery for losses caused by mismanagement; Talcott v. Chew, 27 Fed. 275, an account not objected to within reasonable time, an account stated, and binding upon defendant in absence of impeaching evidence; The Serapis, 37 Fed. 439, clause in ship's charter that all claims on charterer shall cease after settlement, does not prevent correction of errors in settlement; Baxter v. Card, 59 Fed. 167, acceptance of a note by master as balance due under a charter-party did not preclude correction of account; Roberts v. Totten, 13 Ark. 616, settlement of partnership accounts conclusive upon defendant until impeached for fraud or mistake; Goodwin v. Insurance Co., 24 Conn. 603, where directors voted to allow claim through ignorance that it had been settled, concealment of this fact was fraud and defeated plaintiff's claim; Kinney v. People, 3 Scam. 360, account settled by board of public works may be opened by showing fraud or mistake; Bond v. Markstrum, 102 Mich. 16, 60 N. W. 283, record in former suit between the same parties is not conclusive that any fact involved in the second suit was litigated and set at rest; Wharton v. Anderson, 28 Minn. 305, 9 N. W. 862, an account rendered through mistake, greatly reducing amount really due, there being no consideration for such reduction, not admissible in evidence; McKinster v. Hitchcock, 19 Neb. 104, 26 N. W. 706, allegations by defendant that plaintiffs fraudulently failed to credit him with deposits sufficient to vitiate stated account, if proven; Liddel v. McVickar, 11 N. J. L. 46, 19 Am. Dec. 371, revising an administrator's account settled by Orphans' Court, against objections of the heirs; Swayze v. Swayze, 37 N. J. Eq. 187, where claimant attacked settlement on the ground of his mental incapacity, the burden of proof was upon him to show that fact; Weisser v. Denison, 10 N. Y. 76, 61 Am. Dec. 733, incorrect balance in pass-book, caused by entry of forged checks, made known upon detection, may be shown and recovery had; Neyland v. Neyland, 19 Tex. 427, sustaining demurrer, petition not being in form so defendant might intelligently impeach the account; Crampton v. Seymour, 67 Vt. 401, 31 Atl. 891, account rendered does not bar recovery for items not appearing therein; Baxter v. Waite, 2 Wash. Ter. 238, 6 Pac. 431, failure to object to an ac-

count rendered within a reasonable time raises presumption of its correctness and shifts burden of proof; Varner v. Core, 20 W. Va. 478, permitting plaintiff to prove his account where a settlement had been obtained unfairly; Burrill v. Crossman, 91 Fed. 545, holding settled account does not preclude giving evidence of other demands between parties; Colorado Fuel etc. Co. v. Chappell (Colo. App.), 55 Pac. 609, holding bad a demurrer to a replication averring fraud in account stated relied upon in the answer; Bank v. Bank, 56 Fed. 970, 16 U. S. App. 1, arguendo.

Distinguished in Sharp v. Behr, 136 Fed. 798, where plaintiff was by contract entitled to one dollar per ton royalty and defendant asked for reduction of royalty, but plaintiff did not reply thereto nor to account crediting him with reduced royalties, but later refused to accept check for reduced royalties, he is not precluded from claiming royalties at contract rate; People's Nat. Bank v. Geisthardt, 55 Neb. 236 (see 75 N. W. 583), holding rendition of bill for services not accepted does not prevent a recovery for a larger amount on a quantum meruit; Hager v. Thomson, 1 Black, 93, 17 L. Ed. 44, where stock was sold according to agreement between vendor and vendee, there being no fraud, the adjustment was conclusive; Bank v. Morgan, 117 U. S. 107, 29 L. Ed. 816, 6 Sup. Ct. 660, one failing to report mistake in balance shown by pass-book, cannot afterward dispute the correctness thereof if bank has been misled to its prejudice; Ex parte Randolph, 2 Brock. 475, Fed. Cas. 11,558, auditor of the treasury having settled the account of United States official has no jurisdiction to resettle same.

Accounts stated. Note, 136 Am. St. Rep. 49.

Where case is certified to Supreme Court upon division of opinion, if points certified are too imperfectly stated to enable court to pronounce any opinion no action will be taken.

Approved in Ward v. Chamberlain, 2 Black, 434, 17 L. Ed. 323, refusing to consider matters not certified to; Columbus Watch Co. v. Robbins, 148 U. S. 269, 37 L. Ed. 446, 13 Sup. Ct. 595, certificate being essentially defective.

Definiteness of question to be certified. Note, 31 L. R. A. 394.

11 Wheat. 258–279, 6 L. Ed. 468, ARMSTRONG v. TOLER.

Where contract grows immediately out of, and is connected with illegal or immoral act, court will not enforce it.

Approved in Cleveland etc. Ry. Co. v. Hirsch, 204 Fed. 854, 123 C. C. A. 145, contract by which railroad leased property to one at greatly reduced rental in consideration of his freight business void as discriminatory under both interstate and state laws; Mills Novelty Co. v. Dupouy, 203 Fed. 259, 45 L. R. A. (N. S.) 788, 121 C. C. A. 452, agent fined for selling gambling devices in Venezuela for principal could not recover fines from principal in civil action in United States; Miller v. Ahrens, 163 Fed. 876, devise of real estate to church which church was incapable of holding under the

law could not be validated by ratification; Baird v. Howison, 154 Ala. 368, 45 South. 671, where property transferred in fraud of creditors, both parties participating therein, grantor cannot sue in equity to enforce trust arising from transfer; Pride v. Commercial Union Ins. Co., 9 Ala. App. 349, 63 South. 807, broker not having obtained license cannot recover commissions due from foreign insurer; Carey v. Myers, 92 Kan. 507, L. R. A. 1916B, 1056, 141 Pac. 607, denying right to recover from broker profits made on illegal margin gambling transaction; Hallam v. Hoffman, 5 Kan. App. 306, 48 Pac. 603, denying right of recovery to one of money paid to another in connection with agreement to prevent competition in bidding at sheriff's sale; Martin v. Seabaugh, 128 La. 446, 54 South. 937, denying right of partner to have accounting of partnership assets, in gambling business; Britt v. Davis Bros., 118 La. 598, 118 Am. St. Rep. 390, 43 South. 248, denying right of recovery by one employed by gambling establishment of profits therein accepted in lieu of salary; Scripps v. Sweeney, 160 Mich. 161, 125 N. W. 78, holding void contract entered into by four out of nine directors of corporation for own private interests of contracting parties; Leuthold v. Stickney, 116 Minn. 303, Ann. Cas. 1913B, 405, 39 L. R. A. (N. S.) 233, 133 N. W. 857, lessor, who was owner of building cannot recover rent on lease where he failed to maintain fire-escapes in building; Osborne v. Fridrich, 134 Mo. App. 455, 114 S. W. 1047, notes given in settlement of others carrying usurious interest amounting to the original principal were invalid; Culp v. Love, 127 N. C. 461, 37 S. E. 477, holding court will not award damages for breach of contract whereby defendant agrees not to compete with plaintiff in selling flour in certain territory, and the latter agrees not to sell meat and lard in same territory; Standard v. Sampson, 23 Okl. 34, 99 Pac. 803, denying recovery on note part of consideration for which was agreement not to prosecute a crime; Conrad Seipp Brewing Co. v. Green, 23 S. D. 623, 122 N. W. 663, denying right to recover purchase price for beer sold without license; Johnson v. Berry, 20 S. D. 134, 1 L. R. A. (N. S.) 1159, 104 N. W. 1115, denying right to recover compensation for threshing with steam thresher where bond required by statute to protect from fire not executed; Ferguson v. Lunt, 13 S. D. 125, 82 N. W. 510, holding under Comp. Laws, § 6602, relating to horse-racing, that a surety on an undertaking to indemnify a stakeholder against liability for turning over the stakes to one of the parties cannot recover against the principal; Grover v. Zook, 44 Wash. 504, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192, 7 L. R. A. (N. S.) 582, 87 Pac. 643, denying liability for breach of promise for marriage, the woman having consumption under statute regulating public health; Kennedy v. Lonabaugh, 19 Wyo. 361, 370, 372, Ann. Cas. 1913E, 133, 117 Pac. 1082, 1085, 1086, denying right to recover in accounting between partners in matters growing out of illegal contract to purchase coal lands where illegal contract depended upon for proof; dissenting opinion in Cunningham v. Pettigrew, 169 Fed. 350, 94 C. C. A. 457, majority holding that one subsequently advancing money in furtherance of a scheme to defraud complainant out

of mining property was jointly liable with those concocting scheme; dissenting opinion in Harcrow v. Gardner, 69 Ark. 18, 19, 64 S. W. 883, 58 S. W. 553, majority holding that note would not be held invalid on showing that payee while on his deathbed sent for his brother and told him that woman with whom he was living insisted that he provide for herself and illegitimate children, and that note was given to quiet her; dissenting opinion in Conithan v. Royal Ins. Co., 91 Miss. 396, **124 Am. St. Rep. 701, 15 Ann. Cas. 539, 18 L. R. A. (N. S.)** 218, 45 South. 363, majority holding insurance policy covering furniture in bawdy-house valid; dissenting opinion in Pfeifer & Co. v. Israel, 161 N. C. 428, 77 S. E. 421, 429, majority holding notes given in State by agent on nonresident seller for intoxicating liquors sold in State, illegal; Coppell v. Hall, 7 Wall. 559, **19 L. Ed. 248**, holding contract void as against public policy is not made effective by defendant's further plea in "reconvention"; Higgins v. McCrea, 116 U. S. 685, **29 L. Ed. 769**, 6 Sup. Ct. 564, no recovery might be had upon a counterclaim based upon gambling contract made illegal by statute; In re Green, 7 Biss. 340, Fed. Cas. 5751, a broker cannot enforce contract to pay margins arising out of a gambling contract; Lanahan v. Pattison, 1 Flipp. 411, Fed. Cas. 8036, a due-bill for the payment of money received by agent for the sale of lottery tickets cannot be enforced; Carrington v. Caller, 2 Stew. 183, 187, 193, where company organized for the purpose of illegally purchasing public lands, in conformity with their illegal agreement sold the same, notes taken in payment are illegal; McElyea v. Hayter, 2 Port. 154, **27 Am. Dec. 648**, title obtained to land by an evasion of an act of Congress prohibiting transfers of rights of pre-emption, is illegal; Wyatt v. Ayres, 2 Port. 161, where one fraudulently representing himself as the agent of others instituted legal proceedings against defendants, notes secured in compromise of proceedings are invalid; Kennedy v. McCartney, 4 Port. 157, conveyance repugnant to policy of treaty with Cherokee Indians, void; McGhee v. Lindsay, 6 Ala. 22, where commission elected for the purpose of making certain public improvements, permitted one of its members to participate in contract, same was void; McCall v. Capehart, 20 Ala. 525, refusing to sustain contract to sell the possession of land obtained by trespass; Noble v. Cullom & Co., 44 Ala. 562, judgments rendered by rebel courts are invalid in absence of legislative enactments; Lawson v. Miller, 44 Ala. 626, **4 Am. Rep. 150**, note given in renewal of note for loan of Confederate treasury notes is void; Thedford v. McClintock, 47 Ala. 650, where consideration for promissory note was a horse purchased for service of Confederate States, if vendor intended it to be used for that purpose note was void; Alabama Nat. Bank v. Halsey, 109 Ala. 214, 19 South. 528, renewal of note given for fictitious issue of stock does not make it valid; Tatum v. Kelley, 25 Ark. 211, **94 Am. Dec. 718**, holding note void where the consideration was guns to be used against the government; Carllee v. Carlton, 27 Ark. 381, holding contract void where consideration was partially based upon Confederate money; Hoyt v. Macon, 2 Colo. 508, where consideration for a promissory note was an

agreement to keep witness from testifying in an investigation of fraud; Uhlig v. Garrison, 2 Dak. Ter. 98, 2 N. W. 257, lease of reservation land in contravention of treaty of United States is void; Howell v. Fountain, 3 Ga. 183, 46 Am. Dec. 421, contract to convey land obtained by violating provisions of a treaty, grantee being party to fraud, is void; Adams v. Barrett, 5 Ga. 424, party to an executed contract, the consideration upon which it was founded being withdrawal of a felony charge, is not entitled to relief; Martin v. Bartow Iron Works, 35 Ga. 329, agreement to remove negroes from territory within lines of the Federal army in order to avoid their liberation is illegal; Nash v. Monheimer, 20 Ill. 217, trial of speed upon a wager, contrary to an ordinance, precludes court from enforcing payment of wager; Penn v. Bornman, 102 Ill. 531, loan by bank to director in violation of its charter, illegal; Ensley v. Patterson, 19 Ind. 97, by statute note given for money loaned to be wagered upon an election is void, if "lent at the time of such wager"; Root v. Stevenson, 24 Ind. 120, funds retained by a partner to fraudulent contract may not be recovered by other party; Marienthal v. Shafer, 6 Iowa, 226, where one selling liquors in violation of law was not permitted to replevy them from an attaching creditor or from the sheriff; Davis v. Bronson, 6 Iowa, 425, action for recovery of value of liquors, sold contrary to law, not maintainable; Boardman v. Thompson, 25 Iowa, 503, refusing to enforce champertous contract; Dolson v. Hope, 7 Kan. 165, where intoxicating liquors were sold without license, no recovery could be had; Greer v. Payne, 4 Kan. App. 163, 46 Pac. 194, where court of equity refused to lend its aid to enable person to retain his membership in an illegal association; Hallam v. Hoffman, 5 Kan. App. 306, 48 Pac. 603, where several persons agreed to unlawfully prevent competition at sheriff's sale, one of them could not, upon rescission of illegal sale, maintain an action for recovery of money paid in; Cheekmore v. Chitwood, 7 Bush, 319, holding contract for sale of brandy, made in violation of revenue laws, void; Davis v. Holbrook, 1 La. Ann. 178, betting upon election being a statutory crime no action will lie to recover money from stakeholder; Gravier's Curator v. Carraby, 17 La. 128, 36 Am. Dec. 610, refusing to enforce contract entered into in fraud of creditors; Bowman v. Gonegal, 19 La. Ann. 332, 92 Am. Dec. 540, holding void contract to furnish Confederate government salt in exchange for other merchandise; Mazureau v. Morgan, 25 La. Ann. 282, holding contract of champerty declared illegal by statute, void; Meyer v. Farmer, 36 La. Ann. 790, purchaser buying property at a forced sale through fraudulent agreement is not entitled to recover amount paid in consideration of agreement, the sale being set aside; Jones v. Knowles, 30 Me. 404, where statute requires clapboards to be officially surveyed, in order to discharge note payable in clapboards it must appear in the pleadings that there was no violation of law; Snell v. Dwight, 120 Mass. 16, a bill in equity cannot be sustained by one of parties to a contract for illegal trading against the other party for accounting of profits; Dunham v. Presby, 120 Mass. 289, to same point; Bank of Michigan v. Niles, 1 Doug. (Mich.) 412, 41 Am.

Dec. 583, where bank made a contract for the purchase of land, contrary to provisions of its charter, same was void; Snyder v. Willey, 33 Mich. 495, promissory note given in consideration of suppression of criminal proceedings void in hands of party to the illegality; Ingersol v. Randall, 14 Minn. 404, statute requiring certain dangerous parts of a threshing-machine to be inclosed, no recovery can be had upon a contract, the consideration being a machine not so protected; Mohr v. Miesen, 47 Minn. 234, 49 N. W. 864, broker making advances to aid principal in illegally operating in "futures" cannot recover; Wooten v. Miller, 7 Smedes & M. 385, 386, where one employed agent to take slave into another State and sell him in violation of statute, he could not recover the proceeds of sale from agent; Kountz v. Price, 40 Miss. 347, where agreement was made upon Sunday, contrary to statute, note subsequently given in consideration thereof is void; Pickens v. Eskridge, 42 Miss. 120, note given in consideration that payee should serve as substitute for maker in Confederate army is void; Orr v. Lacey, 2 Doug. (Mich.) 254, where a bank in discounting bill reserved greater interest than allowed by its charter, bill, or one founded upon it, is illegal; Buckingham v. Fitch, 18 Mo. App. 99, note in consideration of illegal contract to operate in "futures" is void; Gould v. Kendall, 15 Neb. 557, 19 N. W. 486, holding void contract for carrying on trade with Indians contrary to statute; Storz v. Finklestein, 46 Neb. 587, 30 L. R. A. 648, 65 N. W. 198, refusing to enforce payment for beer sold under agreement that it should be retained contrary to statute; Plumer v. Smith, 5 N. H. 555, 22 Am. Dec. 479, note given for money knowingly lent to be applied to suppress prosecution for crime is void; Bliss v. Brainard, 41 N. H. 268, no recovery may be had for liquors sold contrary to law, or for expenses incurred in facilitating sale; Nellis v. Clark, 20 Wend. 27, plaintiff, chargeable with notice, not entitled to recover on a promissory note given in part consideration of fraudulent conveyance; Gray v. Hook, 4 N. Y. 455, 459, contract between two candidates for an appointive office, that one shall withdraw, the fees to be divided between them, is illegal; King v. Winants, 71 N. C. 472, 17 Am. Rep. 13, refusing to enforce an accounting between ostensible partners for profits made through an illegal agreement; Doty v. Knox Bank, 16 Ohio St. 139, bill of exchange given for two distinct considerations, one of which is void, is valid to extent of good consideration and void as to rest; Crawford etc. v. Wick, 18 Ohio St. 205, 98 Am. Dec. 112, relinquishment of a claim for damages arising from breach of an illegal contract is no consideration for new contract; Widoe v. Webb, 20 Ohio St. 436, 5 Am. Rep. 666, where part consideration for promissory note was liquor sold for illegal use, no recovery could be had; M. R. Coal Co. v. Barkley Coal Co., 68 Pa. St 189, 8 Am. Rep. 168, no recovery permitted for breach of illegal contract made in restraint of trade; Johnson v. Hulings, 103 Penn. St. 504, 49 Am. Rep. 134, real estate broker, transacting business without license, cannot maintain an action on special contract for commission; Whelden v. Chappel, 8 R. I. 233, trover will not lie for recovery of horse let by livery-stable keeper on Sunday in violation of a statute; Hudson

v. Brown, 11 Rich. 648, holding an agreement compounding a felony void, and setting aside verdict of jury; Gist v. Telegraph Co., 45 S. C. 372, 55 Am. St. Rep. 773, 23 S. E. 153, an action cannot be maintained against a telegraph company for failure to deliver message relating to illegal transactions in "futures"; Potts v. Gray, 3 Cold. 471, 91 Am. Dec. 295, a promissory note given for consideration of Confederate notes is illegal; McGavock v. Puryear, 6 Cold. 43, if bank in discounting a note did so for purpose of equipping men to serve against the United States it cannot recover, but mere knowledge of holder's intention is not a bar; Hunt v. Robinson, 1 Tex. 761, specific performance of contract to sell land contrary to legislative act will not be enforced; Shelton v. Marshall, 16 Tex. 358, 359, a note given in payment for slaves taken into State and sold contrary to law is illegal, and new note based upon it is also illegal; Selligson, v. Lewis, 65 Tex. 221, 57 Am. Rep. 597, broker cannot recover for money and services advanced for unlawful speculations in "futures"; Woodruff v. Hinman, 11 Vt. 593, 34 Am. Dec. 712, a note given to prevent prosecution for a crime is void; Bancroft v. Dumas, 21 Vt. 465, no recovery can be had for liquors sold in violation of a statute; Buck v. Albee, 26 Vt. 191, 62 Am. Dec. 566, where several persons placed liquor in hands of another to sell in violation of law, no recovery could be had for money received from sales; Turnbull v. Farnsworth, 1 Wash. Ter. 446, the transfer of a contract to furnish supplies to the United States being forbidden by law is void, and no action can be maintained thereon; Dodson v. Swan, 2 W. Va. 517, 98 Am. Dec. 790, court of equity will not enforce contract for the sale of land, the purpose being to enable vendor to escape from State to avoid prosecution; Slifer v. Howell, 9 W. Va. 398, 400, no recovery can be had for money paid as consideration for Confederate bond; Lemon v. Grosskopf, 22 Wis. 452, 99 Am. Dec. 60, note given by agent for the proceeds of lottery tickets sold is void; dissenting opinion in McCausland v. Drake, 3 Stew. 355, contending that assignee of bond might not enforce the same where he secured the assignment by compounding felony; Sandige v. Sanderson, 21 La. Ann. 766, arguing that contract for the sale of lands and slaves is void in its entirety; Tufts v. Tufts, 3 Wood. & M. 505, Fed. Cas. 14,233, refusing to enforce specific performance of a contract where consideration was illegal as against public policy; Market Bank v. Smith, 16 Fed. Cas. 758, indorsers on usurious note may plead the statute in defense; Powhattan Steamboat Co. v. Appomattox R. R. Co., 19 Fed. Cas. 1239; Lanham v. Patterson, 14 Fed. Cas. 1116, a due-bill given for money claimed to be due from sale of lottery tickets is void; Hilton v. Guyot, 159 U. S. 205, 40 L. Ed. 123, 16 Sup. Ct. 159, discussing the status of foreign judgments; United States v. Ingersoll, Crabbe, 170, Fed. Cas. 15,440; Beverly v. Burke, 9 Ga. 447, 54 Am. Dec. 356, but not in point; in reporter's note, Riggs v. Adams, 12 Ind. 202.

Distinguished in Piatt v. Williams, 2 McLean, 277, Fed. Cas. 11,115, holding purchase of public land by an association formed for that purpose is lawful; Robinson v. McCracken, 52 Fed. 729, enforcing voidable contract made on behalf of a corporation, by its officers, it having been exe-

cuted by other party without objection by stockholders; Tucker v. West, 29 Ark. 403, note invalid by statute, because made on Sunday, becomes valid if expressly ratified on subsequent week day; Martin v. Hodge, 47 Ark. 384, 58 Am. Rep. 765, 1 S. W. 696, it is no defense to an action of replevin to allege that plaintiff intends an unlawful disposition of property when recovered; Hernandez v. Babcock, 13 La. 591, where shipper furnished a false invoice to the assignee with the privity of the buyer, the true one being sent also, contract of sale was valid; Servis v. Cooper, 33 N. J. L. 69, it is no defense to suit upon contract to substitute in the army to set up that the substitute deceived government officers as to age, etc.; Hawthorne v. City of Hoboken, 35 N. J. L. 255, fraud against United States on the part of bounty brokers, does not affect contract between person enlisting and city agreeing to pay bounty; James v. Fulcrod, 5 Tex. 522, 55 Am. Dec. 750, agreement to unite in bid at public auction for the benefit of both parties is not illegal in the absence of fraudulent intent.

Recovery of proceeds of illegal business. Note, 30 Am. Rep. 108.

Accounting between members of illegal or void partnership or one engaged in illegal business. Note, 23 L. R. A. (N. S.) 484.

Enforcement of contract outside of jurisdiction where made. Note, 55 Am. St. Rep. 776.

New contract upon new consideration, although in relation to property respecting which there had been unlawful transactions, is not unlawful.

Approved in McMullen v. Hoffman, 174 U. S. 656, 664, 43 L. Ed. 1124, 1127, 19 Sup. Ct. 845, holding agreement between two bidders for public work to combine their interests and to put in bids known to each other and highest being fictitious and made for purpose of appearing competitive is void; Mechanics' Ins. Co. v. Hoover Distilling Co., 182 Fed. 594, 31 L. R. A. (N. S.) 876, 105 C. C. A. 128, contract of insurance of whisky stored in Iowa not void because it tends to assist insured to violate the prohibition laws; Jenson v. Toltec Ranch Co., 174 Fed. 91, 92, 98 C. C. A. 60, fact that lender knew that money loaned was to repay money expended for corporation for ultra vires purpose no defense; Washington Irr. Co. v. Krutz, 119 Fed. 287, holding where officers of irrigation company offered to convey one hundred and sixty acres of land to register of land office in consideration of services rendered is void when register declined while in office but agreed to do so after his term expired; Hanover Nat. Bank v. First Nat. Bank, 109 Fed. 427, holding where one has received the benefit of performance by plaintiff of contract which was not malum in se or malum prohibitum, he cannot defend an action for payment of indebtedness on ground that plaintiff intended something unlawful; Hubbard v. Mulligan, 13 Colo. App. 129, 57 Pac. 743, holding a contract to enable the other party to perpetrate fraud on third persons in connection with government lands cannot be questioned by party executing it; Mechanics Realty etc. Co. v. Leva, 16 Ga. App. 8, 84 S. E. 222, allegations in answer to action on promissory note setting up that consideration of note obtained

to conduct house of prostitution no defense where lender had no knowledge of such fact; Barnhart v. Goldstein, 27 Ind. App. 103, 59 N. E. 1068, holding under Burns' Rev. Stats. 1894, § 2181 (Ind.), prohibiting the keeping of any gambling apparatus, the answer on suit on notes, that the consideration was a slot machine, was not demurrable; Erb v. Insurance Co., 98 Iowa, 610, 67 N. W. 584, holding when drugs and liquors have been insured, the unlawful use of a part of the property that is susceptible of legitimate use does not render insurance void; Quigley v. Wolf, 177 Mich. 479, 143 N. W. 886, defendant in foreclosure proceedings on second mortgage cannot set up as defense that consideration for mortgage was trust money improperly used to satisfy first mortgage; Disbrow v. Creamery Package Mfg. Co., 110 Minn. 245, 125 N. W. 119, reversing decision sustaining demurrers because contract illegal on ground that contract was not connected with prior illegal transactions and therefore good; Kellogg v. German-American Ins. Co., 133 Mo. App. 400, 113 S. W. 666, insurance of drug stock containing a considerable quantity of intoxicating liquors which were used partly in illegal sales valid; Stewart v. Hutchinson, 120 Mo. App. 39, 96 S. W. 256, when bank in good faith loans money to parties who use it in gambling transaction and defendant gave note to plaintiff who assumed bank's indebtedness, recovery can be had on note; Owens v. Davenport, 39 Mont. 557, **28 L. R. A. (N. S.) 996**, 104 Pac. 683, holding laborer could recover on due bill given by third party in consideration of assignment of claim for wages for cutting timber on government land though timber cut without permit; Gallagher v. Cornelius, 23 Mont. 31, 57 Pac. 449, holding illegal contract made by alderman with city to construct sewer is no defense to indemnify third person for payment of debts incurred in its construction; Davis v. Smith, 68 N. H. 253, **73 Am. St. Rep. 585**, 44 Atl. 384, holding where sole consideration for note is maker's fear of criminal prosecution of her husband induced by representations of the payee made to obtain it, the note is void; Rosenbaum v. United States Credit System Co., 64 N. J. L. 37, 44 Atl. 967, holding where plaintiff did not know that credit system insurance in Massachusetts was unlawful, but defendant did know, plaintiff may recover damages from defendant for inducing him to enter into the contract; Padilla v. Padilla, 11 N. M. 553, 70 Pac. 566, where brother recovered judgment in own name in court of claims, for Indian depredation on property owned jointly with sister, his contract before judgment to give her half of recovery is valid; Owens v. Wright, 161 N. C. 130, **Ann. Cas. 1914D**, 1021, 76 S. E. 736, agreement made subsequent to and after illegal agreement to suppress bidding at public sale was abandoned though concerning same property good; Electrova Co. v. Spring Garden Ins. Co., 156 N. C. 236, **35 L. R. A. (N. S.) 1216**, 72 S. E. 307, upholding recovery on insurance policy on piano situate in house of ill fame destroyed by fire; Citizens Nat. Bank v. Mitchell, 24 Okl. 509, 517, 523, 103 Pac. 729, 733, 735, upholding right of bank to recover money loaned in good faith to partners to carry out contract though there was secret understanding between partners to engage in illegal bidding; Monahan v. Monahan, 77 Vt. 143, **70 L. R. A.**

935, 59 Atl. 172, where complaint seeks to impress securities with trust and alleges they were secretly taken in defendant's name without his knowledge, and issues raised only as to title, fact that securities put in defendant's name to avoid taxes not ground for relief; Reed v. Johnson, 27 Wash. 54, 67 Pac. 386, holding contract whereby plaintiff agreed to convey one-half interest in certain lands to defendant in consideration of his efforts to procure location of depot on the land was against public policy and void where defendant had agreement with railroad officers that they were to receive one-fourth of the proceeds of whatever lots were conveyed; Ocean Ins. Co. v. Polleys, 13 Pet. 164, 10 L. Ed. 108, holding action may be maintained to recover upon insurance policy on a vessel sailing under illegal register; Kimbro v. Bullitt, 22 How. 269, 16 L. Ed. 317, right of acceptors of bill of exchange to recover from drawers not affected because one of the drawers applied proceeds to an illegal purpose; Armstrong v. American Exchange Bank, 133 U. S. 467, 469, 33 L. Ed. 759, 760, 10 Sup. Ct. 460, 461, a bank paying checks at order of another bank could recover, although plaintiff knew the money was used to pay gambling losses; Northwestern Ins. Co. v. Elliott, 7 Sawy. 22, 5 Fed. 229, assignee of void insurance policy entitled to recover money fraudulently obtained from him; Western Union Tel. Co. v. U. P. R. R. Co., 1 McCrary, 563, 3 Fed. 428, holding an illegal contract, executed by the parties thereto, does not affect the settlement of property interests acquired under it; Lehman v. Strassberger, 2 Woods, 563, Fed. Cas. 8216, note given to a broker for money advanced to pay losses upon cotton bought for future delivery is valid, it not being shown that broker intended that there should be no actual delivery; Clark v. Protection Ins. Co., 1 Story, 131, Fed. Cas. 2832, ship taking on board cable smuggled by another vessel does not thereby forfeit recovery upon insurance policy; Buchanan v. Drovers' National Bank, 55 Fed. 226, 6 U. S. App. 566, note given to raise money to pay off prior note given to obtain means to prosecute an illegal business is valid; Morris v. Norton, 75 Fed. 926, 43 U. S. App. 739, assignment of right to collect back money advanced for gambling purposes is a sufficient consideration to support note; Sampson v. Camperdown Mills, 82 Fed. 838, holding valid a mortgage given to secure advances made to pay losses on an invalid contract; Snodgrass v. Cabiness, 15 Ala. 165, mere possession of slaves does not give one right to retain them against purchaser, although the sale may have been fraudulent; Scheible v. Bacho, 41 Ala. 437, contract based on a loan of Confederate treasury notes may be enforced; Ingersoll v. Campbell, 46 Ala. 287, where money earned upon an illegal contract to violate blockade was placed in the custody of another, action may be maintained for its recovery; Lea v. Cassin, 61 Ala. 316, where contract for sale of property to be used for immoral purposes was rescinded, an agreement to refund purchase money paid is valid; Barker v. Parker, 23 Ark. 395, where principal in an illegal bond delivered money due upon it to his surety, who agreed to pay it to payee, said agreement was valid; Phalen v. Clark, 19 Conn. 432, 50 Am. Dec. 255, the proprietor of a lottery can recover from his agent money paid upon prize ticket fraudulently sold

after drawing; Miller v. Gould, 38 Ga. 472, contract between individuals, the consideration being Confederate treasury notes, is valid; Warren v. Hewitt, 45 Ga. 508, an agent may recover money advanced by authority of his principal in making contract, which, though contrary to public policy, was entirely executed; Guilfoil v. Arthur, 158 Ill. 608, 41 N. E. 1011, fact that lands deeded in trust had been drawn in a lottery by grantor is no defense under bill to enforce the trust; Wright v. Hughes, 13 Ind. 113, a promissory note given upon consideration of certain void currency, redeemed at maker's request by payee, is valid; Leavitt v. N. A. Trust Co., Lalor's Sup. to Hill & Den. 228, where defendant took up securities of bank at their request, in discharge of his own indebtedness, transaction not affected by alleged illegality of securities; The Charles E. Wiswall, 86 Fed. 674, 57 U. S. App. 184, 185, 42 L. R. A. 87, a combination to raise the price of services is not bar to recovery of their fair and reasonable value; Phenix Ins. Co. v. Clay, 101 Ga. 332, 65 Am. St. Rep. 308, 28 S. E. 854, fact that house is let to lewd person for purposes of prostitution does not of itself avoid policy of insurance issued thereon in favor of the owner; Patty v. City Bank, 15 Tex. Civ. App. 485, 41 S. W. 177, fact that partnership agreement was illegal as against public policy does not deprive a partner of his right to have assets first applied to partnership debts; Erb v. Insurance Co., 98 Iowa, 611, 40 L. R. A. 849, 67 N. W. 584, permitting recovery upon insurance covering articles owned and used in violation of statutes; Hedges v. Wallace, 2 Bush, 444, 92 Am. Dec. 498, vendee liable for price of hogs purchased for the Confederate government, vendor knowing of, but not participating in, the illegal act; Martin v. Richardson, 94 Ky. 188, 42 Am. St. Rep. 355, 19 L. R. A. 693, 21 S. W. 1040, winning lottery ticket if fraudulently secured and cashed after drawing, the rightful holder may recover; Baker v. Page, 11 Me. 384, 26 Am. Dec. 542, recovery might be had for logs cut by vendor without a license and sold with notice to vendee of that fact; Polleys v. Ocean Ins. Co., 14 Me. 148, 150, fact that register of a vessel is illegal does not render void an insurance policy placed upon her; Boardman v. Merrimack Ins. Co., 8 Cush. 586, insurance policy on factory is not rendered void by drawing of lottery in building, assured participating; Smith v. Barstow, 2 Doug. (Mich.) 161, 162, 163, promissory note, given for return of bank notes deposited as security, held to be valid even though notes may have been illegal; Niagara Ins. Co. v. De Graff, 12 Mich. 136, liquors kept illegally for sale may be lawfully insured; Anheuser-Busch Brewing Assn. v. Mason, 44 Minn. 321, 20 Am. St. Rep. 582, 9 L. R. A. 508, 46 N. W. 558, recovery allowable for liquor sold keeper of house of ill fame, it not being shown that vendor intended to aid any unlawful design; Holt v. Barton, 42 Miss. 714, 2 Am. Rep. 642, a contract founded upon subsequent sale of merchandise illegally donated for benefit of the Confederacy is valid; Walker v. Jeffries, 45 Miss. 167, 169, mere knowledge that money loaned was to be used in aid of Confederacy does not invalidate a note given in consideration thereof; Allgear v. Walsh, 31 Mo. App. 109, one receiving property as bailee cannot refuse to return it, because bailor deposited the property

Defense against recovery of money collected on ground that it was collected on unlawful contract or for illegal purpose. Note, 99 Am. Dec. 62.

Contract, when not immoral. Note, 8 Am. Rep. 141.

Sale of article which may be unlawfully used. Note, 32 Am. Rep. 125, 127.

Contracts to stifle criminal prosecution. Note, 37 Am. Rep. 204.

Validity of contracts in violation of statute. Note, 1 Ann. Cas. 334.

Validity of contracts in business transaction of which is misdemeanor. Note, 12 L. R. A. (N. S.) 592, 593.

Insurance on bawdy-house or its furniture. Note, 18 L. R. A. (N. S.) 214.

Validity of insurance on intoxicating liquors. Note, 31 L. R. A. (N. S.) 874.

Whether promise by third party to pay claim arising out of performance of contract is tainted by its illegality. Note, 28 L. R. A. (N. S.) 997.

A misdirection or omission, in the judge's charge, cannot be taken advantage of by a general exception.

Approved in Allen v. Blunt, 2 Wood. & M. 152, Fed. Cas. 217, where court omitted unimportant instructions, there being no request that they be given; Chicago & G. W. Ry. Co. v. Healy, 86 Fed. 251, error cannot be urged on the ground of the insufficiency of instructions in the absence of request for additional instructions; Armour v. Pecker, 123 Mass. 147, refusing to consider general objection; State v. Hascall, 6 N. H. 359, omission to instruct upon certain point is not error, in absence of request for such instruction; Burnside v. Railroad Co., 47 N. H. 559, 93 Am. Dec. 478, party excepting cannot change his ground of objection on appeal; Robinson v. Varnell, 16 Tex. 387, it cannot be assigned as error that the court omitted instructions which might, with propriety, have been given; Johnson v. Granger, 51 Tex. 46, refusing to reverse judgment because instructions were not sufficiently comprehensive, additional instructions not being requested.

Distinguished in Beazley v. Denson, 40 Tex. 434, where it appeared that the verdict of the jury turned upon an erroneous charge, not objected to at time; Chicago Ry. Co. v. Healy, 86 Fed. 251, 57 U. S. App. 523, where instruction was correct, as far as it went, no request being made for additional instructions, the judgment would not be reversed.

A bill of exceptions should contain the facts found and not the evidence introduced at the trial.

Approved in The Barge Resort v. Brooke, 10 Mo. 533, holding bill of exceptions should not contain all the evidence and criticising contrary practice; Poessenecker v. Weatherby, 16 Neb. 95, 19 N. W. 600, criticising

failure to observe this practice; Schauber v. Jackson, 2 Wend. 52, to the same effect.

11 Wheat. 280–303, 6 L. Ed. 474, CHIRAC v. REINICKER.

An attorney is not competent to testify concerning confidential communications made by his client.

Approved in Kennedy v. Custer, 174 Fed. 976, 98 C. C. A. 584, denying right of attorney to testify concerning antenuptial contract which he had drawn even though procured by fraud; Oliver v. Cameron, McAr. & M. 243, attorney is competent witness to testify that his dealings with client were not professional; Lorimer v. Lorimer, 124 Mich. 637, 83 N. W. 611, holding under Mich. Comp. Laws, § 10,212, providing when suit is defended by heirs, the opposite party shall not be permitted to testify to matters which would have been equally within knowledge of decedent, plaintiff in ejectment who claims as wife of decedent cannot testify as to facts within knowledge of decedent; Ex parte Gfeller, 178 Mo. 269, 77 S. W. 558, in proceedings for discovery of decedent's assets, attorney for decedent must answer questions as to when he last saw certain securities belonging to decedent and whether after death he had money belonging to decedent and what he did with it; Koeber v. Somers, 108 Wis. 507, 84 N. W. 994, holding where attorney was authorized by plaintiff to settle claim against defendant the attorney could testify as to such transaction; Alexander v. United States, 138 U. S. 358, 34 L. Ed. 957, 11 Sup. Ct. 352, holding confession made to attorney privileged although fee was not paid; Liggett v. Glenn, 51 Fed. 395, 4 U. S. App. 438, written contract for fees between attorney and stockholders of corporation not admissible in hands of third person to prove that signer was stockholder; Mutual Life Ins. Co. v. Selby, 72 Fed. 983, 44 U. S. App. 282, statements of client regarding his physical condition, made to his attorney, not admissible in action growing out of insurance policy; State v. Barrows, 52 Conn. 326, admissions of woman to her attorney not competent as evidence against person charged with adultery with her; Martin v. Anderson, 21 Ga. 309, an attorney incompetent to give testimony concerning his client's title to land; Morris v. Cain, 39 La. Ann. 726, 1 South 808, holding incompetency of attorney is not removed by death of his client or termination of his attorneyship.

Distinguished in York v. United States, 224 Fed. 90, 138 C. C. A. 356, denying privilege when statement communicated in presence of third party; Edison Electric Co. v. United States Electric Co., 44 Fed. 297, holding communications between an applicant for a patent and the patent office are not privileged, although resulting from consultations with counsel; Satterlee v. Bliss, 36 Cal. 507, 508, holding the rule should be strictly construed and the admission of testimony of an attorney showing by whom he was employed, is not error; Shaughnessy v. Fogg, 15 La. Ann. 331, questions may be addressed to an attorney to ascertain who was his client, the duration of that relationship, and what money was received and paid out; Bee-

son v. Beeson, 9 Pa. St. 301, where matter communicated was not in its nature private; People v. Mahon, 1 Utah, 208, where the defendant consulted with an attorney as to the effect of a proposed forgery.

Attorneys as witnesses. Note, **66 Am. St. Rep. 213, 222.**

Recovery in ejectment is conclusive in an action for mesne profits, against tenant in possession, but not conclusive as against third persons.

Approved in King v. Davis, 137 Fed. 220, where ejectment brought by third person against tenant, and landlord has no knowledge of action in time to have made himself a party, he may have default judgment against tenant opened, and be allowed to defend; Belden v. Seymour, 8 Conn. 309, **21 Am. Dec. 663**, admitting record of ejectment in suit upon warranty of title, plaintiff, though real defendant, not being a party to the suit in ejectment; Wilson v. Brookshire, 126 Ind. 505, 25 N. E. 134, suit by tenant to enjoin sale of the leased premises on execution is no bar to a subsequent action of corporation owning the property, but not controlling prior suit; Magwire v. Labeaume, 7 Mo. App. 184, holding it competent for defendant in an action for mesne profits to show that he had parted with a portion of his interest before action to divert title was brought; Leland v. Tousey, 6 Hill, 334, 335, where one not party to action in ejectment offered to prove title in himself, the exclusion of such evidence was error; Reid v. Stanley, 6 Watts & S. 375, holding prior occupant of property not bound by judgment in ejectment to which he is not a party and therefore competent to testify in the action; Drexel v. Man, 2 Pa. St. 274, **44 Am. Dec. 197**, judgment in ejectment conclusive of plaintiff's title in action for mesne profits accruing subsequently to service of writ of ejectment; Samuel v. Dinkins, 12 Rich. 175, **75 Am. Dec. 730**, landlord is not concluded in an action for land, by recovery against tenant, landlord not being party, although his title was set up in defense; Read v. Allen, 56 Tex. 180, where a recovery against a tenant was held not binding upon landlord not a party to the action; Yount v. Howell, 14 Cal. 468, in distinguishing common law and statutory effect of a judgment in ejectment upon an action for mesne profits.

Explained in Chirac v. Reinicker, 2 Pet. 617, 622, **7 L. Ed. 539, 541**, on another appeal.

Distinguished in Smith v. Gayle, 58 Ala. 604, holding person entering by collusion with the defendants, subsequently to the commencement of the suit, is bound by the judgment.

Privileged communication between attorney and client. Note, **Ann. Cas. 1913A, 4, 5, 20, 21, 31.**

Necessity that communication to attorney, to be privileged, be in regard to subject matter of employment. Note, **4 Ann. Cas. 531.**

Time as of which judgment in ejectment speaks. Note, **13 Ann. Cas. 1092.**

While record in ejectment is not evidence to establish plaintiff's title against strangers, it is admissible to show possession of plaintiff.

Approved in Henry v. Davis, 149 Ala. 363, 13 Ann. Cas. 1090, 43 South. 123, denying plaintiff's right to recover in trespass, his only evidence of possession being judgment in ejectment, the trespass having occurred prior thereto; Leland v. Tousey, 6 Hill, 332, holding possession acquired by ejectment relates to time when title was acquired; Clark v. Perdue, 40 W. Va. 306, 21 S. E. 738, record showing recovery against tenant is competent to prove possession against landlord not party to prior suit.

Action for mesne profits may be maintained against him who was landlord in fact.

Approved in Rigney v. De Graw, 100 Fed. 214, holding where mortgagee enters into possession under void foreclosure, he is presumed to hold as mortgagee in possession and limitation does not run in his favor against suit by mortgagor to enforce redemption and for accounting until actual notice to mortgagor that he claims adversely; Tyler v. Magwire, 17 Wall. 292, **21 L. Ed. 586**, pointing out remedy of claimant restored to possession; Gaines v. New Orleans, 4 Wood, 234, 17 Fed. 29, holding warrantor assisting in defending title warranted, liable to plaintiff for damages; Limberg v. Higenbotham, 11 Colo. 162, 17 Pac. 484, action may be maintained for mesne profits against persons receiving rents, although not parties to original action; Parsons v. Moses, 16 Iowa, 442, under statute permitting an occupying claimant of land to recover for improvements made therein, occupancy of tenant is occupancy of landlord; Hughes v. Carson, 90 Mo. 402, 2 S. W. 442, such an action is still maintainable against landlord, notwithstanding the statutory provisions; Boyer v. Smith, 3 Watts, 452, one who put the defendant in an ejectment suit into possession is not competent to testify for him, being himself liable in subsequent action for mesne profits; Walker v. Read, 59 Tex. 192, holding joint tenant who assisted in defending the title of others, as well as that of his own share, is jointly liable for the wrongful holding of his codefendants; Middletown Bank v. Bates, 11 Conn. 523, action in ejectment sustainable against landlord in fact who received rents from tenant in possession.

Distinguished in Morris v. Beebe, 54 Ala. 307, holding in statutory real action as in common-law ejectment, the tenant in actual possession is the only proper party defendant; Adams v. Gilchrist, 63 Mo. App. 644, it not being shown that defendant was landlord in fact.

Mesne profits. Note, **1 Am. Dec. 116.**

Amendments to pleadings are matters in discretion of court and error will not lie to allowance or refusal thereof.

Approved in Hartley v. Lapidus & Holub Co., 216 Fed. 96, 132 C. C. A. 336, upholding refusal of District Court in refusing to permit filing of reply after trial had commenced as within his discretion; Pacific Mut. Life Ins. Co. v. Tompkins, 101 Fed. 541, amendment to declaration changing

allegation as to citizenship of plaintiff to conform to writ is within discretion of the court; Morris v. Wheat, 11 App. (D. C.) 214, refusing to disturb order striking out name of one of several plaintiffs in ejectment; State v. Snowden, 23 Utah, 326, 65 Pac. 481, holding right to confidential communication is privilege of client and not attorney, and must be made in course of professional employment; Stanley v. Stanley, 27 Wash. 572, 68 Pac. 188, holding in action for alienating her husband's affections, an attorney may testify that he was employed by defendants and prepared a complaint for divorce on information furnished by defendants; Slicer v. Bank, 16 How. 579, **14 L. Ed. 1066**, where a prothonotary under order of court entered a confession of judgment nunc pro tunc, the original docket having been lost; Chapman v. Barney, 129 U. S. 681, **32 L. Ed. 801**, 9 Sup. Ct. 427, the court permitting a new sole plaintiff to be substituted for sole original plaintiff; Stevens v. Nichols, 157 U. S. 371, **39 L. Ed. 737**, 15 Sup. Ct. 641, sustaining State court in denying application to amend a petition for removal of the cause to Federal court; Blalock v. Equitable Life Assur. Soc., 75 Fed. 47, 41 U. S. App. 761, where court refused to permit an amendment to the petition; Merriam v. Langdon, 10 Conn. 473, where the County Court permitted an amendment to information, after the expiration of the time for presenting new information had passed; Doane v. Cummins, 11 Conn. 158, extending practice and holding it within the discretion of court to admit testimony out of order; Evans v. Rogers, 1 Ga. 467, where lower court permitted verdict to be amended and made to conform to declaration; Newman v. Foster, 3 How. (Miss.) 393, **34 Am. Dec. 104**, where court allowed amendment, rights of the parties not being affected thereby; Shropshire v. Judge of Probate, 4 How. (Miss.) 152, where court refused defendant's motion to file plea of nul tiel record, after pleadings had been regularly made up; Bruch v. Carter, 32 N. J. L. 559, refusal to permit defendant to add plea of justification to the general issue is not error; Fowler v. Colton, 1 Pinn. 337, where trial court refused to permit an amendment to notice of special matter to be given in evidence in justification of alleged slander; Stewart v. Bennett, 1 Fla. 443, where the court permitted plaintiff to amend the declaration and writ by striking out names of co-defendants; Poole v. Nixon, 9 Pet. 773, Appx., **9 L. Ed. 306**, 19 Fed. Cas. 995, where Circuit Court refused an amendment, introducing new parties and new matter into a suit closed by final decree.

Distinguished in Avery v. Bowman, 39 N. H. 397, holding it error, where a court refused a proper amendment, not on the ground of discretion, but on the ground that they had no power to grant it; Welch v. County Court of Wetzel County, 29 W. Va. 68, 1 S. E. 340, modifies the rule, holding matters not subject to review must be purely matters of discretion, and ordering Circuit Court to grant writ of certiorari.

Variance between writ and declaration should be taken advantage of by plea in abatement, in court below.

Approved in How v. McKinney, 1 McLean, 320, Fed. Cas. 6749, refusing motion to quash writ, because of variance with the declaration; Prince

v. Lamb, Breese, 379, variance between the writ and declaration may not be urged as error in appellate court; Carpenter v. Hoyt, 17 Ill. 530, to the same effect, and authorities collected; Cruikshank v. Brown, 5 Gilm. 77, according to modern practice advantage should be taken of variance by motion in the lower court; Chapman v. Davis, 4 Gill, 177, where plaintiff sued out a writ as administratrix and declared as executrix, a plea in abatement could not be maintained, because not made at the proper time; Schenk v. Schenck, 10 N. J. L. 275, plea in abatement, because of variance between writ and declaration, is good; Waldo v. Beckwith, 1 N. M. 111, without particular application, plea in abatement being upon other grounds.

Miscellaneous. Cited, but not in point, Tufts v. Tufts, 3 Wood. & M. 509, Fed. Cas. 14,233; Martin v. Bartow Iron Works, 35 Ga. 328.

11 Wheat. 304–309, 6 L. Ed. 480, FINLEY v. BANK OF UNITED STATES.

When foreclosure set aside to let in prior encumbrancers.

Cited in First Nat. Bank v. Salem Flour Mills Co., 12 Sawy. 490, 31 Fed. 583, holding prior mortgagee proper defendant in suit to foreclose subsequent mortgage; Sutherland v. Lake Superior etc. Co., 23 Fed. Cas. 461, 9 Bank. Reg. 302, holding prior encumbrancers necessary parties where there is substantial doubt as to amounts due them; Converse v. Michigan Dairy Co., 45 Fed. 19, mortgagee can make creditors of mortgagor's grantor parties to suit, when they claim that the transfer to mortgagor was in fraud of their prior liens; Wilson v. Hayward, 2 Fla. 30, holder of remaining notes, secured by mortgage previously foreclosed, cannot under statute have foreclosure of the same mortgage; remedy is in equity where all parties may be joined; Heimstreet v. Winnie, 10 Iowa, 431, bill may be dismissed as to junior mortgagee against whom service cannot be obtained; Hodges v. Mullikin, 1 Bland Ch. 513, 514, setting aside decree against trustee, where cestuis que trust, under certain deeds, would otherwise have been materially injured; Walsh v. Smyth, 3 Bland Ch. 26, where two obligors had a common ground of relief, upon which each might be relieved without prejudice to other, it was not necessary that they should be joined in suit to set aside contract; Miller v. Finn, 1 Neb. 288, refusing to set aside a decree for the purpose of introducing a party who should have been an original defendant; Hall v. Hall, 11 Tex. 547, subsequent purchasers and mortgagees of personal property, having possession thereof, are necessary parties in an action to foreclose a prior mortgage.

Explained in Hagan v. Walker, 14 How. 37, 14 L. Ed. 316, dispensing with a prior encumbrancer, because outside the jurisdiction of the court.

Denied in part in Warren etc. v. Burton, 9 S. C. 198, holding prior encumbrancer not a necessary, but only a proper, party to a suit in foreclosure.

Prior encumbrancers are not bound by decree in suit to which they are not made parties.

Approved in Iron Cliffs Co. v. Negaunee Iron Co., 197 U. S. 472, 49 L. Ed. 840, 25 Sup. Ct. 474, decree of State court requiring defendants to vacate lands and enjoining them from further mining thereon, bill being based on theory that corporation lessor of defendant was no longer in existence, is not reviewable in Supreme Court in proceeding in which corporation is not party; Globe Loan & Trust Co. v. Eller, 61 Neb. 228, 85 N. W. 49, holding that in foreclosure proceedings by junior mortgagee where the interest of the mortgagor was the gross appraised value less the senior mortgage, the appraisement was fair; Williams v. Gibbs, 17 How. 255, 15 L. Ed. 141, holding an assignee not bound by distribution proceedings of which he had no notice; Phillips v. Mariner, 5 Biss. 28, Fed. Cas. 11,105, holding a bill of review would lie, where neither the bill in foreclosure nor the decree accounted or provided for a third note described in the mortgage; State Trust Co. v. National Land Imp. etc. Co., 72 Fed. 578, prior encumbrancers not made parties are not bound by bill in State court, enjoining officers of creditor corporation, and appointing receiver for benefit of creditors; Wilson v. Biscoe, 11 Ark. 55, where State and bondholder were considered prior mortgagees in mortgage given to bank upon issue of stock, their rights are not affected by foreclosure proceedings to which they are not parties; Hefner v. Northwestern Life Ins. Co., 123 U. S. 754, 31 L. Ed. 312, 8 Sup. Ct. 340, holding decree binding upon one claiming property under tax title, he having been made party to the suit.

Purchasers under decree of foreclosure take land subject to prior encumbrances.

Cited in Brown v. Wallace, 4 Gill & J. 492, 2 Bland Ch. 599, holding caveat emptor applies to all judicial sales and a trustee appointed to sell property sold only title of the parties to the suit; Bowyer v. Hughart, 9 Gratt. 359, one purchasing property under decree fraudulently obtained, with knowledge of the fraud, will not be relieved from his purchase though he acquires no valid title.

Effect of foreclosure as to first mortgagee where mortgage foreclosed is subsequent to his. Note, 80 Am. Dec. 716.

Right of foreclosure on default in payment of mortgage. Note, 18 E. R. C. 490.

Miscellaneous. Cited in Shepherd v. Pepper, 133 U. S. 651, 33 L. Ed. 715, 10 Sup. Ct. 446, holding, upon application of a junior encumbrancer, court of equity will provide for the sale of encumbered property, if the interest of the mortgagor and encumbrancers require it; in Johnson v. Culbertson, 79 Fed. 5, without particular application; also Continental Nat. Bank v. Heilman, 81 Fed. 42; Wilson v. Hayward, 6 Fla. 196; in general discussion, Phelps v. Pierson, 1 G. Greene, 127.

11 Wheat. 309-319, 6 L. Ed. 481, WETZELL v. BUSSARD.

Some of American cases proceed on idea of new promise, for which ancient debt is a sufficient consideration.

Approved in Johnson v. Gregg, 7 D. C. 145, where statute of limitations pleaded in bar new promise may be given in evidence under general issue; Martin v. Broach, 6 Ga. 32, 50 Am. Dec. 312, holding promise to pay debt barred by statute constitutes new cause of action, which must be declared on in words in which it was made.

Acknowledgment of debt, which will take case out of statute of limitations, must be unqualified and unconditional.

Approved in Strong v. Andros, 34 App. D. C. 282, "a promise to pay the debt of $100 in monthly installments," is an acknowledgment of the debt to the amount of one hundred dollars; Hornblower v. George Washington University, 31 App. D. C. 74, mere agreement to arbitrate does not estop defendant from relying on statute; Bean v. Wheatley, 13 App. D. C. 480, where debtor does not dispute amount but claims a credit which is allowed, acknowledgment is unconditional; Thompson v. Shepherd, 1 Mackey (D.C.), 388, an acknowledgment is not defective for uncertainty because it admitted too large an indebtedness; Ruppert v. Beavans, 2 App. D. C. 302, answer "I do that," to question "You know you owe it?" held an unconditional acknowledgment; Koop v. Cook, 67 Or. 97, 135 Pac. 318, holding insufficient and conditional a promise "to try to pay if this sickness does not continue too long"; Bell v. Morrison, 1 Pet. 362, 7 L. Ed. 179, holding the admission of existence of unliquidated account, on which something is due to plaintiff, not a sufficient acknowledgment; Thompson v. Peter, 12 Wheat. 567, 6 L. Ed. 731, acknowledgment by personal representative will not take case out of statute of limitations; Fort Scott v. Hickman, 112 U. S. 164, 28 L. Ed. 641, 5 Sup. Ct. 64, report of committee of city council proposing plan of compromise with holders of certain city bonds, not an acknowledgment to take them out of statute of limitations; Shepherd v. Thompson, 122 U. S. 236, 237, 30 L. Ed. 1157, 7 Sup. Ct. 1232, an assignment of a certain claim, in consideration of a debt barred by statute, is not sufficient to raise implication of new promise; Archer v. Poor, 5 Cr. C. C. 542, Fed. Cas. 509, mere acknowledgment of a debt is not sufficient; Nicholls v. Warfield, 2 Cr. C. C. 429, Fed. Cas. 10,234, expression of willingness to pay debt, if certain account should be allowed as setoff, will not take the case out of statute; St. John v. Garrow, 4 Port. 226, 29 Am. Dec. 281, admission by debtor that debt is due, is sufficient to revive original cause of action; Crawford v. Childress, 1 Ala. 488, 489, under statute right of action, founded upon bond, cannot be revived by an acknowledgment of debt; Bates' Admr. v. Bates, 33 Ala. 104, a declaration by the debtor to administrator's attorney, that he had once offered to settle claim in lands, and would do so then if administrator was authorized to make settlement, is not sufficient acknowledgment; Brown v. State Bank, 10 Ark. 136, holding letter to bank acknowledging note, to

be within the above rule, and sufficient to revive debt; De Forrest v. Hunt, 8 Conn. 185, holding expressions in letter acknowledging a debt to be an unqualified acknowledgment; Dickinson v. McCamy, 5 Ga. 488, 48 Am. Dec. 299, acknowledgment in defendant's plea that the signature to note sued on as his, is not sufficient to take case out of the statute; Chambers v. Garland, 3 Greene, 324, promise to pay debt in land, under circumstances leaving impression that the promise was made to avoid litigation, and not to acknowledge indebtedness, does not avoid statute; Penley v. Waterhouse, 3 Iowa, 439, holding certain letters, acknowledging indebtedness, sufficient to bring case within rule; Stewart v. McFarland, 84 Iowa, 57, 50 N. W. 222, bequest to wife in payment of note does not constitute such an admission as would revive right of action on note, where wife refused to accept provisions of the will; Head's Executor v. Mannèrs, 5 J. J. Marsh. 261, a promise to pay debt barred by statute will not be implied from an acknowledgment that same was due; Bailey v. Crane, 21 Pick. 324, letter from defendant, avowing his inability to pay note and asking for discharge without payment, does not take debt out of statute; Ten Eyck v. Wing, 1 Mich. 48, a stipulation that there be reference to a master to state amount due on a judgment is not an acknowledgment of debt; McLean v. Thorp, 4 Mo. 259, admission by defendant to witness that he must raise some money or plaintiff would sue him, and later acknowledgment that he had not paid plaintiff, is not sufficient acknowledgment; Stewart v. Reckless, 24 N. J. L. 429, in case of person discharged in bankruptcy, his expression of an intention to pay certain notes was not a promise to pay them; Purdy v. Austin, 3 Wend. 190, expressions denying an account and refusing to settle with any one but plaintiff is not an acknowledgment of debt; Bradley v. Field, 3 Wend. 273, statements that note against which statute had run had been paid by balance on running account, not sufficient to imply promise of payment, upon failure to produce account; Cocks v. Weeks, 7 Hill, 47, a promise by defendant to pay a certain note "as soon as he conveniently could" is not sufficient; Thompkins v. Brown, 1 Denio, 249, proof of promise to pay "when able" is not sufficient to avoid plea of the statute of limitations, without establishing defendant's ability to pay; Bloodgood v. Bruen, 8 N. Y. 368, an admission of original indebtedness in answer to bill in chancery at suit of third person, will not remove the bar of statute; Wakeman v. Sherman, 9 N. Y. 92, a promise to pay barred debt if successful in business is conditional, and business success must be shown; evidence of defendant's title to certain real estate not admissible; Shoemaker v. Benedict, 11 N. Y. 183, 62 Am. Dec. 97, payments made by one of the joint and several makers of note does not affect the defense of statute as to the other; Laforge v. Jayne, 9 Pa. St. 413, admission of debt, with averments of setoff and a promise to pay balance when able, will not avoid statute, there being no evidence of ability; Hayes v. Clinkscales, 9 S. C. 454, where debt is revived by conditional promise, statute begins to run against new promise upon the performance of the condition; Thurmond v. Trammell, 28 Tex. 380, 91 Am.

Dec. 325, where defendant, while admitting plaintiff's title to personal property refused to submit to title or surrender the property, bar is not thereby removed; Farmers' Bank v. Clarke, 4 Leigh (Va.), 606, where condition of promise was not shown to have been fulfilled, statute was not barred; Aylett v. Robinson, 9 Leigh (Va.), 49, promise to "settle" account when well enough to transact business is not an acknowledgment of debt or a promise to pay; Moore v. Bank of Columbia, 6 Pet. 9, 28 L. Ed. 331, exclamation of debtor, while drinking, that he owed, "one damned five hundred at the Bank of Columbia," is not sufficient acknowledgment; In re Burton, 29 Fed. 639, discussing analogy between debt barred by statute of limitations and debt barred by discharge in bankruptcy; Gulick v. Turnpike Co., 14 N. J. L. 548, declining to further limit operation of the statute; Henry v. Root, 33 N. Y. 531, 532, holding an infant retaining property purchased during infancy, after reaching majority, thereby ratifies his contract; Belote v. Wynne, 1 Yerg. 541, holding a promise made by one partner after dissolution of a partnership, that the firm will pay a debt of the partnership, does not revive debt against the other partner; Davis v. Minor, 1 How. (Miss.) 191, 28 Am. Dec. 329, upon purpose and construction of statute.

Denied in Davis v. Van Zandt, Cr. C. C. 208, Fed. Cas. 3656, a promise to pay "when able" will take the case out statute without proof that defendant has since been able to pay.

Distinguished in Flannery v. Maine Red Granite Co., 3 App. D. C. 399, acknowledgment of debt made by one partner before statute had run binds all the partners.

11 Wheat. 320–324, 6 L. Ed. 484, FOWLE v. COMMON COUNCIL OF ALEXANDRIA.

Joinder in demurrer to evidence.

Approved in Slocum v. New York Life Ins. Co., 228 U. S. 389, 390, 391, 392, Ann. Cas. 1914D, 1029, 57 L. Ed. 890, 891, 33 Sup. Ct. 523, denying right of Circuit Court of Appeals to direct verdict for defendants where in lower court plaintiffs had verdict and modifying order of said court so as to grant new trial; Igram v. Jacksonville St. Ry. Co., 43 Fla. 327, 30 South. 801, where statement of facts reduced to record under demurrer to evidence is loose and indeterminate, judge should refuse to give judgment on demurrer; Bass v. Rublee, 76 Vt. 402, 57 Atl. 966, no final judgment can be rendered on appeal on demurrer to evidence where there is no joinder in demurrer in record; Van Stone v. Stillwell etc. Mfg. Co., 142 U. S. 134, 35 L. Ed. 963, 12 Sup. Ct. 183, sustaining court in overruling general demurrer, there being some evidence supporting plaintiff's contention; Columbian Ins. Co. v. Catlett, 12 Wheat. 389, 6 L. Ed. 667, inferring from the evidence that a delay at particular port was reasonable and not deviation, affecting policy of insurance; Pickel v. Isgrigg, 10 Biss. 233, 235, 236, 6 Fed. 679, 681, 682, it is exclusive province of jury to weigh evidence, and party upon whom rests burden of proof cannot demur

to evidence of adverse party; Johnson v. United States, 5 Mason, 436, 437, Fed. Cas. 7419, assuming as true certain facts which might be inferred from the evidence, and collecting authorities; Hinote v. Simpson, 17 Fla. 451, reversing judgment upon demurrer to evidence, no specific facts being admitted upon record, and no joinder in demurrer; Duncan v. State, 29 Fla. 450, 10 South. 817, it rests in discretion of the court as to whether demurrer to the evidence shall be entertained; Fee v. Florida Sugar Mfg. Co., 36 Fla. 616, 18 South. 855, reversing judgment, where the testimony on demurrer to evidence was "loose, indeterminate, and conflicting"; J. A. & N. Ry. Co. v. Velie, 140 Ill. 62, 29 N. E. 707, there was no error in overruling motion to exclude plaintiff's evidence, where facts were disputed; Fritz v. Clark, 80 Ind. 595, party cannot successfully demur to the evidence, when the burden of the issue is upon him; Indianapolis etc. R. R. Co. v. McLin, 82 Ind. 445, upon defendant's demurring to the evidence, testimony tending to show no contributory negligence on part of plaintiff, accepted as conclusive; Plant v. Edwards, 85 Ind. 589, holding demurrer to the evidence by plaintiff, after both parties had put in their evidence, irregular and incorrect; Franks v. State, 1 G. Greene, 542, the court properly refused to instruct the jury that the evidence was insufficient to support the indictment; State v. Soper, 16 Me. 296, **33 Am. Dec. 667**, sustaining plaintiff's refusal to join in general demurrer, there being a matter of fact in controversy; Copeland v. New England Ins. Co., 22 Pick. 140, 143, ordering a new trial, where plaintiffs joined in demurrer, there still being a dispute as to the fact at issue; Golden v. Knowles, 120 Mass. 337, holding an oral demurrer, in which there was no joinder by plaintiff, irregular and erroneous; Waul v. Kirkman, 27 Miss. 830, court properly refused to compel plaintiff to join in demurrer to evidence, admitting evidence, but not the facts which it was offered to prove; M. & O. R. R. Co. v. McArthur, 43 Miss. 186, in action for damages, upon demurrer being joined court was warranted in accepting as facts, all that testimony tended to prove; Ware v. McQuillan, 54 Miss. 706, a variance between bill of particulars and proof, regarding defendant's name, is not proper ground for demurrer to the evidence; Western Assurance Co. v. Mayer, 64 Miss. 797, 798, 2 South. 174, reversing judgment upon demurrer to the evidence, stating evidence, but not facts proved or admitted; Pino v. Hatch, 1 N. M. 132, reversing judgment upon demurrer to evidence, it appearing that facts in question were disputed; Booth v. Cotton, 13 Tex. 362, plaintiff need not join in demurrer where facts are disputed; Miller v. Baltimore & O. R. R. Co., 17 Fed. Cas. 304, overruling demurrer where facts were in dispute; Suydam v. Williamson, 20 How. 436, **15 L. Ed. 981**, in discussion of modes whereby evidence may, in certain cases, be put on record and questions of law arising thereon, reviewed upon writ of error; dissenting opinion in Slocum v. New York Life Ins. Co., 228 U. S. 413, 415, **Ann. Cas. 1914D, 1029, 57 L. Ed. 899, 900**, 33 Sup. Ct. 523, majority holding that Circuit Court of Appeals cannot set aside verdict for plaintiff in lower court by directing verdict for defendant, but must grant new trial.

11 Wheat. 325–332, 6 L. Ed. 486, PILES v. BOULDIN.

Necessity for color of title, not expressly made a condition by statute, in adverse possession. Note, **15 L. R. A. (N. S.) 1257.**

11 Wheat. 332–360, 6 L. Ed. 488, GOVERNEUR'S HEIRS v. ROBERTSON.

An alien cannot take land by descent.

Approved in Tidwell v. Chiricahua Cattle Co. (Ariz.), 53 Pac. 194, holding under Rev. Stats., §§ 2222, 2223, 3135, relating to settling on government lands, that deeds from grantor to plaintiff corporation were admissible, although title was in the United States; Crane v. Reeder, 21 Mich. 73, **4 Am. Rep. 441**, holding an act authorizing foreigners to take and hold lands does not confer upon the heirs of such foreigners the right to take by inheritance, unless vested before the repeal of the act.

Where alien takes by grant, his subsequent naturalization relates back and obviates every consequence of his alien disability.

Approved in Shea v. Nilima, 133 Fed. 215, 66 C. C. A. 263, following rule; In re Symanowsski, 168 Fed. 981, upholding declaration of allegiance made by alien at time of application to citizenship as relating back to time of filing his declaration of intention; Lone Jack Min. Co. v. Megginson, 82 Fed. 94, 48 U. S. App. 461, holding subsequent declaration of an intention to become a citizen, by an alien locator of mining claim, relates back to date of location; Harley v. State, 40 Ala. 696, the right of the State to escheat the lands of alien is defeated when the latter is admitted to citizenship.

Distinguished in Wulf v. Manuel, 9 Mont. 285, 23 Pac. 725, holding defendant's naturalization could not retroact to his purchase, or right to a mining claim.

Alien may take by grant and may hold until title is divested by an inquest of office.

Approved in McKinley Min. Co. v. Alaska Min. Co., 183 U. S. 571, **46 L. Ed. 335**, 22 Sup. Ct. 87, holding location of mining claim by alien can only be attacked by government; Duncan v. Eagle Rock Gold Mining etc. Co., 48 Colo. 574, **139 Am. St. Rep. 288**, 111 Pac. 590, objection that mining location has been made by alien may be made by United States in patent proceedings which are in nature of inquest of office; Johnson v. Elkins, 1 App. D. C. 442, act of Congress March 3, 1887, prohibiting aliens from holding real estate applies only to titles acquired after passage of act; Hanna v. Kelsey Realty Co., 145 Wis. 280, **140 Am. St. Rep. 1075, 33 L. R. A. (N. S.) 355**, 129 N. W. 1082, denying right of foreign corporation failing to comply with statute permitting it to do business in State, to hold land as against holder of prior unrecorded mortgage; Louisville Property Co. v. Mayor & City Council of Nashville, 114 Tenn. 221, 84 S. W. 812, purchase of realty by foreign corporation which had not complied with statutes relating to foreign corporations is valid; Taylor v. Benham,

5 How. 270, **12 L. Ed. 148**, land taken by aliens, by devise, does not escheat until office found; Manuel v. Wulff, 152 U. S. 508, 511, **38 L. Ed. 533**, 534, 14 Sup. Ct. 652, 653, holding this rule applies to a grant of a mining claim to an alien; Farmers' Loan & Trust Co. v. McKinney, 6 McLean, 5, Fed. Cas. 4667, foreign corporation may maintain an action of ejectment for possession of land acquired by mortgage; Billings v. Aspen Min. & Smelting Co., 52 Fed. 251, 10 U. S. App. 322, the right to defeat title to mining claim on ground that it was located by alien, is reserved to government alone; Bogan v. Edinburgh etc. Mortgage Co., 63 Fed. 197, 27 U. S. App. 346, commission of land office could not forfeit rights of pre-emptor and his mortgagee, because former entered the land as homestead while still alien; Jinkins v. Noel, 3 Stew. 80, an alien may maintain an action to recover possession of land obtained by grant; Jones v. Minogue, 29 Ark. 644, holding it immaterial whether devisee be an alien or not; Justice Mining Co. v. Lee, 21 Colo. 263, **52 Am. St. Rep. 219**, 40 Pac. 445, after grant of title to mineral land is made to an alien, it cannot be attacked by third party; Wadsworth v. Wadsworth, 12 N. Y. 380, statute declaring void every devise of real property to persons who are aliens at time of testator's death, does not apply to alien devisee born after death of testator; Hubbard v. Goodwin, 3 Leigh (Va.), 512, commonwealth cannot take profits received by an alien, before decree giving title to State; Fritts v. Palmer, 132 U. S. 293, **33 L. Ed. 321**, 10 Sup. Ct. 96, discussing right of foreign corporation to hold land under Constitution of Colorado; Kershaw v. Kelsey, 100 Mass. 574, **97 Am. Dec. 137**, **1 Am. Rep. 154**, permitting recovery upon lease of land within Confederate territory; Crane v. Reeder, 21 Mich. 70, **4 Am. Rep. 440**, cited as to statutes of Virginia in regard to land titles of aliens; Davidson College v. Chambers, 3 Jones Eq. 261, where corporation was bequeathed a greater sum than authorized to hold.

Distinguished in Jones v. Chiles, 4 J. J. Marsh. 613, where an entry of land became void through noncompliance with the law, one claiming by subsequent entry may perfect the same.

Denied in Tibbitts v. Ah Tong, 4 Mont. 537, 2 Pac. 760, holding doctrine of the common law inapplicable where aliens claimed mineral lands under a conveyance.

Necessity for judicial proceeding to effect escheat. Note, **15 L. R. A. (N. S.) 380.**

Where title of alien escheats, it passes superior title to government.

Approved in Bank of Lemoore v. Fulgham, 151 Cal. 240, 90 Pac. 938, Constitution, art. V, § 14, providing grants of lands shall be signed by Governor does not apply to grant of lands acquired by State for delinquent taxes; dissenting opinion in State v. West Branch Lumber Co., 66 W. Va. 3, 65 S. E. 1059, majority denying right of State to maintain suit to sell land as forfeited that had reverted to State for failure to pay taxes by one acquiring title through tax sale; Stith v. Hart, 6 T. B. Mon. 629, holding relinquishment of land to the State by grantee of patentee did not pass title to conflicting subsequent patentee.

State never intends to grant lands of another, and where grantee is ignorant of previous patent, caveat emptor applies.

Cited in Webster v. Clear, 49 Ohio St. 400, 31 N. E. 746, holding one who, in good faith, purchased land from State takes no title against former purchaser.

11 Wheat. 361-374, 6 L. Ed. 495, SHELBY v. GUY.

Supreme Court follows State court's construction of State statutes.

Approved in Quinette v. Pullman Co., 229 Fed. 336, decision of Supreme Court of Oklahoma that railroad, because of its noncompliance with statutory requirements, not entitled to plead statute of limitations conclusive on Federal courts; Nielsen v. Chicago etc. R. Co., 187 Fed. 397, 109 C. C. A. 225, upholding construction of Supreme Court of Colorado that "fencing statute" is unconstitutional under Colorado Constitution; Sunset Telephone & Telegraph Co. v. City of Pomona, 172 Fed. 836, 97 C. C. A. 251, Federal court will follow State construction placed upon question whether contract rights given by State statute have been violated contra to Federal Constitution; Zeiger v. Pennsylvania R. Co., 151 Fed. 352, under settled construction placed by Supreme Court of Pennsylvania upon act giving right of action for death such statute does not confer right of action on next of kin; Parker v. Moore, 115 Fed. 802, holding Federal courts will follow decision of State courts whether contract is governed by law of place where made, and whether it is contrary to public policy or statutes of State; Fidelity Ins. Trust & S. D. Co. v. Mechanics' Sav. Bank, 97 Fed. 302, holding the Supreme Court of Kansas having decided that on suit by creditor of corporation against stockholder the stockholder may plead a bona fide indebtedness from the corporation, that defense may be pleaded in any jurisdiction; Williams v. Gold Hill Min. Co., 96 Fed. 465, holding decision of Supreme Court of California that creditors of mining corporation may question validity of mortgage not ratified by stockholders is binding on Federal court; State v. O'Neil, 147 Iowa, 525, Ann. Cas. 1912B, 691, 33 L. R. A. (N. S.) 795, 126 N. W. 458, denying right to prosecute for acts prohibited by statute performed before decision holding statute void had been reversed; Green v. Neal, 6 Pet. 298, 8 L. Ed. 405, construing statute of limitations according to the settled law of the State; Beals v. Hale, 4 How. 54, 11 L. Ed. 873, approving doctrine in construction of statute relating to recording of deeds; Leffingwell v. Warren, 2 Black, 603, 17 L. Ed. 262, in construing statute of limitations; Webster v. Cooper, 14 How. 504, 14 L. Ed. 517, holding a statute inoperative, it having been so held by the State Supreme Court; Christy v. Pridgeon, 4 Wall. 203, 18 L. Ed. 324, adopting the interpretation of the Mexican colonization law, placed upon it by the Texas courts; Hamilton Co. v. Massachusetts, 6 Wall. 641, 18 L. Ed. 907, adopting the definition of the term "commodities" as uniformly given by Massachusetts courts; Davie v. Briggs, 97 U. S. 637, 24 L. Ed. 1089, adopting construction of Supreme Court of North Carolina, that term "beyond the seas" in statute of limitations, means "without

United States"; Louisiana v. Pilsbury, 105 U. S. 294, **26 L. Ed. 1096**, construing section of the Constitution of Louisiana, requiring uniformity in taxation, in conformance with the decisions of the State Supreme Court; Bauseman v. Blunt, 147 U. S. 652, 657, **37 L. Ed. 318, 320**, 13 Sup. Ct. 469, 470, construing Kansas statute of limitations in accordance with decision of State court, rendered after contrary construction by the Circuit Court; Balkam v. Woodstock Iron Co., 154 U. S. 188, **38 L. Ed. 957**, 14 Sup. Ct. 1014, refusing to consider contention that Alabama Supreme Court had misconstrued its own statute of limitations; Falbrook Irrigation Dist. v. Bradley, 164 U. S. 155, **41 L. Ed. 387**, 17 Sup. Ct. 61, refusing to hold act of legislature to be in violation of the State Constitution, in face of clear and repeated decisions of State Supreme Court to contrary; Thompson v. Phillips, 1 Bald. 284, Fed. Cas. 13,974, adopting Pennsylvania construction of statute limiting lien of judgments, though vested rights were thereby affected; In re Cornwall, 9 Blatchf. 127, Fed. Cas. 3250, 6 N. B. R. 318, construing Connecticut statute of limitations affecting bankruptcy proceedings; United States v. Drennen, Hempst. 326, Fed. Cas. 14,992, the laws of several States are rules of decision in United States courts, and there is nothing in laws of Arkansas forbidding the execution of judgment against administrator in his representative capacity; Boyle v. Arledge, Hempst. 623, Fed. Cas. 1758, construing statute of limitations of Arkansas; Perry Mfg. Co. v. Brown, 2 Wood. & M. 455, Fed. Cas. 11,015, construing insolvent law in accordance with Massachusetts decisions; In re Noesen, 6 Biss. 447, Fed. Cas. 10,288, 12 N. B. R. 426, interpreting Wisconsin statute of limitations in its application to proceedings in bankruptcy; Lavin v. Emigrant Bank, 18 Blatchf. 11, 1 Fed. 650, following latest adjudication as to proper construction of statute authorizing surrogate to issue letters of administration; Hiller v. Shattuck, 1 Flipp. 274, Fed. Cas. 6504, holding statute of Michigan governing new trials in ejectment suits constitutes rule of decision for Circuit Court in case arising thereunder; In re Eldridge, 2 Hughes, 257, Fed. Cas. 4331, in conformity with Virginia decisions, filing of petition by bankrupt, including claim of creditor not already barred by statute, is equivalent to new promise; In re Wyllie, 2 Hughes, 461, Fed. Cas. 18,112, court of bankruptcy cannot contravene adjudications made by State courts interpreting exemptions under local statutes; State v. Grand Trunk Ry. Co., 3 Fed. 889, adopting adjudications of New Hampshire courts, holding proceedings under a certain statute penal in their nature; Fidelity Ins. Co. v. Shenandoah Iron Co., 42 Fed. 376, following construction of Virginia courts declaring certain statutes unconstitutional; Bloodgood v. Grasey, 31 Ala. 589, admitting decisions of sister State as conclusive of the proper construction of statute of that State; Yonley v. Lavender, 27 Ark. 264, one obtaining judgment in the Federal courts against administrator in his fiduciary capacity, must file his claim in Probate Court in accordance with the State law limiting his rights; Hammond v. Coleman, 4 Mo. App. 318, government grant having been made to person, "or his legal representatives," the ques-

tion as to who these "representatives" are, must be determined by law of State; Lane v. Watson, 51 N. J. L. 188, 17 Atl. 117, construction given to statutes of New York by Supreme Court of that State is conclusive when raised in other courts; Jessup v. Carnegie, 80 N. Y. 446, 36 Am. Rep. 646, where the construction of Iowa statute was before court; Nimick v. Iron Works, 25 W. Va. 192, adopting construction of Ohio courts of statute affecting corporation organized thereunder; Prentice v. Zane, 19 Fed. Cas. 1270, construing Pennsylvania statute in accordance with decisions of State court; Udell v. The Ohio, 24 Fed. Cas. 498, to same effect in case arising out of statute governing liens for materials furnished; dissenting opinion in Gelpcke v. City of Dubuque, 1 Wall. 210, 211, 17 L. Ed. 527, where State court changes its construction of statute, Supreme Court should follow the later construction; dissenting opinion in B. & O. R. R. Co. v. Baugh, 149 U. S. 404, 37 L. Ed. 787, 13 Sup. Ct. 928, arguing that the decisions of the courts of Ohio should govern in definition of "fellow-servants"; Faulkner v. Hart, 82 N. Y. 421, 37 Am. Rep. 580, arguendo; Commonwealth v. Pittsburgh R. R. Co., 58 Pa. St. 44, local corporation also incorporated under the laws of another State may attack the local statutes in the Federal courts; Crosby v. Huston, 1 Tex. 237, to effect that local statute cannot affect property in foreign jurisdiction.

Distinguished in State v. Missouri Athletic Club, 261 Mo. 604, L. R. A. 1915C, 876, 170 S. W. 911, refusing adoption of construction placed upon statute by State Supreme Court where property or contract rights affected; Burgess v. Seligman, 107 U. S. 34, 27 L. Ed. 365, 2 Sup. Ct. 22, holding where United States Circuit Court had construed statute not before construed by State courts, Supreme Court is not bound to follow subsequent, contrary construction by the State court; Austen v. Miller, 5 McLean, 156, Fed. Cas. 661, where question was not as to construction of State statute, but as to principle of mercantile law governing case; McClure v. Owen, 26 Iowa, 253, decision of United States Supreme Court is not authority in State court when it contravenes construction given by the State court to State Constitution; Farrior v. New England Mortgage Co., 92 Ala. 179, 9 South. 532, 12 L. R. A. 857, later cases adopting new rule will not be given retroactive effect, where existing contracts would thereby be affected; Hall v. Russel, 3 Sawy. 515, Fed. Cas. 5943, this rule does not include special limitations concerning suits in equity.

Questions of State law as to which State court decisions must be followed in actions originating in, or removed to, Federal courts. Note, 40 L. R. A. (N. S.) 393, 422.

Term "beyond seas" is usually construed by the State courts as equivalent to without limits of State where statute is enacted.

Approved in Jamieson v. Potts, 55 Or. 298, 25 L. R. A. (N. S.) 24, 105 Pac. 95, note executed and delivered by nonresident temporarily in State to resident thereof is domestic contract; Smith v. The Heirs of Bond, 8 Ala. 390, holding exception in statute that suit may be brought against

debtor "after his return into State," means after his return within jurisdiction of the State; State Bank v. Seawell, 18 Ala. 618, provision in statute of limitations, entitling creditor to sue after "return" of absent debtor, applies to debtor who has come within State for first time; Field v. Dickinson, 3 Ark. 415, 36 Am. Dec. 460, construing term "beyond the seas" as beyond jurisdiction of State; Stephenson v. Doe, 8 Blackf. 515, 46 Am. Dec. 495, to same effect; Estis v. Rawlins, 5 How. (Miss.) 266, provisions that time of defendant's absence from State shall not be taken as part of time limited by act applies to those who have not been in State; Galusha v. Cobleigh, 13 N. H. 86, following construction above; Smith v. Madison, 7 Ohio (pt. II), 236, to same effect; Snoddy v. Cage, 5 Tex. 117, adopting this construction, and exception to persons "absent" extends to foreigners who reside always abroad; Darling v. Meachum, 2 G. Greene, 604, defining term "beyond sea," as used in the statutes of Michigan, to mean outside of United States; Whitney v. Goddard, 20 Pick. 308, 32 Am. Dec. 217, resident of another State is not person "beyond sea, without any of the United States"; Harris v. Harris, 71 N. C. 176, residing beyond limits of State is not being "beyond seas"; State v. Johnson, 12 Minn. 479, 93 Am. Dec. 244, defining phrase "beyond sea"; United States v. Dustin, 25 Fed. Cas. 949, holding act of Congress punishing conspiracies is revenue law, and limitation of five years applies.

Five years' bona fide possession of slave constitutes title, by laws of Virginia, upon which possessor may recover in detinue.

Approved in Sadler v. Sadler, 16 Ark. 643, where possession of slave was for a longer period than required by statute; Spencer v. McDonald, 22 Ark. 475, where there was possession for the statutory period; Morris v. Lyon, 84 Va. 334, 4 S. E. 735, detinue will not lie against one holding by adverse possession for time prescribed by statute; Moore v. State, 43 N. J. L. 205, 39 Am. Rep. 560, a person cannot be prosecuted for crime barred by statute of limitations, when bar was removed after time had run against it; Hall v. Webb, 21 W. Va. 325, subsequent repeal of a limitation law cannot give a retrospective effect so as to disturb title; Thornburg v. Bowen, 37 W. Va. 543, 16 S. E. 827, statutory bar to detinue attaches in five years, and title thereby becomes vested in the possessor; Sprecher v. Wakeley, 11 Wis. 440, while person held under tax deed, time fixed by statute expired, his title thereby became vested; Kegler v. Miles, 1 Mart. & Y. 430, 17 Am. Dec. 822, adverse possession of slave for statutory period vests absolute right of property in possessor; Calvert v. Lowell, 10 Ark. 151, under act of 1839, action on sealed instrument is barred, after expiration of five years; Mitchell v. Wilson, 3 Cr. C. C. 249, Fed. Cas. 9672, principle of rule, that twenty years' possession of lands gives substantive title applies equally to personal chattels; Sims v. Canfield, 2 Ala. 561, 563, where mortgagee of slaves acquired title by possession, equitable action was barred.

Denied in part in Huffman v. Alderson, 9 W. Va. 624, holding title is not vested by bar of statute, and act of legislature extending time is constitutional.

Effect of the bar of the statute of limitations. Note, 95 Am. St. Rep. 671.

Title to personal property, acquired under the limitation act of a State, must be recognized in other jurisdictions.

Approved in Goodman v. Munks, 8 Port. 95, where action on promissory note was barred by statute of State in which it was made and defendant resided, no action could be maintained in another jurisdiction; Thompson v. Read, 41 Iowa, 50, an action upon promissory note barred by statute of State in which maker resided, cannot afterward be maintained in another State; Hamilton v. Cooper, Walk. (Miss.) 544, 12 Am. Dec. 590, where defendant acquired title to slaves under the statute of another State; Davis v. Minor, 1 How. (Miss.) 189, 28 Am. Dec. 328, to same effect; Fears v. Sykes, 35 Miss. 635, where same question arose; Born v. Shaw, 29 Pa. St. 292, 72 Am. Dec. 634, where sale of personal property was made in another State, question of fraud, because of grantor's possession, must be determined by laws of place of sale; Brown v. Parker, 28 Wis. 32, where action upon a note is barred by statute of State in which it was made and in which parties thereto reside, judgment obtained in another State is of no avail; Thurmond v. Trammell, 28 Tex. 380, 91 Am. Dec. 325, but without particular application in discussion as to whether verbal acknowledgment would, of itself, remove bar of statute.

Distinguished in Finnell v. South. Kan. Ry. Co., 33 Fed. 428, holding cause of action for personal injury not extinguished by statute of the State where it accrued, plaintiff being resident of another State, where common-law rule prevailed; Powell v. Wragg, 13 Ala. 164, where fact of possession of certain slaves was not sufficiently shown; Bohannan v. Chapman, 13 Ala. 645, where the title to slave was not perfected by possession, defendant's vendor having been out of State; Jones v. Jones, 18 Ala. 253, overruling Goodman v. Munks, 8 Port. 95, holding statute does not extinguish contract, and action may be maintained thereon in another State; Moseby v. Williams, 5 How. (Miss.) 524, where facts did not establish adverse possession; McMerty v. Morrison, 62 Mo. 143, construing statute of Louisiana which was pleaded in bar as not an absolute extinguishment of debt, and consequently no defense in another jurisdiction; Haws v. Cragie, 4 Jones (N. C.), 398, in an action upon bond, presumption of payment raised by law of the place of execution is not applicable.

Qualified in Wynn v. Lee, 5 Ga. 233, holding that the statute pleaded must bar the title as well as remedy, and residence of the parties must be such that the statute may actually and fully operate.

Denied in Alexander v. Burnett, 5 Rich. 204, where plaintiff converted a negro and gained title by prescription, he cannot maintain trover against

original owner residing in another State who subsequently regains possession.

The local law of the obligation governs when statute of limitations is pleaded as a bar.

Approved in Toltec Ranch Co. v. Cook, 191 U. S. 538, 48 L. Ed. 292, holding adverse possession for period prescribed by statute of limitations of Utah, after act granting land and before patent had been issued to Central Pacific Railroad Company for part of its land grant and not within right of way, will prevail against patent; Equitable Mut. etc. Ins. Corp. v. Murray, 131 Ky. 750, 115 S. W. 819, validity of capital stock note given to fire insurance company executed and made payable in New York should be determined in New York; Eingartner v. Illinois Steel Co., 103 Wis. 376, 74 Am. St. Rep. 872, 79 N. W. 434, holding if citizen of sister State allows statute of limitations to run on claim against citizen of same State, he cannot enforce claim in courts of Wisconsin if right of defense in his own State is a vested right; in Pritchard v. Norton, 106 U. S. 131, 27 L. Ed. 106, 1 Sup. Ct. 107, holding a bond of indemnity executed in one State, on behalf of an appellant in the court of another State, an obligation to be performed in the latter State and its construction is governed thereby; Nicolls v. Rodgers, 2 Paine, 440, Fed. Cas. 10,260, an action brought in New York upon an attested promissory note, made in Massachusetts, was barred by statute of former, although it would not have been by that of latter State; Bacon v. Dahlgreen, 7 La. Ann. 605, statute of State in which suit upon promissory note is brought determines time in which an action thereon is barred; Townsend v. Jemison, 9 How. 414, 418, 13 L. Ed. 199, statute of limitations of country in which the suit is brought may be pleaded to bar recovery upon contract made out of its political jurisdiction, that of lex loci contractus cannot be.

Distinguished in Boyd v. Clark, 8 Fed. 850, where a statute gave right of action, unknown to the common law, limiting time within which action shall be brought, such limitation held operative in suit brought in another State.

What statute of limitations will govern action in other State or country. Note, 48 L. R. A. 635.

11 Wheat. 375–380, 6 L. Ed. 498, WALKER v. GRIFFIN.

General intention of testator, as indicated by will, controls when there is question as to whether devisees take per stirpes or per capita.

Approved in McIntyre v. McIntyre, 192 U. S. 121, 48 L. Ed. 371, 24 Sup. Ct. 197, holding where testator left residue "to be divided equally between my brothers Edwin and Charles' children," and at date of will, Edward had died leaving six children five of whom survived testator and Charles had two children and he and one child survived testator, residue was to be divided per capita; Laisure v. Richards, 56 Ind. App. 307, 103 N. E. 682, where general scheme of will indicates intent to regard legatees as a class

it will be so construed; Records v. Fields, 155 Mo. 324, 55 S. W. 1023, holding the words "between" the heirs of his two deceased brothers in a will referred to two classes of heirs; Preston v. Brant, 96 Mo. 558, 10 S. W. 80, holding where testator devised land to his wife for life, and after her death to the heirs of his daughter and the heirs of his son, such heirs take per stirpes; Farmer v. Kimball, 46 N. H. 439, 88 Am. Dec. 220, under devise "unto my cousins and to the children of my mother's cousins, to be equally divided between them," the heirs took per capita; Fisher v. Skillman, 18 N. J. Eq. 234, under bequest of property "to be equally divided, share and share alike, between my children and their legal heirs," legatees take per stirpes; Young's Appeal, 83 Pa. St. 63, in devise to wife for life, and upon her death to be "equally divided between her relations and mine," intention was that property should be divided per stirpes; Osburn's Appeal, 104 Pa. St. 644, where the language of will sufficiently indicated intention that estate should be divided per stirpes; Paul v. Ball, 31 Tex. 21, a bequest of money "in equal amounts" to certain-named persons, "and family of A. P., deceased," was correctly divided per stirpes; Ross' Exr. v. Kiger, 42 W. Va. 411, 26 S. E. 196, direction that property be equally divided between heirs of testatrix and her husband's heirs, said property should be divided into two equal parts heirs taking per stirpes.

Under devise of part of estate to certain families, and balance to be given to families of C. and J.'s children, in equal proportion, children took per stirpes.

Approved in Preston v. Brant, 96 Mo. 558, 10 S. W. 80, where testator devised land to his wife for life, and after her death to heirs of his daughter and heirs of his son, holding such heirs take per stirpes.

11 Wheat. 380–392, 6 L. Ed. 500, PATTERSON v. WINN.

In general, validity of patent for lands can only be impeached, in court of equity, for causes anterior to its issuance.

Approved in Yount v. Howell, 14 Cal. 469, holding patent cannot be collaterally impeached unless issued without authority or is prohibited by statute, or is void on its face; Reeve v. North Carolina Land etc. Co., 141 Fed. 825, under Tennessee statutes governing grants of State lands, valid entry is not essential to grant, and older of two conflicting grants, each based on void entry, passes State's title; Garrard v. Silver Peak Mines, 94 Fed. 990, holding under act of Congress, June 16, 1880 (21 Stat. 287), whereby Congress granted certain nonmineral lands to Nevada and under act of State legislature, March 3, 1887 (Stats. 1887, p. 102), whereby State disclaimed any right to mineral land, that the State acquired no right in known mineral land which had been appropriated in 1865 under location of land containing salt; Connelly v. Mon Chung, 1 Cal. Unrep. 750, patent for land issued without authority is open to collateral attack in action for ejectment; Payne & Butler v. Providence Gas. Co., 31 R. I. 329, Ann. Cas. 1912B, 65, 77 Atl. 159, upholding as valid on face lease

of fishing grounds reciting matters required by statute; Davis v. Molyes, 76 Vt. 32, 56 Atl. 176, grant of land from State passes only title which State had; Meader v. Norton, 11 Wall. 458, 20 L. Ed. 188, holding suit in equity would lie upon proof that a patent was obtained by means of fabricated papers; Smelting Co. v. Kemp, 104 U. S. 644, 26 L. Ed. 878, holding it error to admit in evidence, in a suit at law, the record and proceedings of the land office to impeach the validity of a patent; Noble v. Union River Logging R. R. Co., 147 U. S. 175, 37 L. Ed. 127, 13 Sup. Ct. 274, decision by the Secretary of Interior that a certain railroad company is entitled to a right of way over public land, cannot be revoked by his successor; St. Louis Smelting Co. v. Green, 4 McCrary, 235, 13 Fed. 210, a patent for land granted by the United States cannot be collaterally attacked; Sharp v. Stephens, 6 Sawy. 50, Fed. Cas. 12,710, in action at law, patent to settler and wife, "India," cannot be avoided by showing that his true wife was another person; Masters v. Eastis, 3 Port. 372, 373, 374, patent for land entered by patentee cannot be collaterally impeached in action of trespass, by showing an assignment of it to another previous to the issuance of the patent; Bates v. Herron, 35 Ala. 124, following rule; Heeler v. Gist, 27 Ark. 201, refusing to permit an equitable right to land to be set up in suit at law; Arnold v. Grimes, 2 G. Greene, 83, 84, 85, holding patent not impeachable, collaterally, for fraud in an action at law; State v. Bachelder, 5 Minn. 238, 80 Am. Dec. 414, refusing to set aside patent obtained by false testimony; Houston's Lessee v. Pillow, 1 Yerg. 488, re-marking of land in conformance with calls of the grant, is conclusive upon State, and subsequent claimants; Doll v. Meador, 16 Cal. 324, 330, a patent from the State of lands appropriated to State by Congress, cannot be questioned; Durfree v. Plaisted, 38 Cal. 83, patent valid on its face is conclusive.

Patent as evidence of title. Note, 12 Am. Dec. 565.

Where grant by patent is void, its validity may be contested collaterally at law.

Approved in Lockhard v. Asher Lumber Co., 123 Fed. 503, holding while Federal court is bound by decisions of State Supreme Court construing statute, an expression of opinion by the court upon question not involved is not binding; Witherspoon v. Olcott, 119 Fed. 177, holding patent regularly issued to State lands in Texas, although survey was made by surveyor out of his district, is not void; Roberts & Co. v. Taft, 109 Fed. 829, holding Ohio Rev. Stats., §§ 2729a, 2729b, relating to bond issue, should be construed with sections 2701 and 2709; Hevner v. Matthews, 4 App. D. C. 393, acts of Congress, 1832, 1838, 1865, 1867, relating to acknowledgment of deeds, etc., are to be construed in pari materia; Brown v. Patterson, 224 Mo. 658, 124 S. W. 6, proviso in statute denying married women right to testify against husbands affects only cases enumerated in section in which she may testify; Brewer v. Rust, 20 Okl. 781, 95 Pac. 235, eight per cent rate of interest prescribed by proviso

in § 8, Act of Congress, February 18, 1901, is restricted to banks and trust companies mentioned in such section; Rice v. Railroad Co., 1 Black, 375, 17 L. Ed. 152, holding territory could not pass title to lands by an act of incorporation, passed before the grant by Congress to territory; Lake Superior Ship Canal etc. Co. v. Cunningham, 44 Fed. 832, where lands granted in aid of railroads were illegally surrendered by Governor; Lakin v. Dolly, 53 Fed. 338, land patent may be shown to be void by any extrinsic evidence, capable of showing want of authority for issue of patent; Garrard v. Silver Peak Mines, 82 Fed. 587, holding void Nevada grant of lands reserved by United States, and consequently open to attack by patentee of United States; Kennedy v. Jones, 11 Ala. 86, Spanish grant made without authority of Spain, acting through her officers, is void; Knabe v. Burden, 88 Ala. 439, 7 South. 93, subsequent title may be assailed collaterally at law, and declared void without resort to court of equity; Terry v. Megerle, 24 Cal. 629, 85 Am. Dec. 92, where State selected land under grant by United States for internal improvements bona fide pre-emptor of land selected can attack patent by State in ejectment; Parker v. Duff, 47 Cal. 562, scrip issued for lands selected by Indians in accordance with treaty is issued without authority if for lands outside of territory ceded by said Indians; Schwenke v. Union D. & R. R. Co., 7 Colo. 514, 4 Pac. 906, permitting collateral attack on patent showing on its face that it was issued under acts repealed prior to application therefor; Commissioners of Brunswick v. Dart, Charlt. (Ga.) 500, where State granted land contrary to provisions of statute complainants are not entitled to redress in equity; Hilliard v. Connelly, 7 Ga. 180, act authorizing State officers to correct errors in land grants is unconstitutional, void grants being impeachable in courts of law; Winter v. Jones, 10 Ga. 206, 54 Am. Dec. 391, land grant issued by virtue of an unconstitutional act is void and may be impeached; Ballance v. McFadden, 12 Ill. 324, grant not authorized by act of Congress under which it was issued is void; Mantle v. Noyes, 5 Mont. 291, 294, 5 Pac. 862, 864, a patent for lands previously sold is void and subject to collateral attack; Silver Bow M. & M. Co. v. Clark, 5 Mont. 422, 425, 5 Pac. 580, 582, valid location of mining claim is not affected by subsequent entry of town site; Rose v. Richmond M. Co., 17 Nev. 68, 27 Pac. 1115, court of law can relieve against subsequent locator of a mining claim already located; Clements v. Anderson, 46 Miss. 601, where title passed out of government before a patent was issued patent is void and subject to attack in court of law; Blakesly v. Caywood, 4 Or. 288, the United States having no title to land could not lawfully grant it to another and holder of vested title was entitled to relief; Stewart v. Altstock, 22 Or. 188, 29 Pac. 555, a patent issued for lands accepted out of grant under which the patent issued is void and subject to attack; Blankenpickler v. Anderson, 16 Gratt. 62, if grantee in patent for land was dead at time grant issued patent is void; Randolph v. Longdale Iron Co., 84 Va. 466, 5 S. E. 34, title founded upon rights acquired by new survey subsequent to plaintiff's patent are subject to collateral attack; Jarrett v. Stevens, 36 W. Va. 448, 15 S. E. 178,

grant without the seal of commonwealth is void and subject to collateral attack; Dixon v. Doe, 23 Miss. 85; Patterson v. Tatum, 3 Sawy. 174, Fed. Cas. 10,830, where State of California gave patent to lands already preempted; People v. Stratton, 25 Cal. 250, 251, person having interest in high lands to which, as swamp-lands, State issued patent to another, he may maintain action to annul patent; Durfree v. Plaisted, 38 Cal. 83, patent is conclusive evidence of regularity and validity of acts of officers issuing it, subject to above rule.

Distinguished in Knight v. United States Land Assn., 142 U. S. 176, 35 L. Ed. 979, 12 Sup. Ct. 262, where Land Department determined that certain survey was correct, it could not be assailed on collateral proceeding; Garner v. Willett, 18 Ill. 458, distinguished as to facts, there being presumptive evidence that there was authority for issuance of patent; Kissell v. St. Louis Public Schools, 16 Mo. 582, survey including too much land did not invalidate patent to land rightfully included; Strong v. Lehmer, 10 Ohio St. 97, one claiming land adversely to grant by State must show that neither State nor its grantees had any right to land which persons dealing with United States were bound to respect; Lee v. Summers, 2 Or. 268, the right to set aside a patent cannot be exercised by stranger to title; Todd v. Fisher, 26 Tex. 241, where grant emanated from competent authority, it cannot be attacked for preliminary irregularity, except by someone having an equitable interest; Bryan v. Shirley, 53 Tex. 451, 452, 458, to the same effect.

Where several statutes are in pari materia, they are to be construed as one statute in explaining their meaning and import.

This rule followed in Atkins v. Disintegrating Co., 18 Wall. 301, 21 L. Ed. 844, defining the phrase "civil suit," as used in the judiciary act of 1789, in accordance with the entire context of the section; Ryan v. Carter, 93 U. S. 84, 23 L. Ed. 809, construing laws relating to land claims in territories of Orleans and Louisiana as one statute; United States v. Black, 12 Bank. Reg. 341, 24 Fed. Cas. 1157, where question was as to who were competent witnesses under bankruptcy act and amendments thereto; Territory v. Hand, 1 Dak. Ter. 426, 46 N. W. 686, where special act for formation of new counties was construed as part of the general law.

Georgia act of 1783, limiting quantity of land to be granted to any one person, does not prohibit him from purchasing other warrants, and including all in one grant when issued.

Approved in Doe v. Roe, 31 Ga. 599, where holder of several warrants had consolidated survey and grant in his own name of land covered by the warrants.

Miscellaneous. Cited in Marcy v. Commrs. Seminole County, 45 Okl. 7, 144 Pac. 613, as to office of proviso in statute; Groslouis v. Northcut, 3 Or. 399, holding an act of Congress, couched in words of present grant, passes the legal title before issuance of patent; Rhode Island v.

Massachusetts, 12 Pet. 746, 9 L. Ed. 1269, Supreme Court has jurisdiction to settle disputed boundary between States; arguendo in Winn v. Patterson, 9 Pet. 672, 9 L. Ed. 269, where same case was again before Supreme Court.

11 Wheat. 392-413, 6 L. Ed. 502, UNITED STATES v. AMEDY.

Copies of State statutes, authenticated by State seal, are conclusive evidence of such acts in courts of other States.

Cited in United States v. Wilson, 1 Bald. 91, Fed. Cas. 16,730, holding pardon granted by the Governor of a State, under its great seal, is evidence per se; Hudson v. Green Hill Seminary, 113 Ill. 630, act of legislature of another State, creating a corporation, authenticated by Secretary of State, by having seal of the State affixed thereto, does not require further proof; State Bank v. Merchants' Bank, 10 Mo. 128, statute of another State was not properly authenticated where seal of State was not affixed thereto; Coit v. Millikin, 1 Denio, 377, holding it unnecessary to verify seal affixed to a copy of act of legislature of another State; Hatcher v. Rocheleau, 18 N. Y. 94, judge's certificate of clerk's attestation of transcript proves itself and is prima facie evidence of official character of signer; Ray v. Stewart, 105 N. C. 473, 11 S. E. 182, the great seal of State is sufficient authority for registration of grant; dissenting opinion in Pease v. Peck, 18 How. 601, 15 L. Ed. 521, where published laws of Michigan differ in wording of statute of limitations from original copy, latter should be received.

Under indictment for destroying a vessel with intent to prejudice underwriters, it is sufficient to show that insurance company was de facto organized and acting.

Approved in People v. Morley, 8 Cal. App. 376, 97 Pac. 86, in prosecution for arson, proof that insurer de facto corporation sufficient proof of insurer's existence as a corporation; Fields v. United States, 27 App. D. C. 445, receiver of corporation cannot question its de facto existence, when being prosecuted for embezzlement of corporation funds; Territory v. Walker, 16 N. M. 614, 120 Pac. 338, in prosecution for larceny, allegation of ownership of property in corporation met by proof of de facto corporation; State v. Missio, 105 Tenn. 225, 58 S. W. 217, holding incorporation of foreign corporation cannot be proved by list of foreign corporations published by Secretary of State in public volumes of acts of legislature; Arnold v. State, 74 Tex. Cr. 272, 168 S. W. 124, in prosecution for arson, legal existence of insurance company need not be proven; Selma etc. R. R. Co. v. Tipton, 5 Ala. 805, 39 Am. Dec. 353, holding persons acting publicly as officers of corporation are presumed to be rightfully in office and legally performing their duties; People v. Holden, 28 Cal. 133, it is presumed that ballots cast in an election are all returned to county clerk, and that they have not been mutilated; People v. Frank, 28 Cal. 519, upon trial for forging draft on corporation, evidence that it

was acting as corporation is sufficient; People v. Ah Sam, 41 Cal. 652, where indictment charged possession of counterfeit bills in form of bills of banking company, existence of corporation was proved by reputation; People v. Hughes, 29 Cal. 260, 263, on trial for arson to defraud insurance company it is sufficient to prove de facto corporation; Miller v. People, 13 Colo. 168, 21 Pac. 1026, where ownership of stolen goods is alleged in corporation, its corporate existence, at least de facto, must be shown; State v. Byrne, 45 Conn. 281, 282, upon information for burning building with intent to defraud an insurance company it is sufficient to establish de facto organization of company; Damon's Case, 6 Me. 150, on trial for bigamy, oral proof of official character of minister performing ceremony is prima facie evidence of his authority; State v. Tucker, 84 Mo. 25, under indictment for arson with intent to defraud, it was not necessary that policy was valid or the insurance company legally incorporated; Shinn v. Commonwealth, 32 Gratt. 908, to same effect, where secretary of building and fund association was indicted for larceny of check.

Distinguished in In re Jefferson Casket Co., 182 Fed. 693, no jurisdiction conferred on bankruptcy court by filing petition signed by president without authorization of board of directors.

Presumption as to incorporation. Note, 22 L. R. A. 278.

In piracy, it is sufficient to establish proprietary title to ship by evidence of actual possession of party claiming to be owner.

Cited in United States v. Peterson, 1 Wood. & M. 314, Fed. Cas. 16,037, to render vessel American, so as to punish officers aboard, it is enough to show that she sailed from an American port and was apparently owned and controlled by Americans.

Terms "any person or persons," as used in crimes act of 1804, extend to corporations and bodies politic as well as to natural persons.

Approved in Pinney v. Nelson, 183 U. S. 149, 46 L. Ed. 127, 22 Sup. Ct. 55, holding obligation of contract of stockholder in foreign corporation cannot be impaired by provision of Cal. Civ. Code, § 322, imposing same personal liability upon stockholders of foreign corporations doing business within the State as upon stockholders of domestic corporation; Conococheague Club v. State, 116 Md. 325, 81 Atl. 605, an incorporated social club is "a person" within meaning of law prohibiting sale of intoxicating liquors without license; Albion Nat. Bank v. Montgomery, 54 Neb. 683, 74 N. W. 1103, holding the inhibition contained in section 5197, Rev. Stats. U. S., forbids taking of usurious interest by national bank from artificial as well as natural person; Martin v. Atlas Estate Co., 72 N. J. Eq. 419, 65 Atl. 882, service of summons on officer of corporation required to convey such fact to corporation tantamount to personal service; dissenting opinion in Hale v. Henkel, 201 U. S. 85, 50 L. Ed. 670, 26 Sup. Ct. 370, majority holding corporation charged with violation of anti-trust act is entitled to immunity from compulsory production before grand

jury, under subpoena duces tecum, of all papers and contracts between it and other companies; Beaston v. Farmers' Bank, 12 Pet. 135, 9 L. Ed. 1030, holding a banking corporation is a person within the judiciary act of 1879; Bank of Augusta v. Earle, 13 Pet. 588, 10 L. Ed. 308, bank is person in contemplation of law, and may contract outside of its place of residence if permitted by the laws of the place of contract; County of San Mateo v. S. P. R. R. Co., 8 Sawy. 284, 13 Fed. 759, private corporations are persons within meaning of Fourteenth Amendment, and as to their property are entitled to equal protection of laws; Planters' etc. Bank v. Andrews, 8 Port. 427, corporation is person within meaning of attachment laws; Columbus v. Rodgers, 10 Ala. 44, a corporation has power to purchase necessary franchise in another State; Watson v. Thompson Lumber Co., 49 Ark. 86, 4 S. W. 63, a foreign corporation engaged in business in another State cannot be considered resident thereof; S. C. R. R. Co. v. McDonald, 5 Ga. 543, foreign corporation is considered to be person, and its property within State subject to attachment; S. W. R. R. Co. v. Paulk, 24 Ga. 362, corporations are embraced in statute, under designation of persons, where not expressly excepted; Martin v. Mobile & Ohio R. R. Co., 7 Bush (Ky.), 123, a railroad corporation may contract outside of State of its organization; Frazier v. Willcox, 4 Rob. (La.) 533, foreign corporation authorized to contract in Louisiana, may so contract where its charter contains no prohibition; State v. Easton Social Club, 73 Md. 102, 10 L. R. A. 66, 20 Atl. 784, "any person," used in act prohibiting sale of liquors, includes artificial persons, and subjects them to loss of franchise; Dickie v. Boston & Albany R. R. Co., 131 Mass. 517, railroad corporation is person within act requiring notice of omission to "persons" obliged to keep a highway in repair; Brookhouse v. Union Ry. Co., 132 Mass. 180, street railroad company is person within statute fixing penalty for torts; Commercial Bank v. Nolan, 7 How. (Miss.) 524, a bank is a "person" within the law prohibiting usury; Shockley v. Fisher, 75 Mo. 501, corporation is considered person and may make an assignment under statute, for benefit of creditors; Risley v. Phenix Bank, 83 N. Y. 336, 38 Am. Rep. 432, act of Congress, providing for seizure of property of "persons" engaged in the Rebellion, applies to corporations; Railroad Co. v. Gibbes, 27 S. C. 400, 4 S. E. 55, corporation has rights guaranteed by Constitution to natural persons; Bank of U. S. v. Merchants' Bank, 1 Rob. (Va.) 589, suit in equity may be brought against a foreign corporation under an act defining procedure in courts of equity against absent debtors; Crafford v. Supervisors, 87 Va. 116, 10 L. R. A. 131, 12 S. E. 148, act providing upon application of "persons" paying one-third of the taxes, an election shall be held to determine for or against removal of courthouse, includes corporations; Curtis v. McCullough, 3 Nev. 216, in mandamus proceedings against superintendent of foreign corporation by one claiming office; Albion Nat. Bank v. Montgomery, 54 Neb. 683, 74 N. W. 1103, inhibition against national bank taking usurious interest applies to artificial as well as to natural persons.

Distinguished in Farmers' etc. Ins. Co. v. Harrah, 47 Ind. 240, corporation is not citizen within meaning of Constitution of United States, declaring citizens of each State shall be entitled to all privileges and immunities of citizens of several States; Commonwealth v. Phoenix Bank, 11 Met. 149, bank is not person within the meaning of act of Congress, requiring priority of payment to be made to United States upon insolvency of debtor; In re Will of Fox, 52 N. Y. 535, **11 Am. Rep. 754**, government of United States cannot take by devise, under statute authorizing certain "persons" so to take.

Word "person" as including private corporation. Note, **20 Ann. Cas. 742.**

Scope of term "persons." Note, **19 L. R. A. 225.**

Setting fire to building or property with intent to defraud insurance company as crime. Note, **Ann. Cas. 1913C, 1169.**

Domicile of wife for purpose of divorce suit. Note, **16 L. R. A. 498.**

Miscellaneous. Cited in Mathews v. Eddy, 4 Or. 230, holding that in construing contracts it is sometimes necessary to restrict meaning of words, as in case of clerical error; United States v. Platt, 27 Fed. Cas. 549, but not in point.

11 Wheat. 413–414, 6 L. Ed. 508, THE ANTELOPE.

Miscellaneous. Cited in The Schooner Tilton, 5 Mason, 471, Fed. Cas. 14,054, in incidental references to the same case in 10 Wheat, 66, **6 L. Ed. 268.**

11 Wheat. 414–415, 6 L. Ed. 508, WILLIAMS v. BANK OF THE UNITED STATES.

Where there is joint judgment against several defendants and one only sues out writ of error, without joining others it is irregular.

Approved in The Bylands, 231 Fed. 105, joint and several decrees against claimant of libeled vessel in admiralty and his surety on release bond cannot be appealed from by claimant alone; Provident Life & Trust Co. v. Camden etc. Ry. Co., 177 Fed. 857, 101 C. C. A. 68, joint defendant in equity suit to foreclose mortgage not entitled to appeal from decree of foreclosure against all parties; Port v. Schloss Bros. & Co., 149 Fed. 732, where two partners jointly sued on firm debt and judgment entered against both, one cannot appeal alone in absence of service or sufficient showing for nonjoinder; Loveless v. Ransom, 107 Fed. 627, holding where judgment is joint all parties against whom it is rendered must join in writ of error on appeal; Kidder v. Fidelity Ins., Trust & Safe Deposit Co., 105 Fed. 823, holding where one of several interveners appeals from decree in equity and cites only complainant and receiver of one of several defendants, the appeal will be dismissed, as all parties in interest should have been served; Owings v. Kincannon, 7 Pet. 402, **8 L. Ed. 728**, dismissing appeal where all

parties to decree in the Circuit Court had not joined therein; The Protector, 11 Wall. 87, **20 L. Ed. 48**, dismissing appeal where several appellants appeared in title as "William A. Freeborn & Co.," it nowhere appearing in proceedings on appeal who constitute the "Co."; Simpson v. Greeley, 20 Wall. 157, **22 L. Ed. 339**, dismissing writ of error in which none of the codefendants of plaintiff in error joined; Masterson v. Herndon, 10 Wall. 417, **19 L. Ed. 954**, dismissing appeal where one of parties refused to join in writ; Feibelman v. Packard, 108 U. S. 15, **27 L. Ed. 634**, 1 Sup. Ct. 138, dismissing writ of error sued out by one of several joint defendants, without summons and severance or equivalent proceedings; Estis v. Trabue, 128 U. S. 230, **32 L. Ed. 438**, 9 Sup. Ct. 60, dismissing writ of error in which both plaintiffs and defendants are designated merely by name of firm; Hardee v. Wilson, 146 U. S. 181, **36 L. Ed. 933**, 13 Sup. Ct. 39, dismissing appeal from decree in equity, taken by one of several joint defendants below; Humes v. Third Nat. Bank, 54 Fed. 920, 13 U. S. App. 86, sureties upon bond cannot have judgment rendered thereon against them, reviewed upon writ of error without joining principal and all other defendants in writ; Standley v. Jaffray, 13 Fla. 597, dismissing writ of error sued out by one of two joint defendants, notice and refusal to join not being shown; Cameron v. Sheppard, 71 Ga. 782, dismissing writ of error and holding joint defendants in error must be named, words "and others" not being sufficient; Cumberland Coal & Iron Co. v. Jeffries, 21 Md. 381, dismissing appeal taken by one of several defendants in an action of trespass; Curten v. Atkinson, 29 Neb. 620, 46 N. W. 94, dismissing petition of error filed by sureties upon bond who with their principal were defendants below; Doty v. Strong, 1 Pinn. 170, quashing writ of error, prosecuted by one of several joint defendants others not being summoned and severed; Hampton v. Rouse, 13 Wall. 188, **20 L. Ed. 594**, following this practice upon motion to dismiss, referred to in general discussion in Case of the Sewing Machine Companies, 18 Wall. 579, **21 L. Ed. 920**, holding case not removable to United States courts upon application of two of joint defendants who are citizens of another State.

Distinguished in Mussina v. Cavazos, 6 Wall. 362, **18 L. Ed. 812**, holding it not fatal where writ of error describes parties as plaintiffs and defendants in error, as they appear in Supreme Court, instead of describing them as they stood in court below; Guarantee Trust Co. v. Buddington, 23 Fla. 520, 2 South. 888, it is not necessary to join as appellee party whose interests will not be affected by any decree which may be made as to interests of appellants.

Writ of error. Note, **91 Am. Dec. 195.**

Removal of causes from State to Federal courts. Note, **12 Am. Rep. 548.**

Practice and procedure governing transfer of causes to Federal Supreme Court for review. **Note, 66 L. R. A. 855.**

11 Wheat. 415–417, 6 L. Ed. 508, BARNES v. WILLIAMS.

Where special verdict does not find essential facts, though there is sufficient evidence to establish them, Supreme Court will remand with directions to award venire facias de novo.

Approved in Anglo-American etc. Co. v. Lombard, 132 Fed. 734, 68 C. C. A. 89, following rule; Hill v. Walker, 167 Fed. 254, 92 C. C. A. 633, general finding in favor of plaintiff in an action at law without a jury will support jurisdiction of court on appeal where want of jurisdiction not objected to below; Towle v. First Nat. Bank, 153 Fed. 567, 82 C. C. A. 520, applying rule to special findings of trial court; dissenting opinion in Clark v. Belt, 223 Fed. 581, 138 C. C. A. 1, majority refusing to reverse judgment where prevailing party on facts found entitled to larger judgment; Garland v. Davis, 4 How. 148, 154, 11 L. Ed. 915, 917, where the declaration was in tort and plea was "non assumpsit," and verdict followed plea, defect was held material and judgment reversed; Stickney v. Wilt, 23 Wall. 163, 23 L. Ed. 54, where the Circuit Court entertained an appeal in bankruptcy proceedings, over which they had no jurisdiction, cause remanded with directions to dismiss; Cleveland Ins. Co., v. Globe Ins. Co., 98 U. S. 375, 25 L. Ed. 204, where the same question was before the court; Hodges v. Easton, 106 U. S. 411, 27 L. Ed. 171, 1 Sup. Ct. 310, reversing judgment not sustained by special verdict and ordering new trial; Sun M. Ins. Co. v. Ocean Ins. Co., 107 U. S. 501, 27 L. Ed. 342, 1 Sup. Ct. 592, dismissing libel not sustained by facts found in Circuit Court; Saltonstall v. Birtwell, 150 U. S. 420, 37 L. Ed. 1129, 14 Sup. Ct. 170, where findings of fact in an action to recover duties paid under protest were insufficient to support judgment; Lee v. Campbell, 4 Port. 203, refusing to aid defective special verdict by reference to extrinsic facts which appear upon record; Sewall v. Glidden, 1 Ala. 59, in action of detinue, where findings of jury were uncertain and defective; Day v. Webb, 28 Conn. 145, where verdict was not intelligent answer to issue and was insufficient as verdict for either party; La Frombois v. Jackson, 8 Cow. 600, 18 Am. Dec. 470, where necessary fact that plaintiff held under French grant was not found; Thompson v. The People, 23 Wend. 600, cited by way of analogy, reversing, by divided court, judgment founded upon general verdict; Kuhlman v. Medlinka, 29 Tex. 391, in judgment upon special verdict, where jury did not find contract usurious, court cannot assume that such was fact; Dawson v. Watkins, 2 Rob. (Va.) 267, where special verdict did not find essential fact of seisin in demandent; Holt v. Van Eps, 1 Dak. Ter. 212, 46 N. W. 691, where jury failed to pass upon issue of ownership; Prentice v. Zane, 8 How. 484, 12 L. Ed. 1166, but not followed, parties waiving the error; Woodbury, J., follows principal case in dissenting opinion, p. 487, 12 L. Ed. 1168; dissenting opinion in Smith v. Sac County, 11 Wall. 160, 162, 20 L. Ed. 109, arguing that the Supreme Court could not determine issues of fact but may determine that facts found do not support judgment; Ward v. Cochran, 150 U. S. 608, 37 L. Ed. 1198, 14 Sup Ct. 233, where special verdict to try title claimed by prescription failed to find that

possession was active and exclusive; United States v. Page, 27 Fed. Cas. 407, where court refused to construe finding that sailor had "left the ship" as a finding that he absconded.

Distinguished in Ward v. Gradin, 15 N. D. 657, 109 N. W. 60, if facts not found admitted by pleadings new trial will not be granted; Suydam v. Williamson, 20 How. 441, 15 L. Ed. 983, there being a perfect finding by jury upon issue joined; Myers v. Smith, 15 Iowa, 184, holding fact of appellant's liability upon partnership agreement was clearly found; People v. Hilsdale etc. Road Co., 23 Wend. 259, where essential facts of non-repair and suspension of business were found.

What special verdict must contain. Note, 24 L. R. A. (N. S.) 25, 74.

Miscellaneous. Cited in Baltimore & Pot. R. R. Co. v. Trustees, 91 U. S. 131, 23 L. Ed. 262, holding if transcript does not show any error in the record the judgment must be affirmed, except in case of mistrial; Stewart v. Salamon, 97 U. S. 364, 24 L. Ed. 1045, to citing principal case as belonging to limited class of cases in which there has been mistrial.

11 Wheat. 417–419, 6 L. Ed. 508, UNITED STATES v. KELLY.

Although crimes act of 1790 does not define offense of endeavoring to make revolt, court may give judicial definition of it.

Cited in United States v. Seagrist, 4 Blatchf. 422, Fed. Cas. 16,245, holding that United States courts have jurisdiction of the crime; United States v. Almeida, 24 Fed. Cas. 776, recognizing definition of revolt as laid down by act of Congress in 1835.

Offense of revolt against authority of ship's master, defined.

Definition adopted in United States v. Forbes, Crabbe, 560, Fed. Cas. 15,129, in charge of jury trying persons for this offense; United States v. Hemmer, 4 Mason, 107, Fed. Cas. 15,345, in explanatory note any intention of narrowing the doctrine of the principal case is disclaimed. Cited in United States v. Haines, 5 Mason, 277, Fed. Cas. 15,275, denying any variance between instructions given and definition as laid down above; United States v. Peterson, 1 Wood. & M. 310, Fed. Cas. 16,037, arguendo; United States v. Huff, 13 Fed. 635, 637, construing Revised Statutes, sections 5359, 5360.

Miscellaneous. Cited in United States v. O'Sullivan, 27 Fed Cas. 369, holding it generally sufficient to describe statutory crime in words of statute.

Where Circuit Court is divided upon point assigned as reason for arrest of judgment, division may be certified to Supreme Court.

Cited in Daniels v. Railroad Co., 3 Wall. 255, 18 L. Ed. 225, dismissing case for want of jurisdiction, where matters of fact as well as points of law were certified to the court; United States v. Fullerton, 6 Blatchf. 276,

Fed. Cas. 15,175, refusing to postpone trial to await holding of court by two judges with a view to certificate of division of opinion.

11 Wheat. 419–428, 6 L. Ed. 509, UNITED STATES v. TAPPAN.

The words "true value," in the eleventh section of the act of 1818, import the same thing as actual cost.

Distinguished in United States v. Twenty-five Cases of Cloths, Crabbe, 389, Fed. Cas. 16,563, holding act of 1799, speaking of actual cost of goods does not mean same thing as value fixed by appraisement; United States v. One Hundred and Fifty Bales etc., 27 Fed. Cas. 271, to entail forfeiture for undervaluation there must be concurrence of undervaluation and intent to evade payment of duties.

Miscellaneous. Cited in Laderburg v. Miller, 210 Fed. 617, 127 C. C. A. 250, proviso that homestead exemption of personal property shall not apply to "shifting merchandise" applies to goods boxed for removal in contemplation of bankruptcy; United States v. Reindeer, 27 Fed. Cas. 761, to effect that usage or custom in violation of statute may not protect one who breaks law; Lawson v. Jeffries, 47 Miss. 706, 12 Am. Rep. 354.

11 Wheat. 429–430, 6 L. Ed. 511, CHACE v. VASQUEZ.

If Circuit Court decrees damages on libel, and that commissioners be appointed to ascertain amount, no appeal lies until commissioners have reported.

Cited in Canter v. American etc. Ins. Cos., 3 Pet. 318, 7 L. Ed. 692, holding the Supreme Court has appellate jurisdiction upon final decrees only; Corning v. Troy Nail Factory, 15 How. 467, 14 L. Ed. 775, where there was no final decree to appeal from, court below not having acted upon mandate or entered final decree; McGourkey v. Toledo & Ohio Ry. Co., 146 U. S. 545, 36 L. Ed. 1083, 13 Sup. Ct. 172, a decree ordering property to be turned over by receiver to petitioner is not final, authorities collected and reviewed; McLean v. Clark, 23 Fed. 862, hearing upon demurrer is not final hearing, where defendant has a right to answer bill upon overruling of his demurrer; Postal Tel. Cable Co. v. Southern Ry. Co., 90 Fed. 212, no appeal lies from judgment sustaining demurrer to answer in condemnation proceedings leaving proceedings for appointment of commission and assessment of damages still to be taken by court.

Final and interlocutory decrees. Note, 60 Am. Dec. 429.

11 Wheat. 431–441, 6 L. Ed. 512, MILLS v. BANK OF UNITED STATES.

A notice of protest properly directed and mailed upon the day of protest is sufficient to charge indorser.

Cited in Dickens v. Beal, 10 Pet. 581, 9 L. Ed. 541, holding diligence consists in sending notice by first mail of the day of protest.

Notice of nonpayment to indorser is not defective because of immaterial variance, if it conveys sufficient knowledge of particular note dishonored.

Approved in Derham v. Donohue, 155 Fed. 388, 12 Ann. Cas. 372, 83 C. C. A. 657, notice of presentment sufficient though dated by inadvertence one year ahead, indorser not being deceived thereby; First Nat. Bank v. Golden, 19 Cal. App. 505, 126 Pac. 499, charging indorser with notice that order presented on savings account on face payable on demand was payable under conditions prescribed by bank; Landa v. Traders' Bank, 118 Mo. App. 366, 94 S. W. 773, custom of collecting bank in mingling moneys collected on draft sent by forwarding bank for collection with funds of forwarding bank did not make collecting bank agent of depositor who placed draft in bank for collection; Bank of Alexandria v. Swann, 9 Pet. 47, 9 L. Ed. 46, holding notice sufficient, although the amount was misstated; Dennistoun v. Stewart, 17 How. 608, 15 L. Ed. 229, mistake in abbreviations not fatal, where every material fact necessary to identify the bill was set forth; Bank of U. S. v. Watterston, 4 Cr. C. C. 445, Fed. Cas. 941, notice not invalidated by mistake in the recital of date of note; Browning v. Andrews, 3 McLean, 578, Fed. Cas. 2040, holding notice need not be in any particular form; Nelson v. First Nat. Bank, 69 Fed. 801, 32 U. S. App. 554, notice not deficient because not expressly stating that bank looks to indorser for payment; Stephenson v. Primrose, 8 Port. 159, 33 Am. Dec. 283, a verbal notice is sufficient; Crawford v. The Branch Bank, 7 Ala. 212, where notice identified bills with reasonable certainty; Leigh v. Lightfoot, 11 Ala. 938, notice describing bill as it was copied on protest sufficient; Saltmarsh v. Tuthill, 13 Ala. 401, it is matter for court to determine whether or not written notice was sufficient; Thompson v. Williams, 14 Cal. 163, holding verbal notice sufficient, it appearing that indorser knew particular note referred to; Eastman v. Thurman, 24 Cal. 383, a notice of nonpayment sufficient, though not setting forth refusal of payment; Kilgore v. Bulkley, 14 Conn. 393, form of notice of nonpayment not material; Gill v. Palmer, 29 Conn. 59, notice which described bill "as drawn by you" sufficient in absence of proof that indorser was misled thereby; Spann v. Baltzell, 1 Fla. 324, 46 Am. Dec. 374, where notice contained substance and facts of protest; Field v. Thornton, 1 Ga. 311, decision of lower court that due notice of nonpayment of bill was not equivalent to notice of its dishonor was erroneous; Mainer v. Spurlock, 9 Rob. (La.) 163, notice of protest of draft sufficient, though not containing the names of drawees; Plympton v. Preston, 4 La. Ann. 358, a recital in notice that mortgage was executed in consideration of certain sum, when in fact said amount was not original amount, but balance due thereon, does not invalidate same; Denegra v. Hiriart, 6 La. Ann. 100, where notice did not state at what time payment was due; Howe v. Bradley, 19 Me. 35, notice need not state who was holder of note protested; Crocker v. Getchell, 23 Me. 398, description sufficiently accurate and statement that demand had been made, unnecessary; Bradley v. Davis, 26 Me. 51, holding it unnecessary to state the name of holder of protested note in notice; Sasscer v. Farmers' Bank, 4 Md. 420, 421, whether or not indorser was misled by misdescription in notice is question for jury; Selden v. Washington, 17 Md. 387, 79 Am. Dec. 660, notice not stating that demand

Distinguished in Landa v. Traders' Bank, 118 Mo. App. 366, 94 S. W. 773, where depositor and bank made contract whereby bank was to collect drafts for ten per cent, and bank's custom was to send collections to correspondents who gave credit to bank, custom did not make correspondent agent of depositor; Adams v. Otterback, 15 How. 545, 14 L. Ed. 809, holding usage must apply to place rather than to particular bank, and new usage adopted without notice to public, and acquiescence therein is not binding; Beeding v. Pic, 2 Cr. C. C. 152, Fed. Cas. 1227, demand of payment of note on day after the last day of grace is too late; dissenting opinion in British & Am. Mortgage Co. v. Tibballs, 63 Iowa, 474, 19 N. W. 321, arguing that usage of bank to receive its own certificates as money, should not bind one who placed a promissory note payable in money in bank for collection; Wood v. Corl, 4 Met. 205, there being no proof of special custom, rule of the general law merchant permitting grace was followed; Mechanics' Bank v. Merchants' Bank, 6 Met. 24, where usage of banks to give notice before expiration of days of grace was not shown; New York Iron Mine v. Citizens' Bank, 44 Mich. 356, 6 N. W. 829, authority of agent to draw post-dated bills of exchange upon his principal, not presumed from his having done so before without objection, party relying upon his authority not knowing that fact; Hill v. Norvel, 3 McLean, 585, Fed. Cas. 6497, this usage applies only to notes negotiated by the bank.

Denied in Dabney v. Campbell, 9 Humph. 681, 682, 685, holding indorser could not be charged, he not having express knowledge of usage of bank, or previous dealings from which such knowledge could be inferred.

Service of notice of dishonor. Note, **38 Am. Dec. 614.**

Usage of banks. Note, **50 Am. Dec. 97.**

Banking customs. Note, **21 L. R. A. 442, 445.**

Notice of nonpayment of note, payable at bank, which fails to state that payment was demanded at bank when due, is not insufficient.

Approved in Rudd etc. v. Deposit Bank, 105 Ky. 448, 49 S. W. 209, holding a notice of protest need not mention holder's name or bank at which note is payable provided it is reasonably identified; Rudd v. Deposit Bank (Ky.), 49 S. W. 209, holding notice sufficient though thus defective.

Whether demand of payment was duly and regularly made upon maker of note, is a matter of evidence, to be established at trial.

Cited in Stuckert v. Anderson, 3 Whart. 120, holding indorser not liable where a proper demand was not shown.

By general law, demand of payment of a bill or note must be made on the third day of grace.

Cited in Bank of Tennessee v. Officer, 3 Baxt. 175, holding note payable six months after 30th of May, due upon December 3d, and demand on December 2d is of no avail; Carey etc. Lumber Co. v. First Nat. Bank, 86 Tex. 300, 301, 24 S. W. 260, protest must be made upon last day of grace

in order to hold indorser; Jackson v. Henderson, 3 Leigh (Va.), 205, 213, it is the duty of court to state general rule, and if special custom is relied upon, it must be set up by party relying thereon; Duerson v. Alsop, 27 Gratt. 239, following general rule in allowing days of grace in payment of negotiable paper.

Court rule requiring plaintiff, in suit on note or bond, to prove due execution thereof only where defendant denies it upon affidavit, is rule.

Approved in Roberts v. White, 32 R. I. 190, **Ann. Cas. 1912D, 793**, 78 Atl. 498, upholding rule of Superior Court putting upon plaintiff suing administrator proof of defendant's representative character upon being served with notice from defendant; Cumming v. Bradley, 57 Ala. 237, where probate court adopted a rule to facilitate settlements of executors, etc.; Odenheimer v. Stokes, 5 Watts & S. 177, upholding similar District Court rule.

Validity of rule of court dispensing with introduction of evidence on point not disputed by parties. Note, **Ann. Cas. 1912D, 796.**

In action against indorser of note, plaintiff must prove indorsement, unless proof waived.

Approved in **Melton v. Pensacola Bank & Trust Co., 190 Fed. 132, 111** C. C. A. 166, proof of indorsement waived by admission thereof in answer in action on promissory note; Sears v. Daly, 43 Or. 350, 73 Pac. 6, in action on note where execution denied, there is no presumption that it was regularly executed; Stroud v. Harrington, Hempst. 118, Fed. Cas. 13,546a, holding, in action against the maker of a note by an assignee, the indorsements must be proved.

In action upon promissory note on which interest was not stipulated, jury may add interest, by way of damages for delay.

Cited in Remke v. Clinton, 2 Utah, 238, where, in action of tort, jury allowed interest upon the value of property destroyed.

Parol evidence to contradict written instrument. Note, **11 E. R. C. 231.**

Miscellaneous. Cited in Cudahy etc. Co. v. State Nat. Bank, 134 Fed. 545, 67 C. C. A. 662.

11 Wheat. 441–445, 6 L. Ed. 515, MILLER v. M'INTYRE.

Validity of Kentucky statute respecting Virginia-Kentucky compact considered, but not decided.

Cited in Miller v. M'Intyre, 6 Pet. 63, **8 L. Ed. 321**, where the same case was again before Supreme Court; Beard v. Smith, 6 T. B. Mon. 464, 465, holding an entry valid where the survey was made within the time extended by statutes of Kentucky; **Boone v. Helm, 4 Dana** (Ky.), 415, 416, to same effect.

11 Wheat. 446–467, 6 L. Ed. 516, CARNOCHAN v. CHRISTIE.

Award must decide whole matter submitted, must not extend to matter not comprehended in submission, and must be certain, final and conclusive.

Approved in Walden v. McKinnon, 157 Ala. 295, **22 L. R. A. (N. S.) 718**, 47 South. 875, cited in dictum as to certainty of award in holding that there could be no award with reference to title to real property on an oral submission; Strong v. Barbour, 1 Mackey (D. C.), 211, reversing judgment based on reward which professed to be nothing more than a recommendation; Stemmer v. Insurance Co., 33 Or. 83, 53 Pac. 504, holding an award made after loss by fire will not be set aside by the court because certain property covered by the policy was not included; Hecker v. Fowler, 2 Wall. 131, **17 L. Ed. 761**, sustaining award as being within rule; De Groot v. United States, 5 Wall. 430, **18 L. Ed. 703**, holding Secretary of War transcended his authority in undertaking to award for real estate, which was not embraced in resolution under which he was acting; James v. Thurston, 1 Cliff. 369, Fed. Cas. 7186, setting aside award, clearly deficient in necessary particulars; Chicago M. & St. P. Ry. Co. v. Stewart, 19 Fed. 8, setting aside award where arbitrator decreed specific performance with variation; Roundtree v. Turner, 36 Ala. 558, remanding case where arbitrators found terms of executory contract, but failed to find amount due thereon or facts from which amount could be ascertained; Hays v. Hays, 2 Ind. 30, avoiding award for uncertainty; Church of St. Patrick v. Dakin, 1 Rob. (La.) 206, where arbitrators exceeded their authority by annulling contract between parties; Leslie v. Leslie, 50 N. J. Eq. 111, 24 Atl. 322, refusing to set aside award where rejected evidence was not sufficiently set forth to enable court to judge of its sufficiency; Garrow v. Nicolai, 24 Or. 82, 32 Pac. 1038, setting aside award stating partnership account, where other issues were included; Toomey v. Nichols, 6 Heisk. 162, where arbitrators to make a survey exceeded their authority; Pettibone v. Perkins, 6 Wis. 624, where award was so uncertain, vague and inexplicit, that it could not be enforced.

Necessity that arbitrators determine all matters submitted to arbitration. Note, **Ann. Cas. 1916A, 347, 351.**

Necessity that award decide all matters submitted and be certain and final. Note, **3 E. R. C. 428.**

Where bill is filed to set aside conveyance, conveyance cannot be established without cross-bill filed by defendant.

Approved in Royal Union Mut. Life Ins. Co. v. Wynn, 177 Fed. 292, 293, in suit by insurance company to cancel policy for misrepresentations, a cross-bill proper by beneficiary to recover on policy; American Graphophone Co. v. Smith, 26 App. D. C. 568, where contract is attacked by complainant and defendant seeks to establish its validity he must file cross-bill; Koch v. Sumner, 145 Mich. 361, **116 Am. St. Rep. 302, 9 Ann. Cas. 225**, 108 N. W. 727, in action to enforce mechanic's lien, defendant may main-

tain cross-bill to recover damages for defective construction; Washington R. R. Co. v. Bradley, 10 Wall. 303, 19 L. Ed. 895, where complainants prayed that trustees be enjoined from selling property, court could not decree sale of the property without aid of cross-bill; Meissner v. Buck, 28 Fed. 163, holding converse of above rule true, where original bill sought to carry a conveyance into execution, conveyance could not be set aside without cross-bill; Sanford v. Cloud, 17 Fla. 575, reversing chancellor's decree, directing performance of a contract where plaintiff failed to make out his case in bill to set it aside; Carlton v. Southern Mutual Ins. Co., 72 Ga. 393, where bill was filed to ascertain who were legally interested in fund, cross-bills by defendants setting up claims as to funds are germane and not demurrable; Springfield Milling Co. v. Barnard Mfg. Co., 81 Fed. 263, 264, 49 U. S. App. 445, in bill for foreclosure of mechanics' lien, cross-bill alleging a nonfulfillment of guaranties was proper; Haire v. Baker, 5 N. Y. 362, defendant cannot reform deed without aid of cross-bill; Nelson v. Dunn, 15 Ala. 513, defining purposes of cross-bill.

Distinguished in Lockwood v. Cleveland, 6 Fed. 724, in suit against interfering patentee, defendant is not required to file cross-bill in order to obtain affirmative relief.

Nature and objects of cross-bills. Note, 83 Am. Dec. 253.

11 Wheat. 467–475, 6 L. Ed. 531, UNITED STATES v. ORTEGA.

Indictment under act of 1790, for offering violence to person of foreign minister, is not case "affecting ambassadors, and other public ministers and consuls," within article III of Constitution.

Cited in Bylew v. United States, 13 Wall. 594, 595, 20 L. Ed. 642, holding "the civil rights bill," giving jurisdiction to the Circuit Court in causes "affecting" certain persons, does not apply to mere witnesses in case.

Jurisdiction of action against foreign consul or other commercial agent of foreign country. Note, 19 Ann. Cas. 915.

Exemption and privileges of consuls. Note, 45 L. R. A. 581.

Miscellaneous. Cited in Ex parte Martinez, 66 Tex. Cr. 107, 145 S. W. 1015, to point that Federal courts have jurisdiction over cases arising under treaties and law of nations; Börs v. Preston, 111 U. S. 257, 28 L. Ed. 421, 4 Sup. Ct. 409, in discussions as to whether the Circuit Court may under any circumstances hear suit against a foreign consul; in Ames v. Kansas, 111 U. S. 467, 28 L. Ed. 489, 4 Sup. Ct. 446, discussing extent of original jurisdiction of Supreme Court; St. Luke's Hospital v. Barclay, 3 Blatchf. 265, Fed. Cas. 12,241, citing note at end of principal case; Gittings v. Crawford, Taney, 5, 7, Fed. Cas. 5465, holding constitutional provision giving original jurisdiction to the Supreme Court in cases affecting ambassadors, etc., does not render unconstitutional an act of Congress giving jurisdiction to District Court in certain civil cases against consuls and vice-consuls; in Graham v. Stucken, 4 Blatchf. 51, Fed. Cas. 5677, in discussion of

jurisdiction of Circuit Court over foreign consuls; In re Iasigi, 79 Fed. 753, exclusive jurisdiction of Federal courts in criminal cases against foreign consuls, does not affect commitment or extradition proceedings; Delafield v. Illinois, 2 Hill, 171, in discussion of the exclusive jurisdiction of the Supreme Court; State v. Strauder, 11 W. Va. 808, in general discussion of same question; United States v. Rhodes, 1 Abb. 32, Fed. Cas. 16,151, holding constitutional, Civil Rights Bill.

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January Term, 1827,

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN JANUARY TERM, 1827.

BY HENRY WHEATON.

Counselor at law.

VOL. XII.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, Chief Justice.
The Hon. BUSHROD WASHINGTON, Associate Justice.
The Hon. WILLIAM JOHNSON, Associate Justice.
The Hon. GABRIEL DUVALL, Associate Justice.
The Hon. JOSEPH STORY, Associate Justice.
The Hon. SMITH THOMPSON, Associate Justice.
The Hon. ROBERT TRIMBLE, Associate Justice.*
WILLIAM WIRT, Esq., Attorney-General.

*Appointed May 9th, 1826.

REPORTS OF THE DECISIONS

IN THE

Supreme Court of the United States.

JANUARY TERM, 1827.

1*] [*Prize. Piratical Aggression. Lawful Commission. Probable Cause.]

THE PALMYRA, Escurra, Master.

A question of probable cause of seizure, under the piracy acts of the 3d March, 1819, ch. 75, and the 15th of May, 1820, ch. 112.

In such a case, although the crew may be protected by a commission bona fide received, and acted under, from the consequences attaching to the offense of piracy, by the general law of nations, although such commission was irregularly issued; yet, if the defects in the commission be such as, connected with the insubordination and predatory spirit of the crew, to excite a justly founded suspicion, it is sufficient, under the act of Congress, to justify the captors for bringing in the vessel for adjudication, and to exempt them from costs and damages.

Although probable cause of seizure will not exempt from costs and damages, in seizures under mere municipal statutes, unless expressly made a ground of justification by the law itself, this principle does not extend to captures jure belli, nor to marine torts generally, nor to acts of Congress authorizing the exercise of belligerent rights to a limited extent, such as the piracy acts of the 3d of March, 1819, c. 75, and the 15th of May, 1820, c. 112.

2*] *APPEAL from the Circuit Court of South Carolina.

This was a libel of information under the act of Congress of the 3d of March, 1819, c. 75, entitled, "An act to protect the commerce of the United States, and punish the crime of piracy," continued in force by the act of the 15th of May, 1820, c. 112. The libel was filed by the district-attorney, as well in behalf of the United States as of the captors; and alleged that the brig Palmyra, alias the Panchita, was a vessel, from which a piratical aggression, search, depredation, restraint, and seizure, had been attempted and made, upon the high seas, in and upon the schooner Coquette, a vessel of the United States, and of the citizens thereof, and in and upon the master, officers, and crew of the said schooner Coquette, citizens of the United States; and in and upon the Jeune Eugenie, a vessel of the United States, and of the citizens thereof, and in and upon Edward L. Coffin, the master, and the officers and crew of the said vessel, being citizens of the United States; and also in and upon other vessels of the United States, their officers and crews, citizens of the United States; and in and upon other vessels of various nations, states, and kingdoms, their officers and crews, citizens and subjects of the said states and kingdoms. The vessel in question was an armed vessel ostensibly cruising as a privateer, under a commission from the King of Spain, and was captured on the high seas, on the 15th of August, 1822, by the United States vessel of war, The Grampus, commanded by Lieutenant Gregory, after a short resistance, and receiving a fire from the Grampus, by which one man was killed, and six men were wounded. The captured vessel was sent into the port of Charleston, South Carolina, for adjudication. A libel was filed, and a claim interposed; and upon the proceedings in the District Court, a decree was pronounced, restoring the brig to the claimants, without damages for the capture, injury, or detention. From this sentence, an appeal was interposed by both parties to the Circuit Court; and upon the hearing in that court, a decree was pronounced affirming so much of the decree as acquitted the brig, and reversing so much of *it as denied damages; and the [*3 Circuit Court proceeded finally to award damages to the amount of $10,288.53. From this decree an appeal was interposed in behalf of the United States and the captors, to the Supreme Court. The cause coming on to be heard in this court, at the February term, 1825, it not appearing that there had been any final decree in the Circuit Court, ascertaining the amount

NOTE.—As to damages for marine torts, see note to The Amiable Nancy, 3 Wheat. 546; as to seizures, see note to The Apollon, 9 Wheat. 362.

As to proceedings in rem, in favor of material men, and mechanics, and for supplies, etc., see notes to Blaine v. The Charles Carter, 4 Cranch, 328, and to The General Smith, 4 Wheat. 438; see also the following cases: The Aurora, 1 Wheat. 105; The Collector, 6 Wheat. 194; Ex parte Lewis, 2 Gallis. 483; Willard v. Dorr, 3 Mas. 91; The Robert Fulton, 1 Paine, 620; Jennings v. Carson, 4 Cranch, 2; The Packet, 3 Mas. 255; The Grand Trunk, 1 Paine, 73; North v. The Eagle, Be... 78; The Merchant, 1 Abb. Adm. 1; Beam v. The Mayurka, 2 Curt. C. C. 72; Taylor v. Carryl, 20 How. 583; The Gazelle, Sprague, 378; The Julia Ann, Sprague, 382; Rogen v. The Alliance, 1 Woods, 274; The Lottawanna, 20 Wall. 201; 21 Wall. 558; The Belfast, 7 Wall. 624; The Hardy, 1 Dill. 460; The General Sheridan, 2 Ben. 394; Oologaardt v. The Anna, 9 Am. L. Reg. N. S. 475; 2 Int. Rev. Rec. 130; Cunningham v. Hall, 1 Cliff. 43; The Norway, 3 Ben. 163; Reppert v. Robinson, Taney, 492; Kelsey v. The Kate Tremaine, 4 Am. L. T. U. S. cts. 92; The Selt, 3 Biss. 344; The Kate Tremaine, 5 Ben. 64; Gill. v. The Continental, 8 West. Jur. 232; The Thales, 10 Blatchf. 203.

The above case, The Palmyra, is criticised in Rice v. Minnesota and Northwestern R. C. Co. 21 How. 82, 85, as to amendment at law.

of damages, the cause was dismissed.[1] But at the last term, it being discovered that in point of fact there had been a final award of damages, which was omitted by mistake in the transcript of the record certified by the clerk of the court below, this court, on motion of the appellants, ordered the cause to be re-instated.

At the hearing in the court below, it appeared that the commission of the Palmyra was numbered 38, and entitled in the margin, "Real Pasaporte de Corso para los Mares de Indias;" that is, "A royal cruising passport for the Indian seas." The great seal of Spain was affixed to it, and it was signed with the royal sign-manual with the usual formula: "Yo el Reg." It was afterwards countersigned by the Secretary of State and Marine Affairs, and dated at Madrid, the 10th of February, 1816. The blanks in the passport or commission were filled up to Don Pablo Llanger, an inhabitant of Cadiz, to arm for war his Spanish schooner (Goleta) called the Palmyra, of ninety-three tons, one twelve-pound cannon, and eight carronades, ten-pounders, with a crew of one hundred men. A printed note on the back of the commission, signed by Juan Dios Robiou, lieutenant in the national navy, and captain of the port of Porto Rico, dated on the 5th of February, 1822, renewed the commission in favor of Llanger, as captain of the Palmyra, for a new cruise of three months, it having been originally granted for the term of three months, which had expired. The vessel, on board of which the commission was found, was in fact a brig of one hundred and sixty tons, commanded by Captain Escura. Various testimony 4*] was taken as to the *acts of piracy committed by the Palmyra upon the Coquette and the Jeune Eugenie, as to the insubordination and predatory spirit of the crew of the Palmyra, and as to the nature and circumstances attending the encounter between the Palmyra and the Grampus, which gave rise to a question of fact in respect to the justifiableness of the cause of capture. But it has not been thought necessary to analyze the testimony, as the most material facts are stated in the opinion of the court.

The Attorney-General and Mr. Hayne, for the appellants, argued, that the Palmyra was not lawfully and regularly commissioned; and that, admitting the vessel was so commissioned, she had forfeited her character by the misconduct of the the officers and crew, and acquired that of a pirate.

1. A commission to cruise is a delegated authority, and can only proceed from the sovereign.[2] Subordinate agents may be employed to execute the will of the sovereign in that respect, but the actual delegation of the power must clearly appear. The original commission being issued by the King of Spain to Captain Llanger, for a cruise of three months, which had expired, the commission was functus officio. Its subsequent extension to Captain Escura, by the port captain of Porto Rico, was without any authority from the King for that purpose.

2. A commission to cruise is given, not to the armed vessel, but to the officer commanding the vessel; and though the officer next in rank may, in his absence, succeed to his rights, he does so by becoming captain for the time being. It has, therefore, been expressly determined, that if in the absence of the master, a privateer makes a capture, it is not such a capture as vests a prize interest in the captors, but it must be condemned as a droit.[3]

2. It has become an established rule, and made necessary *by the laws of all nations, [*5 that every privateer, before she is permitted to cruise, shall give security, and this fact must appear on the face of the commission itself.[4] Such security is required by the laws of Spain, but was not given in this case.

3. The learned counsel entered into a minute examination of the facts, to show that the vessel ought to have been condemned as a piratical vessel, under the law of nations, or as having committed a piratical aggression under the acts of Congress, which were in conformity with the law of nations. They then proceeded to argue, that however this might be, there was, at all events, probable cause for the capture of the Palmyra, and for sending her in for adjudication. Probable cause had been defined to be less than evidence which would justify condemnation. In its legal sense, it means a seizure made under circumstances which warrant suspicion.[5] The term must receive the same exposition in matters of prize, and is applied to a captor as well as a seizor.[6] In all captures made jure belli, circumstances of strong suspicion will justify the captors, and the same circumstances must equally justify a seizure made under this act of Congress, which authorizes hostilities against those who, by their conduct, have acquired the piratical character, and forfeited the protection of their own country. Indeed, this must now be considered as a settled principle in this court, since the decision of the case of The Marianna Flora;[7] every circumstance of which would find its parallel in the present case. The court having determined that it will not look beyond the act of Congress for a description of piratical vessels, and that no damages will be given for bringing in for adjudication, after capture of a vessel falling within that description, if the seizing officer *acted bona fide in the honest discharge of [*6 his duty under the law, and the instructions of the President, although the court itself might be of opinion that he ought to have released the vessel, nothing remains but to apply these principles to the facts of the present case. The same doctrine had also been laid down by Sir W. Scott, in a case which this court cite with approbation in the judgment in The Marianna Flora.[8]

The learned counsel further insisted, that the seizing officer was fully justified in capturing, and sending in for adjudication, the Palmyra,

1.—S. C. 10 Wheat. Rep. 502.

2.—Martens, Privateers, 11-38; 2 Azuni, 353; Mr. Johnson's translation.

3.—3 Rob. 195, 224; 5 Rob. 280.

4.—Wheat. Capt. 41, 320; Martens, 4, 6; Bynk. Q. J. Pub. Duponceau's transl. 147; 2 Bro. Civ. and Adm. Law, 339; Molloy, 49.

5.—Locke v. The United States, 7 Cranch, 339, 348.

6.—1 Mason's Rep. 27; 3 Cranch, 458, 491.

7.—11 Wheat. Rep. 1.

8.—The Louis, 2 Dodson's Adm. Rep. 210.

upon the following, among other grounds: 1. Because the vessel had, in the very words of the statute, committed various acts "of piratical aggression, search, restraint, depredation, and seizure," on American, and other vessels. 2. Because the conduct of the vessel, in searching American ships, in violation of the treaty between the United States and Spain, and all the other circumstances of the case, warranted the worst suspicions respecting her character and conduct. 3. Because the conduct of the commander of the Palmyra, after the capture, and the unsatisfactory explanations given by him of the above circumstances, confirmed those suspicions; and the seizing officer not being, according to his instructions, "satisfied that she was acting under a regular commission, and not piratically," he was bound to send her in for adjudication.

Mr. Teazewell, for the respondents, argued 1. That the court had no authority to re-instate the cause, after it was dismissed at a former term: 1. Because it might operate to the prejudice of the sureties, to whom the property had been delivered, on bail, in the court below; and, 2. Because the cause might be heard in this court upon the appeal, in respect to the sentence of restitution, that being the only decree in which the United States had any interest as a party; and that, as to damages, the captors were the only persons responsible for 7*] damages, and they alone had a right *of appeal respecting that subject; so that the original cause had thus become divided into two causes, in which each party was an actor.

2. The learned counsel also insisted that the libel was defective, in not charging with sufficient precision the particular acts of piratical aggression, and in omitting to allege a previous prosecution and conviction of the captured persons of the crime of piracy, which, it was insisted, was an essential prerequisite to the proceeding in rem.

3. As to the general merits, he argued with great minuteness and ability upon the facts, to show that the vessel had not been guilty of a piratical aggression, within the meaning of the acts of Congress, and that no such probable cause existed as justified the captors in the original seizure, and in bringing in the vessel for adjudication. The evidence was not sufficient to establish any acts of sea robbery, constituting a piratical character, or general habit of piracy; and so far from having committed a piratical aggression on the Grampus, the Palmyra had merely acted in self-defense, the avowed purpose of Lieutenant Gregory being to capture her upon suspicion. The case presented, was that of a hostile attack made by a vessel of war of the United States on a foreign vessel, known to be regularly commissioned, and sent in for adjudication after her character was satisfactorily explained. But even supposing there was probable cause for the seizure and detention, that would not excuse, unless it was followed by an actual condemnation. Probable cause will not excuse from remunerative damages, in any case, unless of a capture jure belli, or where it is expressly provided as a justification by some municipal law. This doctrine was clearly recognized by the court in the case of The Apollon.[1]

1.—9 Wheat. Rep. 362.

Mr. Justice Story delivered the opinion of the court:

This is the case of a proceeding in rem, by a libel of information founded on the act of Congress of the third of *March, 1819, ch. [*8 75, as continued in force by the act of Congress of the 15th of May, 1820, ch. 112. The second section of the former act authorizes the President "to instruct the commanders of public armed vessels of the United States, to seize, subdue, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel." The fourth section declares, "that whenever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought, and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion."

The brig Palmyra is an armed vessel, asserting herself to be a privateer, and acting under a commission of the King of Spain, issued by his authorized officer at the island of Porto Rico. She was captured on the high seas on the 15th of August, A. D. 1822, by the United States vessel of war Grampus, commanded by Lieutenant Gregory, after a short resistance, and receiving a fire from the Grampus, by which one man was killed, and six men were wounded. She was sent into Charleston, South Carolina, for adjudication. A libel was duly filed, and a claim interposed; and upon the proceedings in the District Court of that district, a decree was pronounced by the court, that the brig be acquitted, without any damages for the capture, injury, or detention. From this decree an appeal was made, by both parties, to the Circuit Court; and upon the hearing in that court, where, for the first time, the officers of the privateer were examined as witnesses, the Circuit Court pronounced a decree, affirming *so much of the decree of the [*9 District Court as acquitted the brig, and reversing so much of it as denied damages, and proceeded finally to award damages to the claimants, to the amount of $10,288.58. From this decree there was an appeal, interposed on behalf the United States and the captors, to the Supreme Court. The cause came on to be heard upon this appeal, at February term. 1825, and upon inspection of the record, it did not then appear that there had been any final decree, ascertaining the amount of damages. The court were of opinion, that if there had been no such decree, the case was not properly before the court upon the appeal, there not being any final decree, within the meaning of the act of Congress. The court considered that the damages were but an incident to the principal decree; that the cause was but a single one; and that the cause could not, at the same time,

be in the Circuit Court for the purpose of assessing damages, and in this court upon appeal, for the purpose of an acquittal or condemnation of the vessel. The questions, indeed, were different; but the cause was the same. Upon this ground, the appeal was dismissed. But at the last term of the court, it appearing that in point of fact there had been a final award of damages, and that the error was a mere misprision of the clerk of the Circuit Court in transmitting an imperfect record, the court, upon motion of the appellants, at the last term, ordered the cause to be re-instated.

It is now contended, that this court had no authority to re-instate the cause after such a dismissal. 1. Because it may operate to the prejudice of the stipulators or sureties, to whom the privateer was delivered, upon stipulation in the court below; and, 2. Because the cause was capable of being heard in this court upon the appeal in respect to the decree of acquittal, that being the only decree in which the United States had any interest as a party; and that as to the damages, the captors were the only persons responsible for damages, and they alone had a right of appeal respecting the same; so that by operation of law, the cause had 10*] become *divided into two separate and distinct causes, in which each party was an actor.

This court cannot concur in either objection. Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorties on the part of the court, which it could properly exercise, if the thing itself were still in its custody. This is the known course of the admiralty. It is quite a different question, whether the court will, in particular cases, exercise its authority, where sureties on the stipulation may be affected injuriously. That is a subject addressed to its sound discretion. In the present case, there was no ground for surprise or injury to the stipulators, or, indeed, to any party in interest. If there had been no final award of damages, the cause would not have been properly before this court, and the appeal itself, being a nullity, would have left the cause still in the Circuit Court. But as such an award was made, the appeal was rightfully made; and the dismissal, being solely for a defect of jurisdiction apparent on the record, and founded on a mistake, constituted no bar to a new appeal, even if a general dismissal might. The appeal, then, might, at any time within five years, have been lawfully made, and have bound the parties to the stipulation, to all its consequences. The difference between a new appeal, and a re-instatement of the old appeal, after a dismissal from a misprision of the clerk, is not admitted by this court justly to involve any difference of right as to the stipulators. Every court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to re-instate any cause dismissed by mistake. The re-instatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases.

The other objection has not, in our opinion, a more solid *foundation. The libel was [*11 filed by the district-attorney, as well in behalf of the United States as of the captors, and prayed, as usual, a condemnation of the vessel, and distribution of the proceeds. This fact is noticed for the purpose of answering the observation made at the bar, as to the parties to the libel. It has been supposed that the United States and the captors are to be deemed severally libelants, having distinct rights, both of prosecution and appeal. But this proceeds upon a mistake. In every case of a proceeding for condemnation, upon captures made by the public ships of war of the United States, whether the same be cases of prize, strictly jure belli, or upon public acts in the nature of captures jure belli, the proceedings are in the name and authority of the United States, who prosecute for themselves as well as for the captors. The captors cannot, without the authority of the government, proceed to enforce condemnation. The suit is, in form and substance, a proceeding by and in the name of the United States, for the benefit of all concerned. And whether the question respect the point of condemnation, or of damages, the United States have a right of appeal co-extensive with the whole matter in litigation, and may interpose their protection to guard their agents and officers against injury and damages. These agents and officers are, indeed, in a certain sense, parties to the suit, as the seizing officer is in cases of mere municipal seizures; and when the claimant makes himself, by a demand of damages, an actor in the suit, no doubt exists that the court may proceed to decree damages against them, and thus entitle them to a separate right of appeal, if the government should feel that it had no further interest to pursue the suit. But still the right of damages must always be dependent upon the question of condemnation or acquittal, for it can never be successfully contended, that if a condemnation is finally adjudged, a decree for damages can be maintained. And, on the other hand, in a case of acquittal, the whole circumstances of the case must be taken into consideration, in order to ascertain that the case is one which justifies an award of damages. *In the present case, there was an appeal [*12 entered by the district-attorney for the United States, and also for the captors, from the decree of the Circuit Court. If this decree was final, such an appeal brought up the whole cause as to all the parties; and would, in point of law, have produced the same effect, if in form the appeal had only been in the name of the United States. If the decree was not final (as upon the original record it appeared to this court not to be), then it was void as to all parties. Either way, then, there never was any separation of the parties libelants, so as to give rise to the point of separate independent causes. We are, then, of opinion, that the whole cause is now rightfully before us.

It is contended on behalf of the appellees, that the present suit cannot be maintained, because the libel itself is fatally defective in its averments. It is said to be too loose, inartificial and general in its structure, to give a just foundation for any judgment of condemnation. If this were admitted to be true, the only effect would be, supposing the merits on the evidence

appeared to be in favor of the libelants, that the court would, according to its known course of practice, remand the cause to the Circuit Court, with directions to allow an amendment of the libel, and ulterior proceedings consequent thereon. But there is asserted to be another fatal defect in the averments of the libel, which is incapable of being cured, because it cannot be established in point of fact; and that is, that the offenders are not alleged to have been convicted upon any prosecution in personam, of the offense charged in the libel. The argument is, that there must be a due conviction upon a prosecution and indictment for the offense in personam, averred and proved, in order to maintain the libel in rem.

In respect to the first objection, it must be admitted, that the libel is drawn in an inartificial, inaccurate, and loose manner. The strict rules of the common law as to criminal prosecutions, have never been supposed by this court to be required in informations of seizure in the admiralty for forfeitures, which are deemed to [*13 be civil proceedings in *rem. Even on indictments at the common law, it is often sufficient to state the offense in the very terms of the prohibitory statute; and the cases cited by the Attorney-General are directly in point. In informations in the Exchequer for seizures, general allegations bringing the case within the words of the statute, have been often held sufficient. And in this court it has been repeatedly held, that in libels in rem, less certainly than what belongs to proceedings at the common law, will sustain a decree of condemnation, if the words of the statute are pursued, and the allegations point out the facts, so as to give reasonable notice to the party to enable him to shape his defense. There is, indeed, in admiralty proceedings, little ground to insist upon much strictness of averment, because, in however general terms the offense may be articulated, it is always in the power of the court to prevent surprise, by compelling more particular charges as to the matters intended to be brought forward by the proofs. In general, it may be said, that it is sufficient in libels in rem, for forfeitures, to allege the offense in the terms of the statute creating the forfeitures. There may be exceptions to this rule, where the terms of the statute are so general as naturally to call for more distinct specifications. Without pretending to enumerate such exceptions, let us look at the allegations in the amended libel in the present case. It charges, "that the said brig, called the Palmyra, etc., was, and is, a vessel from which a piratical aggression, search, depredation, restraint and seizure, has been first attempted and made, to wit, upon the high seas, in and upon the schooner Coquette, a vessel of the United States, and of the citizens thereof, and in and upon the master, officers, and crew of the said schooner Coquette, citizens of the United States; and also in and upon the Jeune Eugenie, a vessel of the United States, and of the citizens thereof, and in and upon Edward L. Coffin, the master, and the officers and crew of the said vessel, being citizens of the United States, and also in and upon other vessels of the United States, their officers and crews, citizens of the United States, and in and upon other vessels of various nations, states and *kingdoms, their officers and crews, citi- [*14 zens and subjects of said states and kingdoms." Now, whatever may be said as to the looseness and generality, and consequent insufficiency of the latter clauses of this allegation, the former specifying the Coquette and Jeune Eugenie (upon which alone the proofs mainly rely for condemnation), have, in our opinion, reasonable and sufficient certainty. It was not necessary to state in detail the particular acts constituting the piratical aggression, search, depredation, restraint, or seizure. The general words of the statute are sufficiently descriptive of the nature of the offense; and the particular acts are matters proper in the proofs. We may, then, dismiss this part of the objection.

The other point of objection is of a far more important and difficult nature. It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment or conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not devested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be malum prohibitum, or malum in se. The same principle applies to proceedings in rem, on seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. *But in neither class of cases has it ever [*15 been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understand the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings in rem is usually vested in different courts from those exercising criminal jurisdiction. If the argument at the bar were well founded, there could never be a judgment of condemnation pronounced against any vessel coming within the prohibitions of the acts on which the present libel is founded; for there is no act of Congress which provides for the personal punishment of offenders, who commit "any piratical aggression, search, restraint, depredation or seizure," within the meaning of those acts. Such a construction of the enactments, which goes wholly to defeat their operation, and violates their plain import, is utterly inadmissible. In the judgment of this court.

no personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature.

Having disposed of these questions, which are preliminary in their nature, we may now advance to the consideration of those which turn upon the merits of the cause. These questions are: 1. Whether the present be, upon the facts, a case for condemnation; and, if not, 2. Whether it be a case for remunerative damages; for vindictive damages are and must be disclaimed.

Upon the first point, it is unnecessary to go into any examination at large of the various facts preceding and accompanying the capture, because the judges are divided in opinion; and consequently, according to the known practice of the court, the decree of the Circuit Court, so far as it pronounced a decree of acquittal, must be affirmed.

In respect to the second point, we are all of opinion that the case is clearly not a case for damages. The whole circumstances present such well-founded grounds for suspicion of the 16*] *piratical character and conduct of the privateer, as required Lieutenant Gregory, in the just exercise of his instructions from the President under the acts of Congress, to subdue and send her in for adjudication. That her crew were guilty of plunder from the Coquette and the Jeune Eugenie, is established by proofs entirely competent and satisfactory. Her exercise of the right of search on these vessels was irregular and unjustifiable, and indicated on the part of the boarding officers no disinclination to petty thefts, if they avoided forcible robbery. Her commission is itself liable to much suspicion and criticism. It varies essentially in the description of the rig, the size, and the denomination of the vessel from that on board of which it is found. It purports to be for a schooner of 93 tons, under the command of Don Pablo Llanger; it is found on board of a brig of 160 tons, commanded by Captain Escurra. It was originally granted for a three months' cruise, which had expired; and it purports to be renewed by the port captain of Porto Rico, a subordinate agent of the King of Spain, for a new cruise, by an indorsement on it, without any known authority. We do not advert to these circumstances to establish the position that the commission was utterly void, or rendered the exercise of belligerent rights piratical. Whatever may be the irregularities in the granting of such commissions, or the validity of them, so far as respects the King of Spain, to found an interest of prize in the captors, if the Palmyra bona fide received it, and her crew acted bona fide under it, it ought, at all events, in the courts of neutral nations, to be held a complete protection against the imputation of general piracy. But the defects of the commission, connected with the almost total want of order and command on board of the privateer, and the manifest insubordination, and predatory spirit of the crew, could not but inflame to a high degree every other just suspicion. In short, taking the circumstances together, the court think that they presented, prima facie, a case of piratical aggression, search, restraint, and depredation, within the acts of Congress, open to explanation, indeed, but if unexplained, *pressing heavily on [*17 the vessel for the purpose of forfeiture. Lieutenant Gregory, then, was justifiable in sending her in for adjudication, and has been guilty of no wrong calling for compensation.

It has been argued at the bar, that probable cause of seizure in this case constitutes no ground of defense against the claim of damages. It has been truly stated as the settled doctrine of this court, that in cases of seizures under mere municipal laws, probable cause, unless so made by statute, constitutes no ground for denying damages, or justifying the seizure. But it is supposed, that probable cause is not an excuse or justification of any seizure or capture, except in cases jure belli; and the case of The Apollon, in this court (9 Wheat. Rep. 362), is relied on to establish this position. That case contains no doctrine leading justly to any such conclusion. It was a case of seizure under our revenue laws, and, in the opinion of the court, the point is examined how far probable cause constituted, in that case, a ground to exempt from damages. On that occasion, the court said that the argument had not distinguished between probable cause as applied to cases of capture jure belli, and as applied to cases of municipal seizures; and then proceeded to state the distinction. There was no intimation, that in cases of marine torts generally, or under laws authorizing the exercise to a limited extent of belligerent rights, or quasi belligerent rights, probable cause might not be a sufficient excuse. In the case of The Marianna Flora, at the last term (11 Wheat. Rep. 1), the very point was before the court, and it was in that case held that probable cause was a sufficient excuse for a capture under circumstances of hostile aggression at sea. Indeed, in cases of marine torts arising under the general maritime law, probable cause often is a complete excuse for the act, and always goes in mitigation of damages. In the admiralty, the award of damages always rests in the sound discretion of the court, under all the circumstances. The case of The St. Louis, in 2 Dods. Rep., 210, is a strong illustration of the doctrine. But, in cases like the present, where the public armed ships *of the United States are authorized [*18 to make captures to a limited extent, the authority so exercised by them must be deemed to stand upon the same analogy as captures strictly jure belli. And the doctrine of the prize courts as to the denial of damages, where there is probable cause for the capture, furnishes the proper rule to govern the discretion of the court. We are then of opinion, that in the present case, there was strong probable cause for the capture, and that the decree of the Circuit Court, so far as it awards damages to the claimants, ought to be reversed.

It remains only to remark upon one or two points made against the competency of some of the testimony in the cause. It is objected that Lieutenant Gregory is not a competent witness, because he is, notwithstanding his release of his interest as captor, interested to defeat the claim for damages. However well founded this objection may be as to his competency on the point of damages, having been admitted both in the district and circuit courts, as a witness without objection, we think there was

a waiver of the objection, and it cannot now be insisted on. As to the depositions of Captains Souther and Coffin, they were taken under commissions duly issued from the Circuit Court according to the rule of this court, and are, therefore, admissible upon the strictest principles.

Decree.—This cause came on, etc. On consideration whereof, it is adjudged, ordered and decreed, that so much of the decree of the Circuit Court as decrees restitution of the brig Palmyra to the claimants, be, and the same is, hereby affirmed; and that so much of the decree of the said Circuit Court as awards damages to the claimants, be, and the same is, hereby reversed and annulled; and it is further ordered that said cause be remanded to said Circuit Court for further proceedings according to law.

19*] [*Constitutional Law.]

MARTIN, Plaintiff in Error,
v.
MOTT, Defendant in Error.

The authority to decide whether the exigencies contemplated in the constitution of the United States, and the act of Congress of 1795, ch. 101, in which the President has authority to call forth the militia, "to execute the laws of the Union, suppress insurrections, and repel invasions," have arisen, is exclusively vested in the President, and his decision is conclusive upon all other persons.

Although a militia-man, who refused to obey the orders of the President, calling him into the public service under the act of 1795, is not, in the sense of that act, "employed in the service of the United States," so as to be subject to the rules and articles of war; yet he is liable to be tried for the offense under the 5th section of the same act, by a court-martial called under the authority of the United States.

Where, in an action of replevin, the defendant, being a deputy-marshal of the United States, avowed and justified the taking the plaintiff's goods, by virtue of a warrant issued to the marshal of the district, to collect a fine imposed on him by the judgment of a court-marshal, described as a general court-marshal composed of officers of the militia of the state of New York, in the service of the United States, (six in number, and naming them), duly organized and convened, by general orders, issued pursuant to the act of Congress of February 28, 1795, ch. 101, for the trial of those of the militia of the state of New York, ordered into the service of the United States in the third military district, who had refused to rendezvous and enter into the service of the United States, in obedience to the orders of the commander-in-chief of the state of New York, on the 4th and 29th of August, 1814, issued in compliance with the requisition of the President made in pursuance of the same act of Congress, and alleging that the plaintiff, being a private in the militia, neglected and refused to rendezvous, etc., and was regularly tried by the said general court-marshal, and duly convicted of said delinquency: Held, that the avowry was good.

ERROR to the court for the trial of impeachments, and correction of errors of the state of New York.

20*] *This was an action of replevin, originally brought in the Supreme Court of New York by the defendant in error, Mott, against the plaintiff in error, Martin, to which an avowry was filed, containing, substantially, the following allegations: That on the 18th of June, 1812, and from thence until the 25th of December, 1814, there was public and open war between the United States of America and the United Kingdom of Great Britain and Ireland, and its dependencies, and the citizens and subjects of the said countries respectively; and that during the continuance of the said war, to wit, on the 4th day of August, 1814; and also, on the 29th day of the same month, in the same year, at the city of New York, to wit, at Poughkeepsie, in the county of Dutchess, his Excellency Daniel D. Tompkins, Esq., was then and there Governor of the state of New York, and commander-in-chief of the militia thereof, and being so governor and commander-in-chief, he, the said Daniel D. Tompkins, as such governor and commander-in-chief, on the several days last aforesaid, and in the year aforesaid, and at the place aforesaid, upon the previous requisitions of the President of the United States, for that purpose made, and to him directed, as such governor and commander-in-chief, did issue two several general orders, bearing date respectively on the said 4th and 29th days of August, in the year aforesaid, in and by which said two general orders, among other things, the said Daniel D. Tompkins, as governor and commander-in-chief as aforesaid, pursuant to such requisitions, and in compliance therewith, did detail certain parts and portions of the militia of the state, as he was required to do, in and by the requisitions of the President of the United States, as aforesaid, and did order the militia so detailed into the service of the United States of America, at the city of New York, within the third military district of the said United States, as in and by the said two general orders may more fully appear. That the said Jacob E. Mott, on the several days and in the year aforesaid, and until the 25th day of December in the same year, being a white citizen of the said state of New York, inhabiting and residing within the same, and between the ages of eighteen *and forty-five years, was liable [*21 to do military duty in the militia of the said state, and was a private in the militia of the said state that was so detailed and ordered into the service of the United States as aforesaid, and as such private in said militia was bound to do military duty in the militia of the said state so detailed and ordered into the service of the United States, in the third military district of the United States. That on the 24th of September, 1814, Morgan Lewis, Esq., was a major-general, commanding the army of the United States, of the third military district of the said United States, in which district the militia of the state of New York, detailed and ordered into the service of the United States as aforesaid, had been ordered to do military duty in the service of the United States. And the said Morgan Lewis, so being a major-general, and commanding as aforesaid, did, on the day and in the year last aforesaid, as such major-general and commander, issue general orders to convene a general court-martial for the purpose in the said orders expressed, composed of so many, and such militia officers in the service of the United States, in the said third military district, as in the said orders are mentioned; it

NOTE.—Calling out militia for service, see note to 15 L.R.A. 116.

having been then and there considered and adjudged by the said Morgan Lewis, that a greater number of officers than those detailed on the said court-martial could not be spared from the service of the United States without manifest injury to the said service; which said general orders are in the words and figures following, to wit: "Adjutant-General's Office, 3d M. D. New York, 24th September, 1814. General Orders. A general court-martial, under the act of Congress of the 28th of February, 1795, for the trial of those of the militia of the state of New York, ordered into the service of the United States, in the third military district, who have failed to rendezvous pursuant to orders, will convene on Monday, the 26th instant, at Harmony Hall, and will consist of the following members" (enumerating them, being six in number), which general court-martial was continued (although varied as to its members) by various general orders set out in the 22*] avowry, *until the 13th of May, 1818. That the said J. E. Mott, being so liable, etc., did fail, neglect and refuse to rendezvous and enter into the service of the United States, in obedience to the orders issued by the governor of the state, on the requisition of the President of the United States, and in compliance therewith. That on the 30th of May, 1818, the said court-martial convened at Poughkeepsie, within the said third military district, at which time and place the said Jacob E. Mott was duly summoned to appear before the said court-martial; and did then and there appear before the said court-martial, and make his defense to the charges alleged against him as aforesaid. That the said general court-martial then and there tried the said Jacob E. Mott for having failed, neglected and refused to rendezvous, and enter into the service of the United States, in obedience to the orders aforesaid, issued in compliance with the requisition aforesaid; and after hearing the proofs and allegations, as well on the part of the United States as on the part of the said Jacob E. Mott, then and there convicted the said Jacob E. Mott of the said delinquency; and thereupon the said general court-martial imposed the sum of $96 as a fine on the said Jacob E. Mott, for having thus failed, neglected and refused to rendezvous, and enter into the service of the United States, when thereto required as aforesaid. That before the said last mentioned day, to wit, on the 25th of December, 1814, a treaty of peace was made and concluded between the United States and the United Kingdom of Great Britain and Ireland and its dependencies; and that the said Morgan Lewis and Daniel D. Tompkins, the major-generals who issued the orders organizing, convening and continuing the said general court-martial as aforesaid, were not continued as such major-generals as aforesaid, in the service of the United States aforesaid, at the time herein next afterwards mentioned, nor was there any other officer of equal grade with the said last-mentioned major-generals in the service of the United States, commanding in the military district aforesaid, at the time the said court imposed the fine and 23*] sentence aforesaid, *on the said plaintiffs as aforesaid, by whom the said sentence could be approved; but that the said fine, sentence and proceedings of the said court-martial, so far as they related to the case of the said Jacob E. Mott, were duly approved by the President of the United States, before the same were certified by the president of the court-martial aforesaid, to the marshal of the southern district of the state of New York, as hereinafter mentioned, and before the 4th day of June, 1814. That the president of the said general court-martial, afterwards, to wit, on the day and year, and at the place last aforesaid, in pursuance to the statute of the United States in such case made and provided, did make a certificate in writing, whereby he did, under his hand, certify to the marshal of the southern district of New York, that the sum of $96 was imposed as a fine on said Jacob E. Mott, for having thus failed, neglected and refused to enter the service of the United States, when hereunto required as aforesaid, and that the said Jacob E. Mott was sentenced by the said general court-martial, on failure of the payment of said fine imposed on him, to twelve months imprisonment.

The avowry then proceeded to state the authority of the plaintiff in error, Martin, as deputy-marshal, to execute such certificate, and that, in the execution thereof, he took the said goods, etc.

To this avowry the plaintiff in replevin demurred, and assigned the following causes of demurrer:

1. That the said defendant, in his said avowry, does not allege that the President of the United States had adjudged that there was an invasion, or imminent danger of an invasion; or that any of the exigencies had occurred in which the President is empowered to call out the militia by the constitution of the United States.

2. The said defendant in the said avowry does not aver that any such previous requisition upon the governor was, in fact, made by the President of the United States; no such requisition is set forth, nor is the date or substance thereof, *or the number of militia [*24 thereby required, stated in the said avowry.

3. The said avowry does not state that the said militia were ordered into actual service, in compliance with such requisition; nor does it appear that the militia were required by said requisition to rendezvous or act within the territory of the United States.

4. The said avowry does not sufficiently show or set forth either the particulars or substance of the said orders of the Governor of the state of New York, in the said avowry mentioned, in such manner that it can appear whether the said orders, or either of them, directed all those of the militia called out thereby, to rendezvous or enter the service of the United States upon the requisition of the said President, solely, or whether the said orders also called out a part of the same militia by, under, and pursuant to the authority and laws of the state of New York, without the requisition of the said President, and without designating which were ordered to rendezvous and enter the service by the said respective authorities.

5. The said avowry does not show that the two said several orders of the governor were cumulative, explanatory of, auxiliary to, or in any way connected with each other; nor

whether both of the said orders embraced the same or different persons, and required the same or different duties; nor with such certainty that it can appear whether a disobedience of the other or both of the said orders would be the same, a different, or an additional offense, subject to the same or different jurisdiction; nor does it state the number of the militia called out by the said orders, so that it can appear whether in that respect the said orders were in compliance with the requisitions of the President, nor by which of the said orders the said plaintiff was called forth into the service of the United States; in all which the said avowry is uncertain and insufficient.

6. The said avowry is double and uncertain, inasmuch as therein the said plaintiff is charged with having committed two several offenses in the disobedience of the two said several orders 25*] *of the Governor, without showing that both offenses were necessary for the trial and conviction of the said plaintiff; or any reason why the said orders should be so blended together; and because the said orders are so blended together without showing any dependence upon each other, or any connection between them.

7. The general orders in the said avowry set forth, under and by virtue of which the said court-martial was convened, and tried, convicted, and fined the said plaintiff, are deficient, uncertain, vague, inoperative, void, and of no effect, and conferred upon the said court-martial, or the members thereof, no jurisdiction over the said plaintiff, or the offense with which he is charged in the said avowry, inasmuch as the said last-mentioned general orders convened said court-martial for the trial of those of the militia of the state of New York, ordered into the service of the United States, in the third military district, who had failed to rendezvous pursuant to orders, without specifying in any manner when, by whom, to whom, or by what authority, or in what manner such orders should have been issued in regard to the said militia, or when such militia had failed to rendezvous, or whether the orders pursuant to which said militia should have failed to rendezvous, were the same orders calling said militia into service in said third military district, or required them to rendezvous elsewhere or otherwise.

8. The said defendant in his said avowry states that the said court-martial was duly convened in pursuance of the said several general orders, in the said avowry set forth, on the 24th day of October, 1814; a day long before the last of the said general orders, by which the said court is stated to have been duly convened, was issued, as appears by the said avowry, all which is repugnant and contradictory.

9. The orders for convening the said court-martial, as in the said avowry set forth, are further uncertain, because by the said orders the said court-martial is stated to have been convened under the act of Congress on the 28th day of February, 1795, without showing which of the acts of Congress of that date is intended. 26*] *10. The trial of the said plaintiff by the said court-martial, as appears by the said avowry, was in a time of profound peace.

11. The said court-martial had no power or authority under the said general orders by which they were convened to try, convict, and fine the said plaintiff, for having failed, neglected and refused to rendezvous and enter the service of the United States, in obedience to the orders aforesaid, issued in compliance with the requisitions aforesaid.

12. The said court-martial, consisting of less than thirteen members, had no power nor authority to try, convict, and fine the said plaintiff, at the time said trial was had, it being a time of peace, without showing that thirteen militia officers could not at that time be spared without manifest injury to the service.

13. By the said avowry it doth not appear whether all or how many of the persons detailed by the said general orders as members of the said court-martial, continued to remain in the service of the United States at the time when the plaintiff was tried; or that the places of such as had resigned were supplied by others appointed in their stead; or in what manner the said court was duly convened; or of how many members it was then composed; and whether all the persons who acted as members of the said court-martial, at the time when the said plaintiff was tried, were then commissioned officers of the militia, of competent rank, and in the service of the United States.

14. The said avowry does not allege that the orders by which the said court-martial was continued in service until further orders, remained still unrevoked at the time when the said plaintiff was tried.

15. The said avowry does not show in what manner, when, or by whom the said plaintiff was duly summoned to appear before the said court-martial.

16. The said avowry does not show at what time the said Morgan Lewis and Daniel D. Tompkins were discontinued; nor but that they were such major-generals commanding as aforesaid, on the said 13th day of May, 1818; nor *but that at the time of the said trial [*27 there was a major-general, of equal rank with the said Morgan Lewis and Daniel D. Tompkins, commanding an army in the service of the United States, or some other officer of competent authority, in some military division of territory comprising the said third military district, by whom the sentence of said court-martial could have been approved.

17. By the said sentence of the said court-martial, as the same is in the said avowry set forth, the said Gerard Steddiford, president of the said court, had no power or authority to issue such a certificate as is in the said avowry mentioned, inasmuch as the said certificate is variant from the said sentence.

18. The said defendant does not in his said avowry allege that the said plaintiff ever was in the service of the United States before, at the time when, or after, the said orders of the Governor, of the 4th and 29th days of August, 1814, were issued, or at the time when the said orders for detailing the said court-martial were issued, when said court-martial convened, or when the said trial took place, and the said fine was imposed.

19. The said certificate of the said Gerard Steddiford, as in the said avowry set forth, does not show with sufficient certainty by what court, or by whom, or by what authority the said fine was imposed; nor does it appear that the said Gerard Steddiford made the said cer-

tificate, as such president of the said court-martial, or signed the same in his official capacity.

And also, that the said avowry is, in other respects, uncertain, informal, and insufficient, etc.

The defendant in replevin (now plaintiff in error) joined in demurrer; and judgment was rendered in behalf of the plaintiff in replevin, in the Supreme Court, which was affirmed by the court for trial of impeachments and correction of errors.

The cause was then brought before this court by writ of error, under the 25th section of the judiciary act of 1789, c. 20.

28*] *The cause was argued by the Attorney-General and Mr. Coxe for the plaintiff in error and by Mr. D. B. Ogden for the defendant in error. But as the grounds of argument are fully stated in the opinion of the court, it has not been thought necessary to insert it.

Mr. Justice Story delivered the opinion of the court:

This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the state of New York, being the highest court of that state, and is brought here in virtue of the 25th section of the judiciary act of 1789, ch. 20. The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the Supreme Court of the state gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court-martial, for a failure to enter the service of the United States as a militia-man, when thereto required by the President of the United States, in pursuance of the act of the 28th of February, 1795, c. 101. It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrec-

29*] tions, and repel invasions;" *and also "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by Congress to the President is doubtless of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or if imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the *President are addressed, [*30 may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defense, and of watching over the

internal peace of the confederacy,"[1] these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Such a 31*] course would be *subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, etc., it shall be lawful for the President, etc., to call forth such number of the militia, etc., as he may judge necessary to repel such invasion." The power itself is confined to the Executive of the Union, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction 32*] *that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

This doctrine has not been seriously contested upon the present occasion. It was indeed maintained and approved by the Supreme Court of New York, in the case of Vanderheyden v. Young, 11 Johns. Rep. 150, where the reasons in support of it were most ably expounded by Mr. Justice Spencer, in delivering the opinion of the court.

But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption *is, that it is [*33 exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and a fortiori, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver that the act which he may rightfully do was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury. This view of the objection is precisely the same which was acted upon by the Supreme Court of New York in the case already referred to, and, in the opinion of this court, with entire legal correctness.

Another objection is that the orders of the President are not set forth; nor is it averred that he issued any orders, but only that the Governor of New York called out the militia, upon the requisition of the President. The objection, so far as it proceeds upon a supposed difference between a requisition and an order, is untenable; for a requisition calling forth the militia is, in legal intendment, an order, and must be so interpreted in this avowry. The majority of the court understood and acted upon this sense, which is one of the acknowledged senses of the word, in Houston v. Moore, 5 Wheat. Rep. 1. It was unnecessary to set forth the orders of the President at large; it was quite sufficient to state that the call was in obedience to them. No

1.—The Federalist, No. 29.

private citizen is presumed to be conversant of the particulars of those orders; and if we were, he is not bound to set them forth in hæc verba.

The next objection is, that it does not sufficiently appear in the avowry that the court-martial was a lawfully constituted court-martial, having jurisdiction of the offense at the time of passing its sentence against the original plaintiff.

Various grounds have been assigned in support of this objection. In the first place, it is said that the original plaintiff was never employed in the service of the United States, but refused to enter that service, and that, consequently, he was not liable to the rules and 34*] articles of war, *or to be tried for the offense by any court-martial organized under the authority of the United States. The case of Houston v. Moore, 5 Wheat. Rep. 1, affords a conclusive answer to this suggestion. It was decided in that case, that although a militiaman, who refused to obey the orders of the President calling him into the public service, was not, in the sense of the act of 1795, "employed in the service of the United States" so as to be subject to the rules and articles of war, yet that he was liable to be tried for the offense under the 5th section of the same act, by a court-martial called under the authority of the United States. The great doubt in that case was, whether the delinquent was liable to be tried for the offense by a court-martial organized under state authority.

In the next place, it is said the court-martial was not composed of the proper number of officers required by law. In order to understand the force of this objection, it is necessary to advert to the terms of the act of 1795, and the rules and articles of war. The act of 1795, s. 5, provides, "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the President of the United States," etc., "shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial." And it further provides, s. 6, "that courts-martial for the trial of militia shall be composed of militia officers only." These are the only provisions in the act on this subject. It is not stated by whom the courts-martial shall be called, nor in what manner, nor of what number they shall be composed. But the court is referred to the 64th and 65th of the rules and articles of war, enacted by the act of 10th of April, 1806, ch. 20, which provide, "that general courts-martial may consist of any number of commissioned officers from five to thirteen inclusively; but they shall not consist of less than thirteen, where that number can be convened without manifest injury to the service;" and that "any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial when necessary." Supposing these clauses applicable to the court-35*] martial in question, it is very clear *that the act is merely directory to the offier appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive. But the present avowry goes farther, and alleges, not only that the court-martial was appointed by a general officer commanding an army, that it was composed of militia officers, naming them, but it goes on to assign the reason why a number short of thirteen composed the court, in the very terms of the 64th article; and the truth of this allegation is admitted by the demurrer. Tried, therefore, by the very test which has been resorted to in support of the objection, it utterly fails.

But, in strictness of law, the propriety of this resort may admit of question. The rules and articles of war, by the very terms of the statute of 1806, are those "by which the armies of the United States shall be governed;" and the act of 1795 has only provided "that the militia employed in the service of the United States (not the militia ordered into the service of the United States) shall be subject to the same rules and articles of war as the troops of the United States;" and this is, in substance, re-enacted by the 97th of the rules and articles of war. It is not, therefore, admitted that any express authority is given by either statute, that such a court-martial as is contemplated for the trial of delinquents under the 5th section of the act of 1795, is to be composed of the same number of officers, organized in the same manner as these rules and articles contemplate for persons in actual service. If any resort is to be had to them, it can only be to guide the discretion of the officer ordering the court, as matter of usage, and not as matter of positive institution. If, then, there be no mode pointed out for the formation of the court-martial in these cases, it may be asked, in what manner is such court to be appointed? The answer is, according to the general usage of the military service, or what may not unfitly be called the customary military law. It is by the same law that courts-martial, when duly organized, are bound to execute their duties, and regulate their modes of proceeding, in the absence of positive enactments. Upon *any other principle, courts- [*36 martial would be left without any adequate means to exercise the authority confided to them; for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them.

The act of the 18th of April, 1814, ch. 141, which expired at the end of the late war, was, in a great measure, intended to obviate difficulties arising from the imperfection of the provisions of the act of 1795, and especially to aid courts-martial in exercising jurisdiction over cases like the present. But whatever may have been the legislative intention, its terms do not extend to the declaration of the number of which such courts-martial shall be composed. The first section provides "that courts-martial to be composed of militia officers alone, for the trial of militia drafted, detached and called forth (not or called forth), for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, when necessary, be appointed, held, and conducted, in the manner described by the rules and articles of war, for appointing, holding, and conducting, courts-martials for the trial of delinquents in the army of the United States." This language is obviously confined to the militia in the actual service of the United States, and does not extend to such as are drafted and refuse to obey the call; so that

the court are driven back to the act of 1795 as the legitimate source for the ascertainment of the organization and jurisdiction of the court-martial in the present case. And we are of opinion that nothing appears on the face of the avowry to lead to any doubt that it was a legal court-martial, organized according to military usage, and entitled to take cognizance of the delinquencies stated in the avowry.

This view of the case affords an answer to another objection which has been urged at the bar, viz.: that the sentence has not been approved by the commanding officer, in the manner pointed out in the 65th of the rules and articles of war. That article cannot, for the reasons already stated, be drawn in aid of the argument; and the avowry itself shows that the sentence has been approved by the President of the United States, who is the commander-in-37*] *chief, and that there was not any other officer of equal grade with the major-generals by whom the court-martial had been organized and continued within the military district, by whom the same could be approved. If, therefore, an approval of the sentence were necessary, that approval has been given by the highest, and, indeed, only, military authority competent to give it.

But it is by no means clear that the act of 1795 meant to require any approval of the sentences imposing fines for delinquencies of this nature. The act does not require it either expressly or by necessary implication. It directs (s. 7) that the fines assessed shall be certified by the presiding officer of the court-martial to the marshal, for him to levy the same, without referring to any prior act to be done, to give validity to the sentences. The natural inference from such an omission is, that the legislature did not intend, in cases of this subordinate nature, to require any further sanction of the sentences. And if such an approval is to be deemed essential, it must be upon the general military usage, and not from positive institution. Either way, we think that all has been done which the act required.

Another objection to the proceedings of the court-martial is, that they took place, and the sentence was given, three years and more after the war was concluded, and in a time of profound peace. But the opinion of this court is, that a court-martial, regularly called under the act of 1795, does not expire with the end of a war then existing, nor is its jurisdiction to try these offenses in any shape dependent upon the fact of war or peace. The act of 1795 is not confined in its operation to cases of refusal to obey the orders of the President in times of public war. On the contrary, that act authorizes the President to call forth the militia to suppress insurrections, and to enforce the laws of the United States, in times of peace. And courts-martial are, under the 5th section of the act, entitled to take cognizance of, and to punish delinquencies in such cases, as well as in cases where the object is to repel invasion in times of war. It would be a strained construction of the act, to limit the authority of the 38*] court to the mere time of *the existence of the particular exigency, when it might be thereby unable to take cognizance of, and decide upon a single offense. It is sufficient for us to say that there is no such limitation in the act itself.

The next objection to the avowry is, that the certificate of the president of the court-martial is materially variant from the sentence itself, as set forth in a prior allegation. The sentence as there set forth is, "and thereupon the said general court-martial imposed the sum of $90 as a fine on the said Jacob, for having thus failed, neglected, and refused to rendezvous and enter in the service of the United States of Ameria, when thereto required as aforesaid." The certificate adds, "and that the said Jacob E. Mott was sentenced by the said general court-martial, on failure of the payment of said fine imposed on him, to twelve months' imprisonment." It is material to state that the averment does not purport to set forth the sentence in hæc verba; nor was it necessary in this avowry to allege anything more than that part of the sentence which imposed the fine, since that was the sole ground of the justification of taking the goods and chattels in controversy. But there is nothing repugnant in this averment to that which relates to the certificate. The latter properly adds the fact which respects the imprisonment, because the certificate constitutes the warrant to the marshal for his proceedings. The act of 1795 expressly declares, that the delinquents "shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine." If, indeed, it had been necessary, to set forth the whole sentence at large, the first omission would be helped by the certainty of the subsequent averment. There is, then, no variance or repugnance in these allegations; but they may well stand together.

Of the remaining causes of special demurrer, some are properly matters of defense before the court-martial, and its sentence being upon a subject within its jurisdiction, is conclusive; and others turn upon niceties of pleading, to which no separate answers are deemed necessary. In general, *it may be said of them, [*39 that the court do not deem them well-founded objections to the avowry.

Upon the whole, it is the opinion of the court that the judgment of the court for the trial of impeachments, and the correction of errors ought to be reversed, and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

Judgment.—This cause came on, etc. On consideration whereof, it is considered and adjudged, that there is error in the judgment of the said court for the trial of impeachments and the correction of errors, in this, that upon the pleadings in the cause, judgment ought to have been rendered in favor of the avowant, whereas it was rendered in favor of the original plaintiff; and it is, therefore, further considered and adjudged, that the same judgment be, and the same hereby is, reversed and annulled; and also that the judgment of the Supreme Court of Judicature of the state of New York, which was affirmed by the said court for the trial of impeachments and the correction of errors, be reversed and annulled; and that judgment be

rendered, and that the said avowry is good and sufficient in law to bar the plaintiff's action, and that the plaintiff take nothing by his writ; and that the cause be remanded to the said court for the trial of impeachments and the correction of errors, if the record be now in the said court, and if not, then to the Supreme Court of Judicature of the state aforesaid, to which the same has been remitted, with directions to cause judgment to be entered upon the pleadings in favor of the avowant.

40*] [*Corporations.]

CLARK

v.

THE MAYOR, ALDERMEN, AND COMMON COUNCIL OF THE CITY OF WASHINGTON.

Municipal corporations, acting within the limits of the powers conferred upon them by the legislature, in the exercise of a special franchise granted to them, and the performance of a special duty imposed upon them, are responsible for the acts and contracts of their agents, duly appointed and authorized, within the scope of the authority of such agents, in the same manner as other corporations and private individuals are responsible on their promises, express and implied.

Where, by the charter granted by Congress to the city of Washington, the corporation was empowered "to authorize the drawing of lotteries," for effecting certain improvements in the city, and upon certain terms and conditions: Held, that the corporation was liable to the holder of a ticket in such a lottery for a prize drawn against its number, although the managers appointed by the corporation to superintend such lottery were empowered to sell, and had sold the entire lottery to a lottery dealer for a gross sum, who was, by his agreement with them, to execute the details of the scheme as to the sale of the tickets, the drawings, and the payment of the prizes.

It seems, that the power granted in the charter "to authorize the drawing of lotteries," cannot be exercised so as to discharge the corporation from its liability, either by granting the lottery, or selling the privilege to others, or in any other manner; but the lotteries to be authorized by the corporation must be drawn under its superintendence, for its own account, and on its own responsibility.

ERROR to the Circuit Court for the District of Columbia.

This was an action of assumpsit, brought by the plaintiff in error, to recover of the defendants the amount of a prize drawn in a lottery called "the fifth class of the National Lottery." A verdict was found for the plaintiff in the court below, subject to the opinion of the court, on a case agreed, on which judgment was rendered for the defendants, and the cause was brought by writ of error to this court.

By the constitution of the United States, Con-41*] gress has *power to exercise exclusive legislation in all cases whatsoever over the district, which, being ceded by particular states, may become the seat of the government of the Union. The District of Columbia having been ceded for that purpose, Congress passed an act, creating a municipal corporation for the city of Washington; and by the act of the 4th May, 1812, for amending the charter, gave the corporation "full power and authority to authorize the drawing of lotteries for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of $10,000; and provided, also, that the object for which the money is intended to be raised, shall be first submitted to the President of the United States, and shall be approved by him." For the purpose of carrying this power into execution, ten successive resolutions were passed by the corporation, the first of which was approved by the President of the United States on the 23d of November, 1812, and the last on the 21st of May, 1821, each of them for raising $10,000 by lottery, for the several objects of endowing two public school-houses, on the Lancasterian system; of building a work-house and penitentiary, and a town house or city hall. On the 24th of July, 1815, the corporation passed an ordinance for carrying into effect the three first of the above resolutions, and appointed certain managers by name, viz., John Davidson, Thomas H. Gillis, Andrew Way, Jr., Moses Young, William Brent, Daniel Rapine, and Samuel N. Smallwood, whose duty it was made to agree on and propose a scheme or schemes of a lottery or lotteries, to raise the sum of $30,000 (clear of all expenses), and to sell and dispose of the tickets therein to the best advantage, with the least possible delay, and diligently to attend the drawing of the said lottery or lotteries, which should be in the city of Washington; and within 60 days after the drawings of the same, respectively (the time of each drawing not to exceed two years), to pay and satisfy the fortunate adventurers for prizes; and within 70 days, to pay over the balance, after deducting all necessary expenses, into the city treasury; and giving to said managers full power and authority to appoint all necessary *agents, [*42 clerks and servants, to do and perform all such acts and things as might be necessary to carry into effect the provisions of the ordinance. Another ordinance was passed on the 17th of November, 1818, for the purpose of carrying into effect the 4th, 5th, 6th, and 7th of the aforesaid resolutions, by which (inter alia) the mayor was authorized to appoint seven citizens to act as managers for the purpose aforesaid, whose duty was declared to be to agree on a scheme of a lottery to raise the sum of $40,000 (clear of expenses), and to sell the said lottery, or dispose of the tickets therein to the best advantage, with the least possible delay, and diligently to attend the drawing of the said lottery, which should be in the city of Washington: Provided, however, that if the said managers, or a majority of them, should sell the said lottery, the individual or individuals purchasing the same should have the power of making a scheme for the aforesaid lottery, and within sixty days after the drawing (the time of drawing not to exceed one year), to pay and satisfy the fortunate adventurers for prizes; and within 70

NOTE.—That corporations are bound by contracts made in the ordinary discharge of the official duty of its agents and officers, express and implied. See notes to 5 L. ed. U. S. 100, 631; 10 L. ed. U. S. 335.

See also note, post 552.

days to pay over the balance, after deducting all necessary expenses, into the city treasury, with the like power and authority to the managers, as in the former act, to appoint all necessary agents, clerks and servants, etc. The mayor appointed, under the authority of the last-mentioned act, seven citizens to act as managers for the purposes aforesaid, the same as those appointed by name in the former act, except that, in the last, Roger C. Weightman takes the place of Samuel N. Smallwood.

On the 25th of October, 1819, another ordinance was passed, by which the managers appointed under the ordinance of 1815, were empowered to sell and dispose of the lotteries to which that ordinance refers, or so much thereof as yet remains to be drawn, in such classes, and on such terms and conditions as should appear to them right and expedient.

In pursuance of the ordinances of 1815 and 1819, the managers sold to David Gillespie, of New York, a lottery called the "Fifth class of the Grand National Lottery," for the sum of $10,000, to be paid before the commencement of the drawing thereof; and the following articles of agreement were entered into for that purpose.

43*] *"Memorandum of an agreement, made and entered into this 14th day of May, 1821, between Roger C. Weightman, John Davidson, Thomas H. Gillis, Andrew Way, Jun., Moses Young, William Brent and Daniel Rapine, as managers of the lotteries authorized by an act of the Board of Aldermen and Board of Common Council of the city of Washington, for the purposes therein mentioned, approved July 24, 1815, of the one part, and David Gillespie, of the city of New York, in the state of New York, of the other part: Whereas, by an act of the Board of Aldermen and Board of Common Council of the said city of Washington, approved October 25, 1819, supplementary to the act aforesaid, the said managers are authorized and empowered to sell and dispose of the said lotteries, in such classes, and on such terms and conditions as shall appear to them right and expedient, and according to the true intent and meaning of the act aforesaid; and that the said managers, for the purpose of raising the sum of $10,000, in conformity with the provisions of the said first-mentioned act, and in pursuance of the power and authority in them vested by the said supplementary act, have agreed to sell and dispose of, to the said David Gillespie, a lottery, denominated the Fifth class of the Grand National Lottery, to be drawn according to the scheme hereunto annexed; and the said David Gillespie, in consideration thereof, hereby agrees to pay to the said managers the sum of $10,000, before the commencement of the drawing of the said lottery, or class, at his own proper cost, charge and expense; to pay and defray all, and all manner of costs, charges, and expenses of the said lottery, or class, excepting the expense of drawing the same, and to draw the same in the city of Washington, in the presence of the said managers, and to finish and conclude the said drawing within two years from the date hereof, and to pay all the prizes within sixty days from the completion of the said drawing. It is further understood and agreed, by and between the said parties, that the said David Gillespie is to provide, at his own cost and expense, two competent clerks, to assist in the drawing of the said lottery, or class; and to execute and deliver, before the commencement of the drawing of the said lottery, or class, and within thirty days from the date hereof, to the said managers, a bond, with such security *as may be [*44 approved by them, in the penal sum of $35,000, conditioned for the true, fair, and faithful drawing of the said lottery or class, and according to the said scheme; for the punctual payment of all prizes, and for conducting the said lottery or class fairly and honestly, and according to this agreement, and the true intent and meaning of the said acts of the said Board of Aldermen and Board of Common Council."

The bond with security, as required by the above agreement, was given by Gillespie on the 28th of May, 1821.

On the 22d of the same month, an ordinance of the corporation was passed, authorizing the managers to appoint a president, whose duty it should be, in addition to the duties imposed by the ordinances of 1815 and 1819, to sign all contracts with the concurrence of a majority of the managers, and to sign all the lottery tickets, in every scheme or schemes sold by them. The 2d section of the ordinance allowed each of the managers of the city lotteries $3.00 each day he had been, or should be employed; and the 7th section enacts that this compensation, "except for the class now contracted for," should be provided for and paid out of the proceeds of lotteries thereafter contracted for.

Under this authority, Thomas H. Gillis was appointed president, who signed the following ticket, No. 2929, on which the suit was brought, and which was indorsed, "Undrawn 29th day over. D. Gillespie, per J. James." The ticket was purchased by the plaintiff, from an agent of Gillespie, at Richmond, Virginia, and drew the prize of $100,000, in the fifth class of the lottery:

FIFTH CLASS.

$100,000 Highest Prize.

William Brent,
John Davidson,
Thomas H. Gillis,
Andrew Way, Jun.
Moses Young,
Daniel Rapine,
R. C. Wightman,
Managers.

No. 2929.

NATIONAL LOTTERY.

This Ticket will entitle the Possessor to such Prize as may be drawn to its number, if demanded within twelve months after the completion of the Drawing: Subject to a deduction of fifteen per cent. Payable sixty days after the Drawing is finished.

Washington City, February, 1821.

By Authority of Congress. THOS. H. GILLIS, Manager.

For erecting two Public School-houses, a Penitentiary, and Town Hall.

*The drawing of the lottery was adver- [*45 tised in two newspapers printed in the city of Washington; in the National Intelligencer from the 18th of May, 1821, and in the Washington City Gazette from the 17th of July, 1821, until the completion of the lottery. These advertisements exhibited the scheme agreed upon be-

vote to this effect; but we do find that the cross bridge was suffered to unite with theirs, pursuant to this proposition, and that for four years all were suffered to pass without toll who came from Charlestown to Cambridge, or vice versa. Now, corporations can be bound by implication as well as individuals, as has been before stated; and no acts could be stronger to show an assent to a proposition, an agreement or bargain, than those which have been mentioned." Nor was this doctrine new at that time in that court. It may be clearly inferred from the prior cases of the President, etc., of the Salem Bank v. The President, etc., of the Gloucester Bank, 17 Mass. Rep. 1, and Foster v. The President, etc., of 74*] the Essex *Bank, 17 Mass. Rep. 479. And it has been more recently confirmed in The Episcopal Charitable Society v. The Episcopal Church in Dedham, 1 Pick. Rep. 372. It may therefore be considered as conclusively settled in Massachusetts. The case of The Bank of Columbia v. Patterson's Adm. in this court, 7 Cranch, 299, did not call for any expression of opinion upon the particular point now under consideration; but the court there held, that from the evidence in that case the jury might legally infer an express or an implied promise of the corporation. The court there said "the contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by the charter. The corporation proceed on the faith of those contracts to pay money, from time to time, to the intestate. Although, then, an action might have lain against the committee personally (for the contract was a personal contract by them, under their private seals), upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the intestate had accepted their engagement." Here, then, secondary evidence and presumptive proof was admitted in a suit against the corporation to fix its responsibility. A vote of the corporation was presumed from other acts, though there was no proof of such a vote being on record. If the corporation had shown that no such vote had been on record, would the presumption have been completely repelled? Would the omission of the corporation to record its own doings have prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation? If such omission would not be fatal to the plaintiff in suits against the corporation (as in our opinion it would not be), it establishes the fact that acts of the corporation not recorded may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights as would be 75*] *admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence. The case of Dunn v. St. Andrew's Church, 14 Johns. Rep. 118, proceeded upon like reasoning. There the plaintiff had performed services as clerk of the church, for the corporation, for which he had received some payments. The records of the corporation contained entries of the payment of moneys, at several times, to the plaintiff for his services; but no resolution was entered on the minutes or records of the corporation appointing the plaintiff clerk of the church. The court held such vote unnecessary to be shown, and that there was sufficient evidence of an implied promise of the corporation to make the compensation. In The King v. Inhabitants of Chipping Norton, 5 East's, Rep. 240, there was a demise by a verbal agreement of the corporation at a court leet, of certain tolls belonging to the corporation. The court held that the corporation could demise only under seal, and that the agreement amounted to a mere license to collect the tolls, though it might be a ground to apply to a court of equity to enforce it as an equitable interest. The ground there was not that the proceeding being verbal was a nullity, but that it did not operate as a demise of the tenement at law. It was conceded that the verbal agreement bound the corporation as a license.

But the present question does not depend upon the point, whether the acts of a corporation may be proved otherwise than by some written document. The reasoning upon it, however, was very ably gone into at the bar, and as it furnishes very strong illustrations upon the point now in judgment, it could not be passed over with propriety.

In the present case, the acts of the corporation itself, done at a corporate meeting, are not in controversy. In corporations existing at the common law and by charter, there are great diversities both of powers and organizations. In some corporations the whole powers rest in a select body, or in select bodies with powers to perpetuate their own corporate *existence, [*76 by filling up vacancies in their own body; and such body or bodies constitute the corporation itself, and the meetings and acts done thereat are the meetings and acts of the corporation itself. In short, they constitute the corporation so far as it has life or organization exclusively, such as many of the boroughs and other municipal corporations in England, familiarly shown by the name of quasi corporations. There are corporations of another sort, where the aggregate body of corporators meet and assemble to discharge corporate functions, and have authority also to perform certain acts and duties, by means of different agents, sometimes designated in the statutes creating them, and sometimes left to their own choice. Of this nature are the townships in New England, where the inhabitants are corporators, and assemble to exercise corporate powers, and have authority to appoint various officers to perform public duties under the guidance and direction of the corporation. Such are the selectmen for the ordinary municipal concerns; overseers of the poor, school committees, assessors of taxes, and various other functionaries. In these cases, the various officers form different boards for the performance of different duties, subordinate to the corporation; their acts lawfully done bind the corporation; but they do not constitute the

corporation, nor are their meetings the meetings of the corporation. In the latter cases, the records of the officers are properly records of their own proceedings, and not of the proceedings of the corporation itself.

It will be at once seen upon an inspection of the charter creating the Bank of the United States, that it is not a corporation of the former description. The charter in the first section declares that a Bank of the United States of America shall be established with a capital of $35,000,000, of which $7,000,000 shall be subscribed by the United States, and the residue by individuals and corporations. It proceeds to enact in the 7th section that the subscribers to the said Bank of the United States, their successors and assigns, shall be and hereby are created a corporation and body politic, by the name and style of "the President, Directors and Company of the Bank of the United States," and by that name shall be capable in law to 77*] have, *purchase, receive, etc., lands, etc., goods, chattels and effects, etc., to an amount not exceeding $55,000,000, including their capital stock; and the same to sell, grant, etc.; to sue and be sued, etc.; to make, have, and use a common seal, and to alter the same at pleasure; to ordain and establish, and put in execution such by-laws and ordinances as they shall deem necessary and convenient for the government of the said corporation; and generally to do and execute all and singular the acts, matters and things which to them it shall or may appertain to do, subject to the other provisions of the act. It proceeds to enact that for the management of the affairs of the corporation, there shall annually be chosen twenty-five directors by the stockholders; and the board of directors shall appoint a president of the corporation. The directors have further authority given to them to appoint such officers, clerks and servants, as they shall deem necessary for executing the business of the corporation, and to exercise such other powers and authorities for the well governing and ordering of the officers of the corporation, as shall be prescribed by the laws, regulations and ordinances of the same. The directors have further authority given them to establish offices of discount and deposit, wheresoever they shall think fit within the United States or the territories thereof, and to commit the management of the said offices, and of the business thereof respectively, to such persons and under such regulations as they shall deem proper, not being contrary to law or the constitution of the bank; and annually to choose the directors of such offices. Among the rules which the act prescribes as fundamental articles of the constitution of the corporation are the following: "That not less than seven directors shall constitute a board for the transaction of business, of whom the president shall always be one, except in case of sickness or necessary absence;" that sixty stockholders who are proprietors of 1,000 shares in the stock "shall have power at any time to call a general meting of the stockholders for purposes relative to the institution;" "that each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond with two or more sureties, to the satisfaction of the directors, in a sum not less 78*] *than $50,000,with condition for his good behavior and the faithful performance of his duties to the corporation;" that the total amount of the debts of the corporation shall not exceed a limited sum; and if it does the directors shall, in their natural and private capacities be liable to any creditor therefor, with the exception that any director who shall have been absent when the excess was contracted or created, and who shall have dissented from the resolution or act authorizing it, and shall give notice of the fact in a particular manner, shall be exonerated; that the Secretary of the Treasury shall be furnished from time to time, as often as he may require, etc., with statements of the amount of the capital stock, of debts due, of moneys deposited, of notes in circulation, and of specie on hand; and shall have a right to inspect such general accounts of the bank as shall relate to the said statement. The act further provides that a committee of either house of Congress appointed for that purpose, shall have a right to inspect the books and to examine into the proceedings of the corporation, and to report whether the provisions of the charter have been violated or not.

Such is the summary of the most important provisions of the act constituting the charter of the bank, and material to the present cause. It is most manifest that the corporation is altogether a distinct body from the directors, possessing all the general powers and attributes of an aggregate corporation, and entitled to direct and superintend the management of its own property, and the government of the institution, and to enact by-laws for this purpose. So far as the act delegates authority to the directors, the latter possess it and may exercise it, not as constituting the corporation itself, but as its express statute agents to act in the ordinary business of the institution. The directors are created a board and not a corporate body. If the authority delegated to them can only be exercised by them when assembled as a board with a proper quorum, and not by the separate assent of a majority of the whole body (on which it is unnecessary here to express any opinion), still it is clear that their meetings and acts are but the meetings and acts of a board of agents acting ex officio, and not the meetings and *acts of the corporation itself. The whole [*79 structure of the charter and the whole proceedings under it, as well as the by-laws and regulations which have come under our review, demonstrate that this has been the uniform construction of the corporation itself and of the directors. Indeed, this is believed to be so universally acted upon in all the cases respecting banks, which have been judicially decided, that it is not thought necessary to do more than express our opinion that such is the true interpretation of this charter.

It is not necessary to consider whether the sixth of the fundamental articles of the constitution of the bank, which directs that such cashier or treasurer shall be required to give bond, etc., to the satisfaction of the directors, might have applied by its own force to the cashiers of offices established as offices of discount and deposit. In the first place, that point is not put in the pleadings; in the next place, the directors are by the charter authorized to establish such offices, subject to such regulations as they shall deem proper; and in virtue of that authori-

As to the corporation, if there be any con- 51*] tract in *the case, it must impose an obligation, either primary and absolute, to pay the prize, or secondary and contingent, as collateral guaranty for Gillespie. The plaintiff's declaration lays a contract of the first description only, and ties him down to the proof of such a contract, made through the agency of these managers, and in no other form; while his actual proof, and every circumstance in the case, exclude and repudiate it, by fixing upon Gillespie the primary and absolute obligation; and, indeed, equally exclude and repudiate any contract of the second description. If the managers held out any assurance or invitation to the ticket-buying public, or otherwise contracted any obligation, absolute or contingent, to see to the payment of prizes, it must have been either virtute officii, as one of the specific duties prescribed to them by the law of their appointment, or as one gratuitously undertaken by them, and not inherent to the nature of their office and functions. Either way it was an obligation contracted, proprio jure, and attaching responsibility to them personally and individually.

Then, (1st) for the due performance of the prescribed duties, inherent to the nature of their office, they are directly responsible, on their bond, to the corporation, from which it is impossible to infer such an inversion in the order of responsibility as that the managers should have made that very corporation, to which they are themselves amenable, liable for their own transgressions of such duties. (2d) If (as is quite clear from the plaintiff's own showing) no action lay against the managers, either because the seeing to the payment of prizes was no part of their prescribed duties, or because they "diligently and impartially exercised and performed the duties and authority vested in them," it follows, necessarily, that no action lies against the corporation. Though the converse of the proposition be utterly untenable, since they may have contracted an obligation either inherent to the nature of their office, or voluntarily superinduced, the violation of which was either an official misdemeanor or a breach of contract; for neither of which could the corporation have been held anywise responsible. (3d) If the corporation were 52*] chargeable, under any circumstances, *or in any form of action, for the misconduct of the managers in the course of their official or ministerial duties, it could only be ex delicto, or quasi ex contractu, in an action for consequential damages, and not in an action, like the present, purely ex contractu. (4th) But no action could be conceived to make the corporation responsible to third persons for a wrong done to itself; for a transgression by its own officers against its own authority, in the breach of a positive duty to itself, voluntarily prescribed in the exercise of its own legislative discretion to its own officers, and enforced by adequate sanctions of its own institutions. (5th) As an obligation not strictly imposed upon the managers, virtute officii, it is impossible to contend that the corporation can be responsible, in this or any other conceivable form of action, for that or any other act of its officers, without the prescribed limits and sphere of their duties and authority.

Mr. Chief Justice **Marshall** delivered the opinion of the court:

This cause depends on the liability of the corporation to pay the ticket on which the suit is instituted. In considering this question, that part of the charter which contains a grant of power on the subject of lotteries, the ordinances of the corporate body in execution of the power, and the proceedings of its agents, must be reviewed.

The charter enacts "that the corporation shall have full power and authority" "to authorize the drawing of lotteries, for effecting any important improvement in the city which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of $10,000. And provided, also, that the object for which the money is intended to be raised shall be first submitted to the President of the United States, and shall be approved of by him."

Some doubt has been expressed whether this power is to be exercised by drawing the lottery, on account and at the risk of the corporation, or by selling the privilege to individuals and authorizing them to draw it on their own account. This doubt is founded on the word "authorize." Congress, we are told, has not granted the power to draw lotteries, but to "authorize" their being drawn.

*We cannot admit the correctness of [*53 this criticism. We do not admit the justice of that construction which denies to the corporation the power of causing the lottery to be drawn on its own account. A corporation aggregate can legislate within its prescribed limits, but can carry its laws into execution only by its agents. Any legislative act directing a lottery to be drawn is literally an act "to authorize the drawing of lotteries."

The object for which the lottery may be authorized is "any important improvement in the city." Its produce is to come in aid of the ordinary funds or revenue thereof, and "the amount to be raised in each year shall not exceed the sum of $10,000." The language of the charter is not that the sum to be brought into the treasury of the city shall not exceed the sum of $10,000, but that "the amount to be raised shall not exceed that sum." This language, it is admitted, comprehends the net proceeds of the lottery, but it comprehends all those net proceeds, and does not allow a partition of profit, so as to retain $10,000 for the treasury, and reserve a residue for others. The single object for which the lottery can be drawn is "any important improvement in the city," not the emolument of individuals. The motive with Congress for this restriction on the amount is, not to limit the sum to come into the city treasury, but to limit the extent of gaming, which the corporation may authorize. Congress must have perceived that, to bring $10,000 into the treasury, either "the amount raised must exceed that sum," or the lottery must be drawn on account of the city; for no man will purchase a lottery from which he can make nothing.

The counsel for the plaintiff in error have remarked, and the remark is certainly entitled to attention, that, in describing the power, Congress has used no words indicating the idea

that the corporation might grant or sell lotteries. "To authorize the drawing of lotteries" is, as has been said, an appropriate term for a corporate act instituting a lottery for the benefit of the city; but if the granting a lottery to others, or a sale of the privilege to others, had been in the mind of Congress, it is to be presumed that some words would have been used indicating the idea.

54*] *There is great weight, too, in the argument that it is a trust, and an important trust, confided to the corporation itself, for the purpose of "effecting important improvements in the city," and ought therefore to be executed under the immediate authority and inspection of the corporation. It is reasonable to suppose that Congress, when granting a power to authorize gaming, would feel some solicitude respecting the fairness with which the power should be used; and would take as many precautions against its abuse as was compatible with its beneficial exercise. Accordingly, we find a limitation on the amount to be raised, and on the object for which the lottery may be authorized. It is to be for "any important improvement in the city which the ordinary funds or revenue thereof will not accomplish;" and is subjected to the judgment of the President of the United States. The power thus cautiously granted is deposited with the corporation itself, without an indication that it is assignable. It is to be exercised, like other corporate powers, by the agents of the corporation under its control. While it remains where Congress has placed it, the character of the corporation affords some security against its abuse; some security that no other mischief will result from it than is inseparable from the thing itself. But if the management, control and responsibility may be transferred to any adventurer who will purchase, all the security for fairness, which is furnished by character and reponsibility, is lost.

We think, then, that the most obvious, if not the exclusive construction of the charter is, that the lotteries to be authorized by the corporation are to be drawn under its superintendence and on its own account.

We will next advert to the measures which have been adopted for carrying this power into execution.

Ten successive resolutions were passed, the first approved on the 23d of November, 1812, and the last on the 21st of May, 1821, each of them for raising the sum of $10,000, by lottery, for particular improvements mentioned in the resolution.

The ordinance of the 24th of July, 1815, which was passed for carrying the three first of these resolutions into effect, contemplates 55*] and authorizes lotteries to be drawn *entirely under the management, for the benefit, and on the responsibility of the corporation. Seven managers are appointed by the ordinance, and they, or a majority, are authorized to employ agents, fill up vacancies in their own body, and to do every act which may be necessary for carrying its provisions into effect.

The ordinance passed on the 17th of November, 1818, for carrying the fourth, fifth, sixth and seventh resolutions into effect, authorizes the mayor to appoint seven managers, whose duty it was to agree on a scheme to sell the said lottery or dispose of the tickets to the best advantage. A proviso is inserted that, should the lottery be sold, the purchasers may make the scheme; but the ordinance enacts generally (and the enactment makes no distinction between a sale of the lottery itself and a disposition of the tickets) that it shall be the duty of the managers to attend diligently to the drawing of the lottery, and to pay the fortunate adventurers for prizes drawn by them. The ordinance, however, adds the farther duty of paying over the balance, after deducting all necessary expenses, into the city treasury. From this it has been inferred that these provisions are made for the contingency that the tickets should be disposed of for the benefit of the city, and are entirely inapplicable to the contingency of an entire sale. Certainly, in the event of an entire sale, the balance, after deducting all necessary expenses, would not be payable into the treasury, unless we suppose it to mean the balance of the sum for which the lottery might be sold. But this is the only part of the clause which is inapplicable to a lottery sold out and drawn for the benefit of the purchaser.

In October, 1819, the managers appointed under the act of 1815 were empowered to sell and dispose of the lotteries to which that act refers, or so much thereof as yet remains to be drawn, in such classes, and on such terms and conditions as shall appear to them right and expedient. The duty of the managers to superintend the drawing, and to pay the prizes, is not changed by this act, unless the mere power to sell implies such change.

The managers sold to David Gillespie, of New York, in pursuance of the acts of 1815 and 1819, a lottery denominated *the [*56 fifth class of the Grand National Lottery, for the sum of $10,000, to be paid before the commencement of the drawing the said lottery or class; and articles of agreement, in pursuance thereof, were executed on the 14th day of May, 1821. The ticket held by the plaintiff is in this class.

On the 22d of the same month an ordinance was passed, authorizing the managers to appoint a president, whose duty it should be, in addition to the duties imposed by the acts of 1815 and 1819, to sign all contracts, with the concurrence of a majority of the said managers, and to sign all the lottery tickets in every scheme or schemes sold by them.

This ordinance recognizes the duties prescribed by the acts of 1815 and 1819. Its 2d section allows each of the managers of the city lotteries $3 for each day he has been or shall be employed; and the 7th section enacts that this compensation, "except for the class now contracted for," shall be provided for and paid out of the proceeds of lotteries hereafter contracted for.

This act is understood to recognize it as a part of the duty of the managers to continue their superintendence of the drawing of the very class which had been sold, and which comprehended the ticket that drew the prize for which this suit is brought.

The defendant has excepted to the admissibility, as well as sufficiency of the testimony offered by the plaintiff in the Circuit Court, and the objection is made in general terms.

We presume, however, that it cannot apply to the charter, or to the resolutions and ordinances of the corporation. Nor do we suppose that any exception was intended to be made to the testimony which establishes the ownership of the tickets, or to the admissibility of the deposition of Mr. Webb. The first document on which a question can arise, is the ticket itself. Is this admissible in a suit against the corporation?

In considering this question, we must inquire into the connection between the ostensible managers and the corporation.

The persons who were held out as managers to superintend the drawing of the lottery com- 57*] prehending this ticket, *were, with one exception, the same persons who were appointed in the ordinance of 1815, as managers for the lotteries established by that act. The name of R. C. Weightman, is substituted for that of S. N. Smallwood. No other change appears. It is in proof that S. N. Smallwood was elected mayor; and, as the managers have, by the ordinance, a right to fill up vacancies in their own body, their acting uniformly with R. C. Weightman, is a proof that they had chosen him to fill the vacancy made by Mr. Smallwood.

But it is contended that this lottery was drawn under the act of 1818, and there is no proof that the individuals who appeared and acted as managers, had any authority under that act.

There is undoubtedly some confusion in this part of the case, and there is not much difficulty in ascribing it to its real cause. The mayor was authorized by the ordinance of 1818 to appoint managers to carry that act into execution, and the probability is, that he appointed the persons who were in office under the appointment of the corporation. The fitness of this proceeding renders it probable; and the subsequent proceedings of the corporation itself, turn this probability almost into certainty. In a case where written evidence of appointment is not in the power of the plaintiff, if indeed it exists, circumstances must be relied on to prove the fact, should it be deemed necessary.

The act of 1821 takes no notice of any appointment under the act of 1818, and makes it the duty of the managers, created under the act of 1815, to elect a president to sign all contracts, "and to sign all the lottery tickets, in every scheme or schemes sold by the said managers." Class No. 5 was then sold by these managers. Lotteries, under seven resolutions, to raise the sum of $70,000, were either sold, or for sale, either in mass or in detail, under the acts of 1815, 1818 and 1819. The language of this ordinance appears to extend to them all; and if it does, certainly admits the authority of the managers appointed under the act of 1815 to extend to all. The 7th section of the act of 1821, which provides the fund for their compensation, expressly excepts "the class now contracted for." The contract for the 5th class was executed a few days be- 58*] fore *the passage of this ordinance, and it is difficult to resist the conviction that the allusion is to this contract. These provisions in the ordinance of 1821 go far to establish the authority of these managers in this very case. The receipt of the purchase money under this very contract, is also a strong circumstance in support of the authority of those who made it. But we think the corporation has waived all exception to the authority of the managers, by producing and relying on their contract for the sale of this very lottery. That body defends itself from the claim of the plaintiff, by alleging that their managers sold this lottery. Their attorney produces the contract in court, and insists that it exempts his clients from all liability. Can he in the same cause deny the authority of those who made it? We think the connection between the managers and the corporation is established beyond controversy.

If the persons who made this contract are the persons appointed under the authority of the corporation, as managers for class No. 5, no doubt exists whether the ticket has emanated from them. The ordinance of the 21st of May, 1821, authorizes them to appoint a president from their own body, whose duty it shall be "to sign all the lottery tickets in every scheme or schemes sold by the said managers." The scheme for the 5th class was annexed to the agreement between Gillespie and the managers, and has been produced in court with it. Mr. Webb proves that the ticket 2929, on which this suit was brought, was signed by T. H. Gillis, whose name is subscribed to it; and that T. H. Gillis was at that time president of the board of managers.

It is, then, satisfactorily proved that the ticket was issued and sold under the authority of the corporation, and was consequently admissible in a suit brought against that body. The remaining inquiry is, does it bind the defendants to pay the prize it has drawn in the lottery?

Had the managers, instead of selling the whole scheme in mass, sold the tickets in the usual manner, and received the purchase money of the several tickets, instead of a sum in gross, for the use of the city, this question could not have arisen. No person would have denied the liability of the *corporation. The sole [*59 inquiry, then, is, whether the agreement of the 14th of May, 1821, has discharged this liability.

If the exposition of the charter in the early part of this opinion be correct, this question is answered. If the corporate body was not empowered to vest in an individual the independent right of drawing lotteries for himself, and on his own responsibility, uncontrolled by the city government, then the agreement with Gillespie can operate only as a sale of the profits for a given sum, leaving the responsibility of the corporation as if that agreement had never been made. The contract would be between the corporation and the ticket purchaser; and, although the price of the ticket was paid to Gillespie, yet the corporation had consented that he should receive it for the purpose of performing their engagements to such ticket-holders as should draw prizes, and had consented to receive from him $10,000, as full compensation for that portion of it which would remain after satisfying those engagements.

If the charter did grant the power to the corporation which is now claimed, the whole transaction must be considered, in order to determine its actual character. We must inquire whether the corporation has so acted as

to devest itself entirely of all connection with, control over, and responsibility for, this lottery, and substituted the purchaser in their place.

In its origin, the lottery was a city lottery. It was to be managed by persons appointed by the city, drawn under their superintendence, and, so far as the public was informed, for the benefit, and on the responsibility of the city. Tickets were prepared under the authority of the corporation, bearing on their face the city improvements for which the lottery was to be drawn, the names of the managers appointed by the city, and the words "national lottery," and "by authority of Congress." Before these tickets were disposed of in the usual way, the managers entered into an agreement with David Gillespie, to sell him a lottery denominated the fifth class of the Grand National Lottery, to be drawn according to the scheme annexed, at the cost of the said Gillespie, except the expense of drawing the same.

The stipulations of this contract show that [*60] it was not intended *to dissolve the connection between the city and the lottery, and to give the absolute property in it, and control over it, to Gillespie; nor to exhibit him to the world as its owner, with whom alone the purchasers of tickets were to contract, and to whom the fortunate adventurers were to look for the payment of their prizes. He engages to draw the lottery in the city of Washington, in the presence of the managers; to finish the drawing within two years from the date of the contract; to pay all the prizes within sixty days from its completion; to provide two clerks to assist at the drawing; and to execute, within thirty days, and before the drawing should commence, a bond to the managers, with such security as they should approve, in the penal sum of $35,000, conditioned for the faithful drawing of the lottery, according to the scheme, for the punctual payment of the prizes, and for conducting the lottery fairly and honestly, according to the scheme, and according to the true intent and meaning of the acts of the aldermen and board of common council.

A bond was executed in pursuance of this agreement.

These provisions are in the spirit of a contract made to secure the city from the hazard of a continuing responsibility; a responsibility which they were induced to continue by the consideration of the $10,000 paid by Gillespie. Why else stipulate that the lottery should be drawn in the city? Why that it should be completed within a limited time, and drawn in the presence of the managers appointed by the corporation? Why that the prizes should be paid? and why take a bond to the managers, conditioned, among other things, for their payment? Had the corporation felt no farther interest in the lottery, the purchaser might have been permitted to exercise his own discretion with the article he had purchased, and to appear to the world as its owner. But the nature of the case justifies the opinion that such a sale could not have been made. No purchaser could have been found who would have given $10,000 for the privilege of drawing a lottery on his own account and responsibility, having no connection with the city. The probability is strong, that the aspect which the lottery still continued to bear was a necessary part of the contract, *without which it [*61 would never have been made, and that these precautions were used to diminish the hazard of a responsibility which was unavoidably continued. We find the appearance of this responsibility carefully preserved by the corporation itself, and by its managers. In the ordinance of the 22d of May, 1821, it is enacted, that the tickets shall be signed by the president of their board of managers, and that their managers shall receive a daily allowance for attending the drawing of the lottery. The tickets were signed in conformity with this ordinance.

The manner in which the lottery was advertised, confirms the opinion that the contract of sale was made with a view to the continuing the responsibility of the city. Exception is taken to the admission of these advertisements, and we will not affirm that their appearance in the city papers, one of which was published by a member of the corporate body, is evidence that the publication was made by authority of the managers; but the advertisements prove the fact that the lottery was ushered to the world in the form and character which those advertisements represent. It is proved that they were published in two papers in the city, in the National Intelligencer from the 18th of May, 1821, and in the Washington City Gazette from the 17th of July, 1821, until the completion of the lottery. These advertisements exhibited the scheme which was agreed on between the managers and Gillespie, which was annexed to their contract; gives notice of the time when the drawing would take place; of the number of days to be employed in the drawings, and that they would be completed as soon as possible, under the superintendence of the managers. To this advertisement the names of the managers are annexed. The lottery is drawn in pursuance of it, and the managers superintend the drawing. In its progress, a postponement takes place. An advertisement purporting to be signed by three of the managers appears, giving notice of this postponement, and of its cause. Another advertisement soon follows, purporting to be signed by the president, by order of the board, giving notice when the drawing would recommence. It does recommence under the superintendence of the managers.

*It is not, we think, within the com- [*62 pass of human credulity, to believe that the managers did not see these advertisements, or did not believe that they would be received by the public as being accredited by their names. Not to contradict them was to sanction them. To appear in pursuance of them, and superintend the drawings of which they had given notice, was to adopt them. It is not to be believed that this concurrence of circumstances, all tending to assure the public that these advertisements were published by authority of the managers, could have been produced by accident. To sit daily superintending the drawing of a lottery, in pursuance of notice published every day under their names, verifies that publication, and must be considered as a ratification of it.

The proceedings which took place between the managers and Gillespie, after the contract still farther corroborates the opinion that this

continuing responsibility of the corporation which was held out to the public, was not a fraudulent representation for the purpose of enabling Gillespie to sell the tickets, but a representation of the fact as then understood.

It appears, from the deposition of Mr. Webb, that all the tickets, amounting to 50,000, were put into the possession of Gillespie; but these tickets were not vendible until signed by the president of the board of managers. Those unsigned could no more be used by him than if they had not been in his possession. As soon as the scheme was agreed on, three or four thousand tickets were signed, and afterwards tickets were occasionally signed, so as to make the additional number of 17,208. Why were these tickets thus withheld from him, if he had become the absolute and unconditional proprietor of them? The conduct of the managers, as disclosed in the subsequent part of Webb's deposition, will inform us. He says, that some time after the drawing of the lottery commenced, the president of the managers refused to sign tickets, unless an equivalent in prize tickets, either paid and taken in by Gillespie, or drawn on hand, or the notes of individuals which Gillespie had taken, payable to himself, for tickets sold, were deposited with them; and, accordingly, when the witness, as [63*] the *clerk and agent of Gillespie, presented tickets to be signed, he was obliged, at the same time, to deposit such prize tickets or promissory notes; and, on some occasions, when tickets were called for, and wanted, the managers have refused to sign the same for want of such equivalent; that the amount of such prize tickets so deposited with the managers was about the sum of $141,779; that the managers on such occasions objected to trusting Gillespie with the disposal of tickets much beyond the penalty of his bond, and the witness understood, from the conversations and transactions between the parties at the time, that this precaution arose from doubts which had been circulated respecting Gillespie's solvency. The whole number of tickets actually signed was 30,960. This conduct of the managers is explained by the supposition that they considered the city as still responsible for prizes, but is irreconcilable with the idea of an entire transfer of responsibility to Gillespie. Such entire transfer would have entitled him to the free use of all the tickets. That the parties who made the contract so understood it, would go far in its construction, were it even in the power of the corporation to transfer its responsibility.

We think, then, that the contract of May, 1821, can be considered only as a sale of the profits of the lottery, and could not, under all the circumstances of the case, affect the responsibility of the corporation. The ticket was in fact what it purports on its face to be—a ticket in the National Lottery, by authority of Congress, sold under the direction of the corporation, and signed by the person who was authorized by an act of the corporate body to sign it. It asserts that it shall entitle the possessor to such prize as may be drawn to its number; and this is, we think, in such a case, the promise of the corporation, made by its authorized agent, to pay such prize.

The judgment of the Circuit Court, then, on the verdict found in the cause, and on the case agreed, to which that verdict refers, ought to have been for the plaintiff. The judgment is to be reversed, and the cause remanded to the Circuit Court, with directions to enter judgment for the plaintiff.

[*Corporations.] [*64

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES

v.

DANDRIDGE ET AL.

In a suit brought by the president, directors and company of the Bank of the United States, upon a bond given to the bank to secure the faithful performance of the official duties of one of its cashiers, evidence of the execution of the bond, and of its approval by the board of directors, (according to the rules and regulations contained in the charter of the bank) is admissible, notwithstanding there was no record of such approval; and the plaintiff may prove the fact of such approval by the board, by presumptive evidence, in the same manner as such fact might be proved in the case of private persons, not acting as a corporation, or as the agents of a corporation.

Where, in such a case, the cashier is duly appointed, and permitted to act in his office, for a long time, under the sanction of the directors, it is not necessary that his official bond should be accepted by the board of directors as satisfactory, according to the terms of the charter, in order to enable him to enter legally on the duties of his office, or to make his sureties responsible for the non-performance of those duties. The charter and the by-laws are to be considered, in this respect, as directory to the board, and not as conditions precedent.

THIS cause was very elaborately argued by the Attorney-General and Mr. Webster for the plaintiffs, and by Mr. Tazewell for the defendants. But as the arguments are very fully stated, and the authorities cited and commented on, in the opinions of the learned judges, it has not been thought necessary to insert them.

Mr. Justice Story delivered the opinion of the court:

This is a writ of error to the Circuit Court for the district of Virginia. The original action was debt on a bond, purporting to be signed by Dandridge, as principal, and Carter B. Page, Wilson Allen, James Brown, Jr., Thomas Taylor, Harry Heth, and Andrew Stevenson, as his sureties, and was brought jointly

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NOTE.—As to the official bonds, their scope, and the liability of sureties therein. See note to The United States v. Giles, 9 Cranch, 212; see also The United States v. Kirkpatrick, 9 Wheat. 720.

As to corporations being bound by acts and contracts of agents not in writing. See note to Mechanics' Bank v. The Bank of Columbia, 5 Wheat. 326, also Fleckner v. The United States, 8 Wheat. 338.

The subsequent recognition of the acts of an agent appointed by parol, proves his agency. Detroit v. Jackson, 1 Dougl. Mich. 113; Bank of Ky. v. Schuylkill Bank, Par. Sel. Cas. 180, 251; Commonwealth v. Cullen, 13 Penn. St. 133; Narragansett Bank v. Atlantic Silk Co. 3 Metc. 282; Middlesex Hurb. & Man. v. Davis, 3 Metc. 133; Mellege v. Boston Iron Co. 5 Cush. 158.

65*] against all the parties. The condition *of the bond, after reciting that Dandridge had been appointed cashier of the office of discount and deposit of the Bank of the United States at Richmond, Virginia, was, that if he should well, and truly and faithfully discharge the duties and trust reposed in him as cashier of the said office, then the obligation to be void, otherwise to remain in full force and virtue. The declaration set forth the condition, and assigned various breaches. Dandridge made no defense; and the suit was abated as to Heth by his death. The other defendants severed in their pleas. It is not thought necessary to state the pleadings at large; it is sufficient to state, that Stevenson and Allen pleaded, among other pleas, non est factum generally, and also special pleas of non est factum, on which issues were joined; and that all the defendants in various forms pleaded, that the instrument was not the deed of Stevenson; and further pleaded, that the bond had never been approved, according to the provisions of the 30th article of the rules and regulations of the bank. Issues were also taken on these pleas; and the cause came on for trial upon all the issues of fact.

At the trial, evidence was offered for the purpose of establishing the due execution of the bond by the defendants, and particularly by Stevenson and Allen, and its approval by the plaintiffs. The evidence was objected to on behalf of the defendants, as not sufficient to be left to the jury, to infer a delivery of the bond, and the acceptance and approval thereof by the directors of the bank, according to the provisions of their charter; and the objection was sustained, the court being of opinion, that although the scroll affixed by Allen to his name, is in Virginia, equivalent to a seal of wax, and although proof of the handwriting of Stevenson, and the bond being in possession of the plaintiffs, and put in suit by them, and the introduction of Dandridge into the office of cashier, and his continuing to act in that office, would, in general, be prima facie evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted; yet it was not evidence of that fact, or of the obligation of the bond in this case; because, under the act of Congress, incorporating the Bank of the United States, the bond ought to be satisfacto-
66*] ry to the board of directors, before *the cashier can legally enter on the duties of his office, and consequently before his sureties can be responsible for his non-performance of those duties; and that the evidence in this case did not prove such acceptance and approbation of the bond, as is required by law for its completion. This opinion constitutes the subject-matter of the first bill of exceptions.

Further evidence was then offered by the plaintiffs for the same purpose, the particulars of which are not now necessary to be enumerated; to which the defendants took various objections, and contended, among other things, that the whole of the evidence, if legal, was not sufficient to go to the jury, upon which to infer the delivery of the paper as the act and deed of the defendants, and its acceptance and approbation by the directors of the bank, pursuant to their charter; which objection was sustained; and the court excluded the whole, and every part of the said evidence from the jury, being of opinion that the board of directors keep a record of their proceedings, which record, or a copy of it, showing the assent of the directors to this bond, was necessary to show that such assent was given; and if such assent had not been entered on the record of the proceedings of the said directors, the bond was ineffectual, and no claim in favor of the plaintiffs could be founded thereon against the defendants in these issues. This opinion of the court constitutes the subject-matter of the second bill of exceptions.

It has become the duty of this court, upon the present writ of error, to decide whether these opinions of the Circuit Court, or either of them, can be maintained in point of law.

It is material to state, that the rejection of the evidence did not proceed upon the ground that it was of a secondary nature, leaving behind, in the possession of the plaintiffs, evidence of a higher and more satisfactory nature. On the contrary, the whole structure of the case shows that there was in the understanding of both the parties no record ever made of the approval or acceptance of the bond in question; and the principal controversy was, whether it could be established by any evidence short of such record proof.

*The propositions maintained by the [*67
Circuit Court were in substance these: First, that the cashier could not legally enter upon the duties of his office, or make his sureties responsible for his non-performance of those duties, before his official bond was accepted as satisfactory by the board of directors, according to the terms of the charter. Second, that such acceptance could be established only by proof drawn from the records of the board of directors; and if no record had been kept of such assent and acceptance, the bond was ineffectual, and no secondary evidence could be admitted to establish the fact.

The last proposition will be first considered. The correctness of it in a great measure depends upon the soundness of the distinction taken between the acts of private persons and the acts of corporations. It is admitted in the opinion of the Circuit Court, that the evidence offered would, in common cases between private persons, have been prima facie evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted. But it is supposed that a different rule prevails in cases of corporations; that their acts must be established by positive record proofs; and that no presumptions can be made in their favor, of corporate assent or adoption, from other circumstances, though in respect to individuals the same circumstances would be decisive. The doctrine, then, is maintained from the nature of corporations, as distinguished from natural persons; and from the supposed incapacity of the former to do any act not evidenced by writing; and if done, to prove it, except by writing.

Little light can be thrown on this subject by considerations drawn from corporations existing by the common law, or dependent upon prescription. To corporations, however erected, there are said to be certain incidents attached, without any express words or authority for this purpose; such as the power to plead

and be impleaded, to purchase and alien, to make a common seal, and to pass by-laws.[1] In ancient times it was held that corporations aggregate could do nothing but by deed under 68*] their common seal. *But this principle must always have been understood with many qualifications; and seems inapplicable to acts and votes passed by such corporations at corporate meetings. It was probably in its origin applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. Be this as it may, the rule has been broken in upon in a vast variety of cases, in modern times, and cannot now, as a general proposition, be supported. Mr. Justice Bayley, in Harper v. Charlesworth, 4 Barnw. & Cresw. 575, said: "A corporation can only grant by deed; yet there are many things which a corporation has power to do otherwise than by deed. It may appoint a bailiff, and do other acts of a like nature." And it is now firmly established, both in England and America, that a corporation may be bound by a promise, express or implied, resulting from the acts of its authorized agent, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal.

But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself. The doctrine of this court, in Head v. The Providence Insurance Company, 2 Cranch, 127, on this subject, is believed to be entirely correct. It was there said by the Chief Justice, in delivering the opinion of the court, that, "without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." In that case, the act of incorporation prescribed the mode in which contracts should be made, in order to bind the corporation, 69*] which was not complied *with; and the court held, that there was no binding contract, for the corporation could only act in the manner prescribed by law; and when their agents do not clothe their proceedings with those solemnities which are required by the incorporating act to bind the company, they cannot be deemed as more than proposals or preparatory negotiations. We do not perceive anything in this doctrine which fairly admits of controversy. But this case has been pressed upon us, at the present argument, as justifying to its full extent the reasoning of the defendants on the present occasion. The question there, was not whether every corporate act must be evidenced by writing, but whether certain acts, which by law were to bind only when done and verified in a particular manner, ought to bind, although those forms were not adopted.

We do not admit, as a general proposition, that the acts of a corporation, although in all other respects rightly transacted, are invalid, merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such a restriction, it must be obeyed; if it does not, then it remains for those who assert the doctrine to establish it by the principles of the common law, and by decisive authorities. None such have, in our judgment, been produced.

By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved;[2] it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, *according to the [*70 maxim, omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium. Thus, it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance, if a grant or feoffment has been declared on, attornment will be intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party. The books on evidence abound with instances of this kind, and many of them will be found collected in Mr. Starkie's late valuable Treatise on Evidence. 3 Starkie's Evid. part iv. 1234, 1241, 1248 and note 1250, etc.

The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be pre-

1.—Com. Digest, Franchise, F. 10, 13.

2.—See Rex v. Hawkins, 10 East's Rep. 211; Powell v. Milbourne, 3 Wilson, 355; Hartwell v. Root, 19 Johns. Rep. 345.

sumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty.

71*] *It may not be without use to advert to a few cases where corporate acts have been the subject of presumptions. In the first place, we may advert to the known fact, that a charter may be presumed to have been given to persons who have long acted as a corporation, and assumed the exercise of the powers of a corporate body, whether of an ordinary or extraordinary nature. This is the case in respect to all corporations existing by presumption. Yet the very case supposes that no written proof can be adduced of a charter, or of a vote of the corporators to accept the charter. Yet, both a charter and acceptance are vital to the existence of the corporation. They are, however, presumed, not merely from the lapse of time, but from the continued exercise of corporate powers, which presuppose their existence. So, in relation to the question of acceptance of a particular charter by an existing corporation, or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument or vote of acceptance on the corporation books. It may be inferred from other facts which demonstrate that it must have been accepted. Upon this point it is not necessary to do more than to refer to the general course of reasoning in The King v. Amery, 1 Term. Rep. 595; S. C. 2 Term. Rep. 515, as applied to the circumstances of that case.[1] In Wood v. Tate, 5 Bos. & Pull. 246, which was replevin upon a distress made by the bailiff of the borough of Morpeth, for rent, it appeared in evidence that the tenant went into possession under a lease void for not being executed under the corporate seal, even if made by proper officers; yet the court held, that though the lease was void, the tenant was to be deemed tenant from year to year under the corporation, and his payment of rent from time to time to the officers of the corporation (though not proved to be by virtue of any written authority), was sufficient proof of tenancy under the corporation, on which the 72*] corporation *might distrain for the rent in arrear. In Doe v. Woodman, 8 East's Rep. 228, where certain premises had been demised by the plaintiff to the corporation, as tenant from year to year, at an annual rent, though it does not appear in what manner the demise had been accepted, except by the payment of rent by the bailiff, as such it seems to have been taken for granted that it was proper evidence of a holding by the corporation. In Magill v. Kauffman, 4 Serg. & Rawle, 317, which was an ejectment for land claimed by a Presbyterian congregation, before incorporation, under a purchase by their trustees, and after their incorporation claimed in their right as a corporation, the Supreme Court of Pennsylvania held, that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting the business of the corporation, and also evidenced by witnesses of what passed at the meetings of the congregation when assembled on business, were admissible to show their possession of the land, and the extent of their claim of its boundaries. This must necessarily have proceeded upon the ground that the acts of corporate agents, and even of aggregate bodies corporate or unincorporated, might be established independent of written minutes of their proceedings.

In respect to grants and deeds beneficial to a corporation, there seems to be no particular reason why their assent to, and acceptance of the same, may not be inferred from their acts, as well as in the case of individuals. Suppose a deed poll granting lands to a corporation, can it be necessary to show that there was an acceptance by the corporation by an assent under seal, if it be a corporation at the common law; or by a written vote, if the corporation may signify its assent in that manner? Why may not its occupation and improvement, and the demise of the land by its agents be justly admitted by implication, to establish the fact in favor and for the benefit of the corporation? Why should the omission to record the assent, if actually given, deprive the corporation of the property which it gained in virtue of such actual assent? The validity of such a grant depends upon the acceptance, not upon the mode, by which *it is proved. It is no [*73 implied condition that the corporation shall perpetuate the evidence of its assent in a particular way. At least, if it be so, we think it is incumbent on those who maintain the affirmative, to point out the authorities which sustain it. None such have been cited at the bar. On the contrary, there are highly respectable decisions made upon great consideration, which assert a different doctrine. The case of the The Proprietors of the Canal Bridge v. Gordon, 1 Pickering's Rep. 297, is directly in point. There the object was to impose an onerous duty, and to discharge or limit the right of toll of the plaintiffs; and the court held that the corporation could bind itself, and did in fact, in that case, bind itself to a surrender of its valuable rights, by implications from corporate acts, without vote or deed. The learned Chief Justice of Massachusetts on that occasion, in delivering the opinion of the court, said, "it is true that the acts, doings and declarations of individual members of the corporation, unsanctioned by the body, are not binding upon it; but it is equally true that inferences may be drawn from corporate acts, tending to prove a contract or promise, as well as in the case of an individual; and that a vote is not always necessary to establish such contract or promise. This has been settled in several cases in this country and in England." And afterwards addressing himself to the facts of that case, he added, "the question, then, is narrowed to this: Have the proprietors of the canal bridge assented to this proposition and acted under it? We find no

1.—See also Newling v. Francis, 3 Term Rep. 189; Butler v. Palmer, Salk. 191.

vote to this effect; but we do find that the cross bridge was suffered to unite with theirs, pursuant to this proposition, and that for four years all were suffered to pass without toll who came from Charlestown to Cambridge, or vice versa. Now, corporations can be bound by implication as well as individuals, as has been before stated; and no acts could be stronger to show an assent to a proposition, an agreement or bargain, than those which have been mentioned." Nor was this doctrine new at that time in that court. It may be clearly inferred from the prior cases of the President, etc., of the Salem Bank v. The President, etc., of the Gloucester Bank, 17 Mass. Rep. 1, and Foster v. The President, etc., of 74*] the Essex *Bank, 17 Mass. Rep. 479. And it has been more recently confirmed in The Episcopal Charitable Society v. The Episcopal Church in Dedham, 1 Pick. Rep. 372. It may therefore be considered as conclusively settled in Massachusetts. The case of The Bank of Columbia v. Patterson's Adm. in this court, 7 Cranch, 299, did not call for any expression of opinion upon the particular point now under consideration; but the court there held, that from the evidence in that case the jury might legally infer an express or an implied promise of the corporation. The court there said "the contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by the charter. The corporation proceed on the faith of those contracts to pay money, from time to time, to the intestate. Although, then, an action might have lain against the committee personally (for the contract was a personal contract by them, under their private seals), upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the intestate had accepted their engagement." Here, then, secondary evidence and presumptive proof was admitted in a suit against the corporation to fix its responsibility. A vote of the corporation was presumed from other acts, though there was no proof of such a vote being on record. If the corporation had shown that no such vote had been on record, would the presumption have been completely repelled? Would the omission of the corporation to record its own doings have prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation? If such omission would not be fatal to the plaintiff in suits against the corporation (as in our opinion it would not be), it establishes the fact that acts of the corporation not recorded may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights as would be 75*] *admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence. The case of Dunn v. St. Andrew's Church, 14 Johns. Rep. 118, proceeded upon like reasoning. There the plaintiff had performed services as clerk of the church, for the corporation, for which he had received some payments. The records of the corporation contained entries of the payment of moneys, at several times, to the plaintiff for his services; but no resolution was entered on the minutes or records of the corporation appointing the plaintiff clerk of the church. The court held such vote unnecessary to be shown, and that there was sufficient evidence of an implied promise of the corporation to make the compensation. In The King v. Inhabitants of Chipping Norton, 5 East's, Rep. 240, there was a demise by a verbal agreement of the corporation at a court leet, of certain tolls belonging to the corporation. The court held that the corporation could demise only under seal, and that the agreement amounted to a mere license to collect the tolls, though it might be a ground to apply to a court of equity to enforce it as an equitable interest. The ground there was not that the proceeding being verbal was a nullity, but that it did not operate as a demise of the tenement at law. It was conceded that the verbal agreement bound the corporation as a license.

But the present question does not depend upon the point, whether the acts of a corporation may be proved otherwise than by some written document. The reasoning upon it, however, was very ably gone into at the bar, and as it furnishes very strong illustrations upon the point now in judgment, it could not be passed over with propriety.

In the present case, the acts of the corporation itself, done at a corporate meeting, are not in controversy. In corporations existing at the common law and by charter, there are great diversities both of powers and organizations. In some corporations the whole powers rest in a select body, or in select bodies with powers to perpetuate their own corporate *existence, [*76 by filling up vacancies in their own body; and such body or bodies constitute the corporation itself, and the meetings and acts done thereat are the meetings and acts of the corporation itself. In short, they constitute the corporation so far as it has life or organization exclusively, such as many of the boroughs and other municipal corporations in England, familiarly shown by the name of quasi corporations. There are corporations of another sort, where the aggregate body of corporators meet and assemble to discharge corporate functions, and have authority also to perform certain acts and duties, by means of different agents, sometimes designated in the statutes creating them, and sometimes left to their own choice. Of this nature are the townships in New England, where the inhabitants are corporators, and assemble to exercise corporate powers, and have authority to appoint various officers to perform public duties under the guidance and direction of the corporation. Such are the selectmen for the ordinary municipal concerns; overseers of the poor, school committees, assessors of taxes, and various other functionaries. In these cases, the various officers form different boards for the performance of different duties, subordinate to the corporation; their acts lawfully done bind the corporation; but they do not constitute the

corporation, nor are their meetings the meetings of the corporation. In the latter cases, the records of the officers are properly records of their own proceedings, and not of the proceedings of the corporation itself.

It will be at once seen upon an inspection of the charter creating the Bank of the United States, that it is not a corporation of the former description. The charter in the first section declares that a Bank of the United States of America shall be established with a capital of $35,000,000, of which $7,000,000 shall be subscribed by the United States, and the residue by individuals and corporations. It proceeds to enact in the 7th section that the subscribers to the said Bank of the United States, their successors and assigns, shall be and hereby are created a corporation and body politic, by the name and style of "the President, Directors and Company of the Bank of the United States," and by that name shall be capable in law to 77*] have, *purchase, receive, etc., lands, etc., goods, chattels and effects, etc., to an amount not exceeding $55,000,000, including their capital stock; and the same to sell, grant, etc.; to sue and be sued, etc.; to make, have, and use a common seal, and to alter the same at pleasure; to ordain and establish, and put in execution such by-laws and ordinances as they shall deem necessary and convenient for the government of the said corporation; and generally to do and execute all and singular the acts, matters and things which to them it shall or may appertain to do, subject to the other provisions of the act. It proceeds to enact that for the management of the affairs of the corporation, there shall annually be chosen twenty-five directors by the stockholders; and the board of directors shall appoint a president of the corporation. The directors have further authority given to them to appoint such officers, clerks and servants, as they shall deem necessary for executing the business of the corporation, and to exercise such other powers and authorities for the well governing and ordering of the officers of the corporation, as shall be prescribed by the laws, regulations and ordinances of the same. The directors have further authority given them to establish offices of discount and deposit, wheresoever they shall think fit within the United States or the territories thereof, and to commit the management of the said offices, and of the business thereof respectively, to such persons and under such regulations as they shall deem proper, not being contrary to law or the constitution of the bank; and annually to choose the directors of such offices. Among the rules which the act prescribes as fundamental articles of the constitution of the corporation are the following: "That not less than seven directors shall constitute a board for the transaction of business, of whom the president shall always be one, except in case of sickness or necessary absence;" that sixty stockholders who are proprietors of 1,000 shares in the stock "shall have power at any time to call a general meting of the stockholders for purposes relative to the institution;" "that each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond with two or more sureties, to the satisfaction of the directors, in a sum not less 78*] *than $50,000,with condition for his good behavior and the faithful performance of his duties to the corporation;" that the total amount of the debts of the corporation shall not exceed a limited sum; and if it does the directors shall, in their natural and private capacities be liable to any creditor therefor, with the exception that any director who shall have been absent when the excess was contracted or created, and who shall have dissented from the resolution or act authorizing it, and shall give notice of the fact in a particular manner, shall be exonerated; that the Secretary of the Treasury shall be furnished from time to time, as often as he may require, etc., with statements of the amount of the capital stock, of debts due, of moneys deposited, of notes in circulation, and of specie on hand; and shall have a right to inspect such general accounts of the bank as shall relate to the said statement. The act further provides that a committee of either house of Congress appointed for that purpose, shall have a right to inspect the books and to examine into the proceedings of the corporation, and to report whether the provisions of the charter have been violated or not.

Such is the summary of the most important provisions of the act constituting the charter of the bank, and material to the present cause. It is most manifest that the corporation is altogether a distinct body from the directors, possessing all the general powers and attributes of an aggregate corporation, and entitled to direct and superintend the management of its own property, and the government of the institution, and to enact by-laws for this purpose. So far as the act delegates authority to the directors, the latter possess it and may exercise it, not as constituting the corporation itself, but as its express statute agents to act in the ordinary business of the institution. The directors are created a board and not a corporate body. If the authority delegated to them can only be exercised by them when assembled as a board with a proper quorum, and not by the separate assent of a majority of the whole body (on which it is unnecessary here to express any opinion), still it is clear that their meetings and acts are but the meetings and acts of a board of agents acting ex officio, and not the meetings and *acts of the corporation itself. The whole [*79 structure of the charter and the whole proceedings under it, as well as the by-laws and regulations which have come under our review, demonstrate that this has been the uniform construction of the corporation itself and of the directors. Indeed, this is believed to be so universally acted upon in all the cases respecting banks, which have been judicially decided, that it is not thought necessary to do more than express our opinion that such is the true interpretation of this charter.

It is not necessary to consider whether the sixth of the fundamental articles of the constitution of the bank, which directs that such cashier or treasurer shall be required to give bond, etc., to the satisfaction of the directors, might have applied by its own force to the cashiers of offices established as offices of discount and deposit. In the first place, that point is not put in the pleadings; in the next place, the directors are by the charter authorized to establish such offices, subject to such regulations as they shall deem proper; and in virtue of that authori-

ty, they have prescribed regulations on this very subject in the 30th article of the rules and regulations adopted by them for the government of such offices, which are set forth at large in the transcript of the record. The fourth of these articles declares that the directors of the Bank of the United States shall appoint the cashiers of the offices of discount and deposit; the fifth declares the duties of the cashier, and among other things, his duty "to attend all meetings of the board" of directors of the office, and "to keep a fair and regular record of its proceedings." The sixteenth directs that all notes and bills discounted shall be entered in a book to be called the credit book, in such manner as to discover to the board at one view, on each discount day, the amount which any person is discounted, or is indebted to the office either as payer or indorser. The thirteenth directs that "the cashier of each office shall give bond to the president, directors and company of the Bank of the United States, with two or more approved securities, with a condition for his good behavior and faithful performance of his duties to the corporation." By whom the approval is to be made, whether by the directors of the par-
80*] ent bank or by the directors *of the office, is not stated. If the directors of the parent bank might by the charter have committed it to the local directors, being found in a system of by-laws for their regulation, it would seem a natural inference that it was their intention to commit it to the latter. When, as in the fourth rule, they reserve the appointment of the cashier to themselves, the language directly reserves it to "the directors of the Bank of the United States." If such authority could not by the charter be delegated, then it must be deemed to belong to the directors of the parent bank. It is in the latter point of view that it has been argued at the bar, and in that view it will be considered by this court.

Assuming, then, that the directors of the parent bank were as a board to approve of the bond so far as it respects the securities, in what manner is that approval to be evidenced? Without question, the directors keep a record of their proceedings as a board; and it appears by the rules and regulations of the parent bank, read at the bar, that the cashier is bound "to attend all meetings of the board, and to keep a fair and regular record of its proceedings." If he does not keep such a record, are all such proceedings void, or is the bank at liberty to establish them by secondary evidence? In the present case (we repeat it), the whole argument has proceeded upon the ground as conceded, that no such record exists of the approval of the present bond.

The charter of the bank does not, in terms, require that such an approval shall be by writing, or entered of record. It does not, in terms, require that the proceedings of the directors shall generally be recorded, much less that all of them shall be recorded. It seems to have left these matters to the general discretion of the corporation, and of the directors; and though it obviously contemplates that there will be books kept by the corporation which will disclose the general state of its affairs, it is not a just inference that it meant that every official act of the directors should be recorded, of whatever nature it might be. And if it had, it would deserve consideration, whether such provisions ought to be deemed conditions precedent, without which the act was void, or only directory to the officers in the performance of their duty, the omission of which might subject *themselves to responsibility, and the cor-[*81
poration itself to the imputation of a violation of its charter. There are many cases where an act is prescribed by law to be done, and record made thereof, and, nevertheless, if left unrecorded, the act is valid. By the English marriage act, registers of marriages are required to be kept in public books in every parish, and signed by the parties, and the minister, and attested by two witnesses. Yet, it has been decided, that such an entry is not necessary to the validity of the marriage, and that an erroneous entry will not vitiate it.[1] So, where a magistrate omits to record an oath of office taken before him, parol evidence of the fact is admissible, though it is an omission of duty.[2] That some of the provisions of the charter and by-laws may well be deemed directory to the officers, and not conditions without which their acts would be utterly void, will scarcely be disputed. What are to be deemed such provisions must depend upon the sound construction of the nature and object of each regulation, and of public convenience, and apparent legislative intention. If a regulation be merely directory, then any deviation from it, though it may subject the officers to responsibility both to the government and the stockholders, cannot be taken advantage of by third persons.[3] In the case of The Bank of the Northern Liberties v. Cresson, 12 Serg. & Rawle, 306, the directors were required, by their own by-laws, to take a bond of the book-keeper with sureties, and they took a bond from sureties without joining the principal. The court held the bond valid, notwithstanding the by-law, and took notice of the distinction between such provisions of a statute as are essential to the validity of an act, and such as are merely directory. Mr. Justice Duncan said, that it was a matter between the directors and the stockholders; and that the obligors, who had voluntarily entered into the stipulation, could not withdraw themselves from their obligation.

*But, waiving for the present this in-[*82
quiry, we ask, upon what ground it can be maintained that the approval of the bond by the directors must be in writing. It is not required by the terms of the charter, or the by-laws. In each of them the language points to the fact of approval, and not to the evidence by which it is to be established, if controverted. It is nowhere said the approval shall be in writing, or of record. The argument at the bar upon the necessity of its being in writing, must, therefore, depend for its support upon the ground that it is a just inference of law from the nature and objects of the statute, from the analogy of the board of directors to a corporate body, from principles of public convenience and necessity, or from the language of authorities which ought not to be departed from.

Upon the best consideration we can give the

1.—1 Phillips' Evid. ch. 5, s. 2, [326.]
2.—Bassett v. Marshall, 9 Mass. Rep. 312.
3.—United States v. Kirkpatrick, 9 Wheat. Rep. 720; United States v. VanZandt, 11 Wheat. Rep. 184.

subject, we do not think that the argument can be maintained under any of these aspects.

If the directors had been a board constituted by an unincorporated company, or by a single person, for the like purposes, and with the like powers, it would scarcely occur to any person that the acts of the board must, of necessity, be reduced to writing, before they would bind their principal. The agents of private persons are not usually in the habit of keeping regular minutes of all their joint proceedings, and hitherto there has been no adjudication, which requires such a verification of their joint acts. Yet, innumerable cases must have arisen in which such a principle might have been applied with success, if it had ever been supposed to possess a legal existence. The acts of private and public trustees, of joint agents for commercial purposes, of commissioners for private objects, and of public boards, must have presented many occasions for passing upon such a doctrine. The silence of the books under such circumstances would form no inconsiderable answer to the argument, connected, as it must be, with the knowledge of the loose and inartificial manner in which much of the business of agencies is generally conducted. There may be, and undoubtedly there is, some convenience in the preservation of minutes of proceedings by agents; but their subsequent acts are often just as irresistible proof of the existence of 83*] prior *dependent acts and votes, as if minutes were produced. If a board of directors were created to erect a bridge, or make a canal or turnpike, and they proceeded to do the service, and under their superintendence there were persons employed who executed the work, and the board proceeded to pay them therefor out of funds in their hands, these facts of public notoriety would be as irresistible evidence of the due execution of their authority, and of due contracts made, and proceedings had by the board, as if the proceedings were recorded in the most formal and regular manner. Can there be a doubt that, in the cases put, many contracts are so varied and rescinded, many acts done and assented to by the board, which never are reduced to formal votes, and declarations, and written proofs? We think we may safely say that the sense of the profession, and the course of private business, have never hitherto, in respect to private agencies and boards, recognized the existence of any rule which required their acts and proceedings to be justified by written votes.

What foundation is there for a different rule in relation to agencies for corporations? The acts of a single duly authorized agent of a corporation, within the scope of his authority, bind the corporation, although he keeps no minutes of such acts. They may be, and they are, daily proved aliunde. In what respects do the acts of a board of agents differ from those of a single agent, in their operation as evidence? A board may accept a contract, or approve a security by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof by parol evidence than if it were reduced to writing. But surely this is not a sufficient reason for declaring that the vote or assent is inoperative. If a board of directors agree to build a banking house, and it is accordingly built, and paid for by their cashier, with their assent, is the whole proceeding to be deemed void, because, in the progress of the undertaking, from accident, or negligence, the votes and payments have not been verified by regular minutes? But, it is said, that in the present case, the cashier is required to keep a fair and regular record of the proceedings of the directors. But if this is admitted, it does not establish the purpose for *which it is used. [*84 It is a by-law of the corporation, directory to its officers, enacted for its own security and benefit, and not for the purpose of restricting the acts of the directors. If the cashier should neglect to keep such records, or should omit any single vote, the by-law has not declared that the vote shall be void, and the proceedings nugatory. Suppose no such by-law had been passed, would not the votes of the board have bound the corporation? If they had discounted notes, taken mortgages, advanced money, and bought stock by faith of viva voce, unrecorded votes, and evidence of the existence of these acts and votes necessarily resulted from the other proceedings of the bank, could it be the intention of the legislature that they should be utterly void? or of the stockholders, that any by-law should operate a legal extinguishment of their title to the property? It seems to us difficult to imagine that such could be the legislative or corporate intention. If, in ordinary cases, such an intention could not be inferred in order to produce a very strict and inconvenient construction of the charter, there is still less reason to apply it to the cases of approval of official bonds. These are taken exclusively for the security and benefit of the bank itself, and not of mere strangers. The approval is matter of discretion in the directors, and that discretion once being exercised, it is of very little consequence to the bank whether a written minute of the vote be made or not. All that the bank is interested in, is that there shall be an approval; and it matters not whether the fact is established by a direct record, or by acts of the directors, which recognize its prior existence.

It has been supposed by the defendant's counsel that the case of Beatty v. The Marine Insurance Company, 2 Johns. Rep. 109, is in point in his favor. Upon an examination of the facts of that case, we think it is otherwise. In that case, the incorporating act provided that no losses should be paid without the approbation of at least four of the directors, with the president and his assistants, or a majority of them. The attempt was to charge the company with a total loss, upon a verbal agreement made by the president and assistants, to accept an abandonment, and pay a total loss, at a meeting, when it did not appear that a single director *was present. The board therefore [*85 was not so constituted, as to bind the company. Mr. Justice Thompson, in delivering the opinion of the court, said, "no part of the case will warrant an inference that any of the directors were present at the time of the alleged acceptance. When the plaintiff's agent called to know the determination of the company in relation to the payment of the loss, he says, the secretary went into the room where the president and assistants were convened, and the answer returned was, that the president and assistants had agreed to pay a total loss; but no mention is

made of any of the directors being present, or assenting to it. When the testimony is positive as to the persons by whom the acceptance is made, there is no room left for presumption. If any of the directors were present, so as to make the act binding on the company, the plaintiff ought to have shown it affirmatively. We are of opinion, therefore, that the acceptance not having been made by the agents constituted by the act of incorporation, cannot be binding on the company." The case, therefore, so far as it goes, is against the defendants. It carries an almost irresistible inference that the court did not think a written vote of acceptance necessary, and that parol proof would have been sufficient. No other authority has been produced to sustain the argument; and it cannot be doubted, that if any did exist, the researches of the counsel would have brought it before the court. We may therefore consider that it is a new doctrine, unsupported by prior cases, and to be established now for the first time. We think that the reasons of public convenience and individual safety and protection would not be promoted by establishing it.

On the other hand, every case which has been adduced to show that corporate acts need not always be reduced to writing, but may be proved by presumptions, is, a fortiori, an authority against the argument. There are, however, some cases which confirm in a very clear manner the doctrine for which we contend, and which have not been yet particularly adverted to. In the case of Apthorp, Treasurer of the Commonwealth, v. North, 14 Mass. Rep. 167, a suit was brought on the official bond of a coroner. By the laws of Massachusetts, the bond 86*] was required to be approved by *the Court of Common Pleas of the county. It was delivered into the Court of Common Pleas by the first justice thereof, and remained on its files for some time. No record was ever made of its approval by the Court of Common Pleas; and at the trial, contradictory evidence was offered, of a presumptive nature, as to its approval and rejection by that court. It was held, that notwithstanding there was no record of any approval, the bond might well, upon the circumstances, be deemed to have been duly delivered and approved. Chief Justice Parker, in delivering the opinion of the court, said, "A formal act, or certificate of approbation by the court, is not made necessary by the statute;" and after commenting on the terms of the statute, he added, "it is not, then, required expressly that any record or certificate should be made, that the bond given was approved. But if such bond is found upon the files, without any evidence accompanying it that it has been rejected, and the principal has proceeded to execute the duties of his office, the presumption is violent, if not conclusive, that the bond was received by the court as the security required by the statute." In Foster v. The Essex Bank, 17 Mass. Rep. 479, there was no clause in the charter respecting the receipt of special deposits, and no by-law had ever been made by the corporation or the directors on the subject. But the practice had long prevailed to receive such deposits, and was known to the directors, though no vote could be found recognizing them. The court held the bank liable for the safe keeping of such deposits, like a common bailee, without hire, upon the ground that there was a plain adoption of them, from the knowledge and acquiescence of the directors. The case of the Dedham Bank v. Chickering, 3 Pick. Rep. 335, approaches still nearer the present case, and discussed the very point now in judgment. It was the case of an official bond, given by the cashier of the bank, with sureties. The charter required that the cashier, before he entered upon the duties of his office, should give bond, with two sureties, to the satisfaction of the directors. After the cashier was elected, the directors passed a vote, that A B, and C D be accepted as sureties in a bond to be given by the cashier for the faithful discharge of the duties of his *office. The bond in ques- [*87 tion was dated before this vote, but does not seem to have had but one surety. That circumstance, however, was not relied on at the argument; but the principal ground was, that there had been no approval of the bond by the board of directors. It was found on their files, and the cashier had been frequently re-elected. Chief Justice Parker, in delivering the judgment of the court, said, "We should have supposed that in the case as well of a corporation as of an individual, a paper intended for their benefit, and found on their files, would be considered as accepted by them;" and after alluding to the decision of the Circuit Court in this case, which required the record of a vote of the directors, he added, "We think, however, that the case before us may be decided without touching that principle, for, admitting it to be correct, we are, nevertheless, of opinion, that the vote to accept the sureties, and the bond being in possession of the president, are a sufficient acceptance of the bond." It is impossible, we think, to doubt that the real opinion of the court was, that the acceptance might be proved without any record of a vote, and that the very facts of the case brought the point of implied and presumptive acceptance from other acts of the directors completely in judgment.

So far, then, as authorities entitled to very great respect and deference go, we are of opinion that they are against the reasoning assumed on behalf of the defendants.

To all the authorities cited at the bar on this point, the counsel for the defendants has made one answer, which he deems applicable to all of them. It is this, that where no particular form for the expression of the corporate will is prescribed by law, there it may be inferred from corporate acts; but that where such a form is prescribed, it must be followed. This distinction, he supposes, will reconcile all the cases. The distinction, if admitted, will not aid the argument. It may be, and, indeed, is conceded, that no corporate act can be valid, if done differently from the manner prescribed by law, as essential to its validity. If in the present case the statute had prescribed that nothing but a written vote on record should be deemed an approval of the bond, or that the cashier should not be deemed, for any purpose, in *office, until such approval, [*88 the consequence contended for would have followed. His acts would have been utterly void, and any unrecorded vote of approval nugatory. But the very point in controversy is, whether such written record be necessary by the char-

ter or by-laws, not as a matter of convenience or discreet exercise of authority, but as a sine qua non to the validity of the act. The cases which have been commented on by the court, do not deny the distinction, but proceed upon the ground, that unless positively required by law, a written vote is not to be deemed indispensable. The court, then, is called upon, not to administer a doctrine of strict, and settled, and technical law, but to introduce a new rule into the law of evidence; and to exclude presumptive evidence, not only of the acts of corporations, but of their unincorporated agents. If such a rule be fit to be adopted, it must be upon the foundation of some clear and unequivocal analogy of law, and public policy and convenience. We are not prepared to admit that it has any such foundation. On the contrary, we are persuaded that the introduction of the rule itself would be attended with serious public mischiefs, and shake many titles and rights, which have been consummated in entire good faith, and the confidence that no such written record was necessary to their validity. We cannot therefore assent to the doctrine decided in the Circuit Court on this point.

In respect to a collateral argument urged at the bar, upon the point whether the terms of the charter and by-laws would be complied with, without an express vote that the bond was "to the satisfaction of the directors," or that the sureties of the bond were "approved" by the directors, we are of opinion, that in either case there need not be express votes of approval and satisfaction. An acceptance of the bond by the directors would, necessarily, in intendment of law, include the approval of it, and be conclusive of it.

The remaining point is as to the opinion of the court delivered in the first bill of exceptions. If that opinion meant to state what it seems to import, that the cashier was not legally cashier, so as to bind the bank in its rights and interests by his acts, if permitted to enter upon the duties of his office, before a satisfactory bond 89*] was given, we think it cannot *be maintained. The cashier was duly appointed, and he was permitted to act in his office, under the express sanction of the directors, for several years. If he had never given any bond whatsoever during this period, yet his acts within the scope of his authority would have bound the bank. Notes signed by him would be lawful notes; moneys paid by him would be irrecoverable; records kept by him would be bank records. Indeed, it is conceded by the defendant's counsel that the bank would, under such circumstances, be bound by his acts in favor of third persons, acting upon the faith of his public character. The same principle, in our opinion, applies in favor, as against the bank. If he could legally perform the duties of the office for any purposes, he could for all. He was either an agent, capable of binding the bank in all his official acts, or those acts were void as to third persons as well as the bank. If he was held out as an authorized cashier, that character was equally applicable to all who dealt with the bank, in transactions beneficial as well as onerous to the bank. It seems to us, that the charter and the by-laws must be considered in this respect as directory to the board, and not as conditions precedent. The language is not more strong than that of the laws which came under the consideration of this court in The United States v. Kirkpatrick, 9 Wheat. Rep. 720, and the United States v. Van Zandt, 11 Wheat. Rep. 184.

Our view of this matter is in exact coincidence with that entertained by the Supreme Court of Pennsylvania, in The Bank of the Northern Liberties v. Cresson, 12 Serg. & Rawle, 306. The directors might have been responsible for their neglect of duty; but it was a matter wholly between themselves and the stockholders, and between the latter and the government, as a violation of the charter and by-laws.

So far, indeed, as respects the sureties to the bond, they may not be responsible for any breaches of official duty by the cashier, before their obligation has been accepted. But this is a very different consideration from that which respects the legal effects of the acts of the cashier himself upon the interests and transactions of the bank itself.

This is the substance of what we deem it necessary to *say upon the present oc- [*90
casion. We do not go into the consideration of the admissibility of every part of the document and testimony offered in evidence. Perhaps some of them were in a shape not exactly fit to be admitted as formal evidence, without farther verification and proofs. But much of it was of a nature unexceptionable, as conducing to proof of the issues joined, if anything short of record proof were admissible, as competent to establish the approval or acceptance of the bond. It is not understood that the Circuit Court entertained any doubt as to its general competency, except upon the ground already stated. We are of opinion that the evidence was competent, in point of law, to go to the jury, notwithstanding there was no record of approval of the bond, it being in its nature competent; its sufficiency to establish the issues was matter of fact, the decision of which belonged to the jury, and upon which they ought to have been allowed to pass their verdict.

The judgment of the Circuit Court must be reversed, and a mandate awarded, with directions to the Circuit Court to award a venire facias de novo.

Mr. Chief Justice **Marshall** dissented. I should now, as is my custom, when I have the misfortune to differ from this court, acquiesce silently in its opinion, did I not believe that the judgment of the Circuit Court of Virginia gave general surprise to the profession, and was generally condemned. A full conviction that the commission of even gross error, after a deliberate exercise of the judgment, is more excusable than the rash and hasty decision of an important question, without due consideration, will, I trust, constitute some apology for the time I consume in stating the reasons and the imposing authorities which guided the Circuit Court in the judgment that has been reversed.

The case before that court depended on the question whether the official bond of the cashier, on which the suit was brought, bound the defendants.

As preliminary to the investigation of this

question, I shall state some propositions belonging to it, which are supposed to be incontrovertible. All admit that delivery is essential to the validity of a deed, and that acceptance is essential to a complete delivery. If this be 91*] true, they must *be proved in every case where they are put in issue by the pleadings. This proof varies according to circumstances. If there be subscribing witnesses to the instrument, it can be proved only by them, if attainable. If unattainable, or if there be no subscribing witnesses, other proof may be admitted; but, in every case, a delivery and acceptance must be legally proved.

If, in transactions between individuals, where a deed is without a subscribing witness, proof of the signature of the maker, accompanied with the facts that the instrument has passed out of his hands, and is in the possession of the person for whose benefit it was made, be prima facie evidence of its delivery, it is because delivery by mere manual tradition, without witnesses, is good; and the assertion of title under it is proof of acceptance, because that requires only the assent of the mind, which assent is legally manifested by asserting a claim to it. That a plaintiff may maintain his action by this evidence, does not show that delivery and acceptance are unnecessary, or that proof of them can be dispensed with; but that, in ordinary cases, this evidence amounts to such proof. If, however, a case should occur in which the possession of the instrument by the party claiming under it, does not afford legal prima facie evidence of delivery and acceptance, because such party is incapable of receiving and assenting to the instrument in a form which can be legally proved or inferred from those facts, then such other facts must be shown on the trial as will establish a lawful delivery and acceptance.

I state these legal axioms, at the hazard of being thought tedious, because they appear to me to have a direct bearing on the case before the court.

The plaintiff is a corporation aggregate; a being created by law; itself impersonal, though composed of many individuals. These individuals change at will; and, even while members of the corporation, can, in virtue of such membership, perform no corporate act, but are responsible in their natural capacities, both while members of the corporation, and after they cease to be so, for everything they do, whether in the name of the corporation or otherwise. The corporation being one entire 92*] impersonal entity, distinct *from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature.

Can such a being speak, or act otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will. The voice which utters it must be the aggregate voice. Human organs belong only to individuals. The words they utter are the words of individuals. These individuals must speak collectively to speak corporately, and must use a collective voice. They have no such voice, and must communicate this collective will in some other mode. That other mode, as it seems to me, must be by writing.

A corporation will generally act by its agents; but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing.

If, then, corporations were novelties, and we were required now to devise the means by which they should transact their affairs, or communicate their will, we should, I think, from a consideration of their nature, of their capacities and disabilities, be compelled to say, that where other means were not provided by statute, such will must be expressed in writing.

But they are not novelties. They are institutions of very ancient date; and the books abound with cases in which their character, and their means of action, have been thoroughly investigated. In Brooke's Abridgement (title Corporation) we find many cases, cited chiefly from the year books, from which the general principle is to be extracted, that a corporation aggregate can neither give nor receive, nor do anything of importance, without deed. Lord Coke, in his commentary on Littleton, (66 b.) says, "But no corporation aggregate of many persons capable" *"can do homage." "And [*93 the reason is, because homage must be done in person, and a corporation aggregate of many cannot appear in person; for, albeit, the bodies natural, whereupon the body politic consists, may be seen, yet the body politic or corporate itself cannot be seen, nor do any act, but by attorney." So, too, a corporation is incapable of attorning otherwise than by deed (6 Co. 386), or of surrendering a lease for years (10 Co. 676), or of presenting a clerk to a living (Br. Corp. 83), or of appointing a person to seize forfeited goods (1 Vent. 47), or agreeing to a disseisin to their use. (Br. Corp. 34.) These incapacities are founded on the impersonal character of a corporation aggregate, and the principle must be equally applicable to every act of a personal nature.

Sir William Blackstone, in his commentaries (V. I. p. 475), enumerates, among the incidents to a corporation, the right to have a common seal." "For," he adds, "a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse. It therefore acts and speaks only by a common seal. For though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."

Though this general principle, that the assent of a corporation can appear only by its seal, has been in part overruled, yet it has been overruled so far only as respects the seal. The corporate character remains what Blackstone states it to be. The reasons he assigns for requiring their seal as the evidence of their acts, are drawn from the nature of corporations, and

must always exist. If the seal may be exchanged for something else, that something must yet be of the same character, must be equally capable of "uniting the several assents of the individuals who compose the community, and of making one joint assent of the whole." The declaration that a seal is indispensable, is equally a declaration of the necessity of writing; for the sole purpose of a seal is to give full faith and credit to the writing to which it is appended. The seal in itself, not 94*] affixed *to an instrument of writing, is nothing; is meant as nothing, and can operate nothing. The writing is the substance, and the seal appropriates it to the corporation.

Though the rule stated by Blackstone may not be so universal as his language indicates, it is certainly of extensive application, and the exceptions prove its extent. Mr. Hargrave, in his notes on Co. Litt. (99) says: "In general, a corporation aggregate cannot take or pass away any interest in lands, or do any act of importance, without deed, but there are several exceptions to the rule." The question before the court depends very much on the extent of these exceptions, and on the manner in which this invisible impersonal being must act and speak, when it may act and speak without using its seal.

It is stated in the old books (Br. Corp. 49), that a corporation may have a ploughman, butler, cook, etc., without retaining them by deed; and, in the same book, (50) Wood says, "small things need not be in writing, as to light a candle, make a fire, and turn cattle off the land." Fairfax said: "A corporation cannot have a servant but by deed. Small things are admissible on account of custom, and the trouble of a deed in such cases, not by strict law." Some subsequent cases show that officers may be appointed without deed, but not that they may be appointed without writing. Every instrument under seal was designated as a deed, and all writings not under seal were considered as acts by parol. Consequently, when the old books say a thing may be done without deed, or by parol, nothing more is intended than that it may be done without a sealed instrument. It may still require to be in writing. In 2 Bac. Abr. 13, it is said, "Aggregate corporations, consisting of a constant succession of various persons, can regularly do no act without writing; therefore, gifts by and to them must be by deed." In page 340, it is said, "If a corporation aggregate disseise to the use of another, they are disseisors in their natural capacity;" "as a corporation they can regularly do no act without writing."

In the case of The King v. Bigg, Strange, 18, the prisoner was convicted for erasing an indorsement on a bank note. The indictment 95*] and verdict are set forth at large by *Peere Williams (V. III, p. 419), and it appears that the note was signed by Joshua Adams, who was intrusted and employed by the Bank of England to sign bank notes, but not under their common seal. It was contended by Peere Williams, in an able argument, that the appointment was not valid, because not made under their common seal; and his argument contains an enumeration of decisions previously made, which go far in support of his proposition. The prisoner, however, was condemned, and, consequently, the appointment was held valid. But there is no reason to suppose that it was not made by writing. The verdict finds "that he was intrusted and employed by the governor and company of the Bank of England, but not under their common seal." Consequently his employment was evidenced by writing, if it was necessary; and the negative, finding that it was not under their common seal, strengthens the presumption that it was in writing. Peere Williams has reported his argument, and would certainly have taken this objection, had the case afforded it. I consider the appointment of Adams, then, as having been made in writing, though not under seal.

Mr. Fonblanque says (Vol. I, p. 296, note o): "And the agreement of the major part of the corporation, being entered in the corporation books, though not under the corporate seal, will be decreed in equity." The inference is strong that it will not be decreed unless it be entered on the corporation books. Consequently, unless it be so entered, it is not an agreement, for every lawful agreement which is in itself equitable, will be decreed in equity.

In the Mayor of Thetford's case, 1 Salk. 192, Lord Holt said, that though a corporation cannot do an act in pais without their common seal, they may do an act on record, and that is the case with the city of London, which makes an attorney in court annually by warrant; and the reason is, they are estopped by the record. Upon the same principle, a return to a mandamus is good, though not under the common seal. In these exceptions to the general rule, the substitute for the common seal must be writing; and the exceptions are stated in terms which exclude every idea that the act can be evidenced otherwise.

*Yarborough v. The Bank of England, [*96 16 East, 6, was an action of trover and conversion, in which, after verdict for the plaintiff, it was moved in arrest of judgment, that the action would not lie, because a corporation was incapable of committing a tort. The action was sustained; and Lord Ellenborough, in delivering the opinion of the court, said, that a corporation can act only through the instrumentality of others; and wherever they can act, or order any act to be done on their behalf, which, as by their common seal they may do, they are liable to the consequences of such acts. "A corporation cannot be aiding to a trespass nor give a warrant for a trespass, without writing." His lordship cited several old cases, showing the incompetency of a corporation to act in important matters otherwise than by deed; and added, "But many little things require no special command, as to chase cattle out of their land. Those things are incident to the appointment." Several cases are put, in which a corporation may be liable for a trespass; but they are all consistent with his first proposition, that the liability of a corporation must be founded on writing. "If," he says, "the mayor and commonalty disseise me, and I release to 20 or 200 of the commonalty, this will not save the corporation, and the reason is, because the disseisin is in their corporate character, and the release to individuals." So in trespass against the mayor and commonalty of York, they cannot justify under a right of the inhabitants to common, because the right in

natural persons gave no right to a corporation. Nor could the corporation give a warrant without writing, to commit a trespass. The foundation of this action is, was the authority in writing given by the corporation? It stands on the same principle with the action of assumpsit made by an agent acting under a written power. The idea that their seal was indispensable to the validity of all corporate acts, which is laid down in such strong terms by Blackstone, and by others, on whom he relied, probably grew out of the state of the times in which it originated; seals were then more frequent and better known than signatures. An instrument was much more certainly authenticated by the seal than by the name of the maker. This circumstance would bring seals 97*] into common use; and as *every corporation possessed a seal of extensive notoriety, and any other mode of authenticating its acts would, in those simple times, be attended with difficulties and perplexities, it is not matter of surprise that this rule should prevail. As writing has become more common, and seals are less distinguishable from each other, the good sense of mankind generally receives the writing without the seal, in all the less formal and less important transactions of the corporate body. All the reasons derived from the corporate character, which have been assigned for requiring the seal, are satisfied by the writing without it.

The English cases on this subject are very well summed up by Mr. Kyd (p. 259). The result of the whole appears to be, that in England, the general rule is, that a corporation acts and speaks by its common seal, at least so far as respects the appointment of officers, whose duties and powers are important. In those transactions, where the use of the seal would be unnecessary, and extremely inconvenient, it is frequently dispensed with; but in all of them, I think, writing is indispensable. In almost every case which I can imagine, there ought to be, and is, a record in the corporation books. With respect to the necessity of a seal, the difference is certainly great between ancient and modern times; and between corporations, whose principal transactions respected land, and those which are commercial in their character. This distinction may, and ought to influence the use of the seal, but not the use of writing. The inability of a corporation aggregate to speak or act otherwise than by writing, is constitutional, and must be immutable, unless it be endowed by the legislature with other qualities than belong to the corporate character. The English cases, so far as I have had an opportunity of examining them, concur in the principle that a corporation aggregate can act only by writing. A case from 4 Burrow. & Crosw. has been cited at the bar, and undoubtedly deserves attention. I regret that it has not been in my power to examine it. As far, however, as I could judge of it from the statement made at the bar, I did not think that it had overturned what appears to me to be the settled law of England.

98*] *I will now inquire whether the decisions of this court vary in principle from those of England.

Head & Amory v. The Providence Insurance Company, 2 Cranch, 127, was an action on a policy of insurance, which the defendants contended had been vacated by a subsequent agreement; and the validity of this agreement constituted the sole question in the cause.

The plaintiffs had proposed terms for vacating the policy, and some communications had taken place through Brown & Ives, their correspondents, which showed a misunderstanding between the parties, and that mutual propositions had been mistaken by the plaintiffs for an acceptance of the terms they had proposed. This produced a letter from the plaintiffs, of the 3d of September, 1800, which was understood by the defendants, and was considered by the court, as amounting to a renewal of propositions for vacating the policy. The secretary of the company delivered to Brown & Ives, on the 6th of September, the following note:

"Sept. 6th, 1800.

"As there appears to have been a misunderstanding in the business as it respects the first propositions of the company, the directors are willing to accede to Messrs. Head & Amory's proposition, viz., to settle the policy on the merchandise at 25 per cent., although it was their intention and expectation to have both policies included in the settlement. Messrs. Head & Amory will please to forward the policy, and have it annulled immediately. Premium due 12–15 September.

"You will please to govern yourself accordingly, and we will attend to your wishes."

This paper was in the handwriting of the secretary, but without signature.

Testimony was given at the trial to show the usage of the insurance companies, to consider an agreement to do an act as equivalent to the performance of the act.

This paper was forwarded by Brown & Ives, on the 9th of September, to the house of Head & Amory, in Boston, and its receipt was acknowledged by their clerks on the 12th, they being at the time absent. On the 17th of September, *the plaintiffs wrote to Brown & [*99 Ives, informing them that, previous to their seeing the letter of the 9th, intelligence was received of the capture of the vessel, which would, of course, prevent any farther negotiation on the subject.

The Circuit Court determined that the agreement to vacate the policy was complete; and the jury found for the defendants. The judgment was brought before this court, and was reversed; because this informal paper did not amount to an acceptance of the terms proposed by the plaintiffs. The act incorporating the company, enacted, "that policies of insurance and other instruments, made and signed by the president of the said company, or any other officer thereof, according to the ordinances, by-laws," etc., "shall be good and effectual," etc. The court considered the company as the mere creature of the incorporating act, and as being capable of exerting its faculties only in the manner which the act authorizes. This paper, not being executed in the form prescribed by law, could not be considered as the act of the company.

On the testimony of the witness concerning usage, the court observed, that "if he was to be understood as stating than an assent to the formation or dissolution of a policy, if manifested according to the forms required by law,

is as binding as the performance of the act agreed to be done, it is probable that the practice he alludes to is correct. But if he means to say that this assent may be manifested by parol, the practice cannot receive the sanction of this court. It would be to dispense with the formalities required by law for valuable purposes, and to enable these artificial bodies to act and to contract, in a manner essentially different from that prescribed for them by the legislature."

"An individual," the court added, "has an original capacity to contract and bind himself in such manner as he pleases." "He who acts by another, acts by himself. He who authorizes another to make a writing for him, makes it himself; but with these bodies, which have only a legal existence, it is otherwise. The act of incorporation is, to them, an enabling act. It gives them all the power they possess. It 100*] *enables them to contract; and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

The court considered the note of the 6th of September "as a mere informal paper, which might perhaps amount to notice of an act, if such act was really performed, but which is not in itself an act of any legal obligation on the company. That if the proposition contained in the letter of the 3d of September, had been regularly accepted, this note might possibly have been considered as notice of that acceptance, but is not in itself an acceptance."

I have gone the more fully into this case, because, both the decision itself, and the reasoning by which it is supported, appear to me to apply throughout to the case now before the court.

This subject came on to be again considered in The Bank of Columbia v. Patterson's Administrators, 7 Cranch, 299. That was an action of assumpsit brought by Patterson's administrators for work and labor done by their intestate for the bank. It was founded on an agreement in writing between Patterson and "a duly authorized committee of the directors of the bank," in their own names. Judgment was given in favor of the administrators, upon which the cause was brought by a writ of error into this court; and, among other objections to the proceedings below, it was contended that a corporation aggregate could not promise otherwise than under its seal.

In considering this objection, the court did not controvert the ancient rule. But this rule, if it ever existed to the extent claimed by the plaintiffs in error, had been relaxed; and it seems at length to have been established, that, though corporations could not contract directly, except under their corporate seal, yet they might, by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. It being conceded that the committee were authorized to make agreements, there could be no doubt that a contract made by them in the name of the corpora- 101*] tion would be *binding on the corporation. But as this promise is made in their own names, if the principle stopped here, the remedy would be only against the committee.

The court proceeds to consider it as a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation.

In applying this rule of law to the case then under consideration, the court reviewed the evidence from which the jury might legally infer "that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiffs' intestate had accepted the engagement."

The Bank of Columbia v. Patterson's Administrators differed from the case of The Providence Insurance Company v. Head & Amory in two essential circumstances. The contract which was sustained against the bank was made through the instrumentality of a legally constituted agent; that which the insurance company attempted to set up, purported to be a direct contract between the company and the plaintiffs in the cause. In the case of The Bank of Columbia, the court said: "At length it seems to have been established, that though they (corporations) could not contract directly, except under their corporate seal, yet they might, by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation."

The obligation on which this suit was instituted, if it be an obligation, purports to be a direct contract between the bank and the individuals who signed the instrument. It is not alleged that any agent was authorized to act for the bank.

Another very essential difference between the two cases cited from Cranch is this: In that of The Providence Insurance Company, the corporation attempted to set up an agreement, which, if it existed, was in its own possession. It claimed to imply that an act had been performed by itself, *the evidence of which [*102 was in its own possession, and might be produced. The court disallowed this implication.

In the case of The Bank of Columbia, as in that of the insurance company, the act to be implied was an act performed by the corporation in its own office, without witnesses, the evidence of which remained in its own possession; but it was set up against, not by the corporation. The court was not of opinion that the suit could be maintained without the existence of this act. No such idea is indicated. On the contrary, the language of the opinion shows very clearly that the act was necessary. If, in order to charge the bank, it was necessary that the corporation should have "adopted the contracts of the committee," and should have "voted to pay the whole sum which should become due under the contracts." The court enumerates circumstances which were deemed sufficient to justify a jury in implying against the corporation that the bank had performed these acts.

In the case at bar, the suit is brought by the corporation, and the corporation asks the court

to imply that it has performed those acts which are necessary to the validity of the bond on which it sues, although the evidence of its having performed them is in its own possession.

Fleckner v. The Bank of the United States, 8 Wheat. Rep. 338, was a writ of error to a judgment given by the court of the United States for the district of Louisiana, in favor of the bank, in a suit instituted against Fleckner on a note given by him, and indorsed to the Bank of the United States by the president, directors and company of the Planters' Bank of New Orleans, through their cashier, as their agent. One of the errors alleged in the proceedings of the court below was, that the cashier of the Planters' Bank had no authority to make the transfer. The authority was given by a vote of the board of directors to the president and cashier, and the act itself was afterwards affirmed by an instrument of writing under the corporate seal. It was contended that the original vote, empowering the president and cashier to perform the act, ought to have been a power under the corporate seal. In no- [*103] ticing this objection, *the court said: "Whatever may be the original correctness of this doctrine as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts under the corporate seal."

The court then proceeded, in a very elaborate and well digested opinion, to maintain that the indorsement was within the official duty of the cashier, that it was within the original power given to the president and cashier, and that, were this otherwise, it was sanctioned by the concluding act under the corporate seal. The whole of this case, as of the two preceding cases, turns upon the idea that a writing, in due form, on the part of the corporation, is indispensable to the validity of its contracts.

According to the decisions of the courts of England, then, and of this court, a corporation, unless it be in matters to which the maxim de minimus non curat lex applies, can act or speak, and, of course, contract, only by writing. This principle, which seems to be an essential ingredient of its very being, has been maintained by all the judges who have ever discussed the subject. Upon this principle, and the authority of these cases, I have supposed that a corporation cannot receive and assent to a deed of any description, unless this assent be expressed regularly in writing. It ought to be entered on the books of the corporation.

The counsel for the plaintiffs in error insist, that the proof offered in the Circuit Court was sufficient to establish the full execution of the bond; and they support this proposition upon principle, upon convenience, upon usage, and upon the authority of cases decided in the different states of the Union.

It is, we are told, a general rule that acceptance by a corporation is a fact which may be proved before a jury, and the acceptance of a new charter is mentioned to illustrate the rule.

*Without question, acceptance is a [*104] fact, and is to be proved before a jury; but the inquiry is, by what evidence may it be proved? I have supposed that it must be proved by testimony which shows that the corporation has acted in the form in which alone it is capable of acting; that it has expressed its acceptance in the mode in which such a being is capable of expressing it. I receive readily the case put of the acceptance of a new charter as an apt illustration of the principle we are investigating, and should be surprised, indeed, if a new charter were to be accepted without a vote of acceptance entered upon the record. The case cited from 1 Term Rep. 575, does not appear to me to sanction the doctrine it is adduced to support.

We are told, too, that there was never a time when a corporation might not take by a deed poll. But, if this be admitted, I cannot perceive its influence on the case. A deed poll is in writing, and there is the same necessity that its acceptance should be evidenced by writing as if it were an indenture. The general assertion which we find in all the books, that a corporation can take only by deed—that is, as I understand it, that the act of taking must be by deed—applies as well to conveyances by deed poll as by indenture.

We have been also referred to a time anterior to writing, and are asked how corporations then acquired property?

We have no knowledge of such a time. Since Europe was subdued and civilized by the arms and literature of Rome, the science of writing, though rare, has never been entirely lost. So much of it as remained was found most generally in corporate bodies. If the corporation was not entirely ecclesiastical, which in early times was most frequent, yet there can be little reason to doubt their having, among themselves, or being able to command, a scribe. Be this as it may, the earliest information we have on the subject tells us that corporations aggregate could only take or grant by deed, under their corporate seal. Even when land passed from man to man by livery, a corporation could not so grant or take. Livery could not be made by, or to, a corporation aggregate, because they are personal acts, and it is an impersonal being. These acts were to be performed *through the agency of an in- [*105] dividual having a power to perform them under the corporate seal.

We are also told that the title of the bank to the ground purchased for a banking house, and to all mortgages taken for the security of its debts, will be put in hazard by the principle which I have endeavored to maintain; that it is probable not a single conveyance will stand the test by which the defendant in error proposes to try its validity, and that the usage is, to receive and deposit them among the papers of the institution without taking any notice of them on its records.

I can scarcely suppose it possible that so loose a practice can have prevailed. I can scarcely suppose it possible that, on points of such vital importance, and of such rare occurrence, the plain requisites of law can have been so entirely disregarded. Deeds of mort-

gage, as well as of ground for necessary buildings, are conveyances of lands, and if any one legal proposition is laid down without a single exception, it is this, that a corporation aggregate cannot take lands otherwise than by deed. To me it would appear very incautious to take such conveyances otherwise than as is prescribed in the books, that is, by appointing an attorney under the corporate seal to receive them; but, however this may be, I can scarcely suppose it possible that an act so easily performed as to enter their assent in their own books, should be habitually neglected. That the current business of the bank should sometimes want the requisite forms, might be excused, but that the same failure should take place in single transactions, which seldom take place, and are yet of great importance, seems to me to be scarcely possible. I should not be inclined to act judicially on the presumption that the fact exists. If it does, the mischief may be corrected by correcting the practice.

The counsel for the plaintiff rely very much on the cases which have been decided in the states of Pennsylvania, New York, and Massachusetts.

In the case mentioned at the bar, from Pennsylvania, a demurrer was filed to a plea in bar of the action on a cashier's bond, which brought up the very question in consideration before this court. The argument was opened by the [*106] counsel *for the plaintiff, but he stopped in the midst of it, and withdrew his demurrer without submitting the point to the court.

The cases in New York have not, I think, gone farther than The Bank of Columbia v. Patterson's Administrators. Those of Massachusetts have, I admit, gone the full length for which the plaintiffs contend, and the point is probably settled in that state. It would be presumptuous in me to place my understanding of those decisions in opposition to that of professional gentlemen from that state, but to me it seems, that even there the doctrine has not been uniformly maintained. Bigelow's Digest of Massachusetts cases contains this passage: "Aggregate corporations cannot make a parol contract, unless by the intervention of some agent or attorney duly authorized by a corporate vote to contract on their part, because there is no other way in which they can express their assent." He cites 7 Mass. Rep. 102, in which Chief Justice Parsons said: "We cannot admit that a corporation can make a parol contract unless by the intervention of some agent or attorney duly authorized to contract on their part."

In The Essex Turnpike Company v. Collins, 8 Mass. Rep. 292, the court said: "Aggregate corporations cannot contract without vote, because there is no other way in which they can express their assent."

In the case of Hayden v. The Middlesex Turnpike Corporation, 10 Mass. Rep. 397, the work for which the action was brought was performed on the road. The committee appointed to contract for, and superintend it, was frequently present while it was going on, and directed the workmen. Other directors were also present, and one of them swore that he supposed the work to be going on by order of the directors. But the contract was not in exact conformity with the written authority under which the committee acted. A verdict taken for the plaintiff, subject to the opinion of the court, was set aside, and the court said, "No individual member can represent the corporation in their aggregate capacity, but in consequence of their consent. The requisite evidence of this, at common law, was a deed under the seal of the corporation. Aggregate corporations, established *by statute, [*107 are not restricted to that formality. They have power given them to order their affairs, and to appoint and employ agents by votes, or in such other manner as the corporation may by their by-laws appoint." Again: "Nor can a parol declaration, made to the corporators at a corporate meeting, by any individual, amount to a contract between such individual and the corporation."

In The Proprietors of the Canal Bridge v. Gordon, 1 Pick. Rep. 297, the court decided, that a corporation could be bound without a vote, by implication from corporate acts. This, however, was in a suit brought against a corporation, and attended with circumstances extremely well calculated to strengthen every presumption against them. The corporation might have passed the vote, though it was not in the power of the plaintiff to produce it, and their acts afforded the strongest probability in favor of the implication that they had passed it. I should not consider this case as conclusive evidence that the same court would have drawn the same inference from the same circumstances, in a case in which the corporation was plaintiff. But, in the case of The Inhabitants of the First Parish in Sutton v. Cole, the corporation was plaintiff, and the validity of an entry into land was one of the points made in the cause. The corporation had appointed two agents for the purpose, but the entry was made by one only. This entry was held to be made, not in pursuance of the authority, but it was also held, that the action brought by the corporation was a ratification of the entry. This I admit to be a decision expressly in point. But, thinking it a case in opposition to the whole course of decisions in England, as well as in this court, and not supported by decisions in other states, or by a long course of decisions even in the state of Massachusetts, I should not, perhaps, highly respectable as it undoubtedly is, and as I certainly think it, have felt myself warranted in yielding to it, had it even been known to me.

It has been contended, that the act of Congress incorporating the bank, does not, in terms, require that it shall keep a record of its proceedings; and from this omission, it has *been inferred, that a record is unnec- [*108 essary. I cannot assent to the correctness of this inference.

When a being is created without the organs of speech, and endowed only with the faculty of communicating its will by writing, we need not look in the laws given by its creator for a prohibition to speak, or a mandate to write. These are organic laws which it is compelled to observe. If we find, in the act of its creation, an enumeration of duties and powers which are to be performed and exercised by writing, it is evidence that the creator considered it as certain that the creature would write, and that the evidence of its conformity

to the will of the creator would be found in writing. It is equivalent to a declaration that it shall act by writing.

Let the charter be examined with this principle in our minds.

The 8th section empowers the stockholders to choose directors for the management of their affairs, but does not require that the election shall be evidenced by writing. It is to be believed that Congress could have intended that an act, on which all the operations of the corporation depended, which might be controverted in every action it should institute, might rest upon the uncertain, and, perhaps, contradictory recollection of the individuals who were present.

The fairness of an election may be contested; the mode of voting is prescribed by law. Can it be that Congress supposed no provision was made which secured written testimony, by which such contests might be tried?

The directors are to elect one of their body as president; is no record to be kept of this election? Can we presume so much carelessness in Congress, as to suppose it possible that matters of such consequence should be left to the loose proof which the memory of individuals might furnish? The act prescribes the notice which shall be given of the time and place of holding the election; and adds, "it shall be lawful for such election to be then and there made." The legality of the election depends on time and place. Did Congress mean that these facts should rest on memory?

The 10th section empowers the directors, for 109*] the time being, *to appoint officers, and to allow them a compensation; and to exercise such other powers for the well governing of the officers of the corporation, as shall be prescribed by its laws. May all these acts be found only in the frail memory of individuals?

The 4th rule of the fundamental articles provides, that not less than seven directors, of whom the president, or some person deputed by him, shall be one, shall constitute a board for the transaction of business; but there is no clause in the charter requiring a board. Can it be pretended, that not less than seven directors may make a board, and yet, that the directors may act without being assembled as a board? Congress has not thought it necessary to forbid their acting otherwise than as a board, because the whole law of corporations forbids it.

In the event of making unlawful loans, the directors are made personally responsible; but those are exempted who were absent, or who dissented from the resolution or act whereby the same was so contracted or created.

No clause in the charter directs that loans shall be created only by writing. The bond of the debtor may be said to be sufficient. Yet this clause is obviously drawn in the idea, that all the proceedings on the subject would necessarily be in writing. The absentees and dissentients are excused. How is this absence or dissent to be proved? Is it to depend on vague and uncertain memory?

The same observations apply to the limitations and restrictions which are found in the 9th and 10th rules of the fundamental articles.

The 13th rule declares, that semi-annual dividends shall be made, but does not direct that they shall be declared in writing. May the bank so manage its affairs that no trace of these dividends shall be found on its books?

The 16th rule declares, that no stockholder, unless he be a citizen of the United States, shall vote in the choice of directors, but does not direct that written lists shall be taken. May they be dispensed with? Is the question who has voted, to depend on recollection solely?

The 23d section subjects the books of the corporation to the inspection of a committee of either house of Congress. *But there is [*110 no clause in the charter which directs the corporation to keep any books. May this be set up as an excuse for not opening books containing their transactions for the inspection of a committee of Congress?

How are we to account for all these strange omissions? Strange and unaccountable they would certainly be, on any other hypothesis, than that the law of its being, required that it should speak and act by writing. Aware of this, Congress did not deem it necessary to enjoin upon it, that it should act in the only mode in which its organs enabled it to act, and that it should abstain from what its organs did not enable it to do.

It may be said, that although certain things ought to appear in writing, it is not necessary that all the transactions of a bank should so appear; and the assent of the directors to the bonds given by their cashiers, need not appear. Such grave acts or omissions as may justify the suing out a scire facias, to vacate the charter, ought to be evidenced by their records; but such unimportant acts as taking bonds from their officers, need not appear. These may be inferred.

I do not concur in this proposition. I neither admit the distinction which has been alleged, nor do I admit that the bond of a cashier is to be classed with unimportant transactions. Congress has not prescribed the intrinsic importance which shall entitle any transaction of a bank to a place on its record, but has legislated on the idea that a record of its proceedings will be kept. And if such a distinction could be found, the bonds of officers, intrusted with all the money of the bank, are among the most interesting of its duties. Congress has manifested this opinion by enacting, that "Each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors, in a sum not less than $50,000, with a condition for his good behavior, and the faithful performance of his duties to the corporation."

Congress, then considered the bonds to be given by the cashiers as a subject of real importance; and Congress was right in this opinion. It requires very little knowledge of the interior of banks, to know that the interests of the stock-holders *are committed, to a [*111 very great extent, to these and other officers. It was, and ought to have been, the intention of Congress to secure the government, which took a deep interest in this institution, and to secure individuals, who embarked their fortunes in it, on the faith of government, as far as possible, from the malpractice of its officers. One of the means employed for this purpose is the bond required from the cashier. Are the

directors at liberty to dispense with this requisition? I think they are not.

Should a committee of Congress, on inspecting the books of the corporation, find the cashiers were acting without bonds, would not such gross negligence, such utter disregard of the positive mandate of the law, furnish serious cause for a scire facias to vacate the charter?

It has been urged, that the rule for which the defendants contend, would break in upon all the usages of the bank, invalidate all the notes they have discounted, and destroy their liability for deposits.

I do not think so. I do not profess to understand banking operations; but I think the counsel for the defendants has plainly shown, that not a single note is discounted, without evidence, in writing, on the note itself, or on the books of the bank, or on both. It is admitted that the official acts of the officers of the bank are binding, and, of course, written memorandums, made by such officer, in pursuance of orders of the board, whether on the note itself, or in a book, is a corporate act, is written evidence of such order of the board of directors, as the writing imports. The counsel for the defendant has, I think, shown from "the rules and regulations for conducting the business of the Bank of the United States," as well as from the practice under those rules, that all transactions of that character are, as they ought to be, in writing. He has shown also, conclusively, as I think, that full provision is made both for general and special deposits; and, in my judgment, every difficulty of this description is removed by the 23d rule, which shows that a regular record is, as it ought to be, kept of all the proceedings of the board of directors. So much of that rule as applies to this subject is in these words:

"The proceedings of the board of directors, 112*] when conducting *their business as a deliberative body, shall be governed by the following articles:

"1st. When the president takes the chair, the members shall take their seats.

"2d. The minutes of the preceding meeting shall be read before the board proceeds to any other business; and no debate shall be admitted, nor question taken at such reading, except as to errors and inaccuracies. The state of the bank shall then be read, and the discounts settled."

The board, then, does act as a deliberative body, and does keep a minute of its proceedings, which are to be read over and corrected. On what subject does the board deliberate, if not on the measures which are to be taken for the security of its debts, and on the sufficiency of the sureties in the bonds given by the officers who have the management of its funds? Most especially is it bound to deliberate on the bonds to be given by the cashiers of the bank. This is a subject on which the directors are particularly commanded to exercise their judgment by one of the fundamental articles of the constitution of the corporation. That article requires, that "each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors, in the sum of $50,000, with a condition," etc. Is not the sufficiency of this bond, then, most especially a subject for deliberation? If it be, how is this deliberation to be conducted? The rules prescribe the mode with precision, and go so far as to direct, that "at the request of any two of the board, the names of the members who make and second a motion, shall be entered on the minutes." The bond must be offered, and the question ought to be put, and must be put, whether it shall be accepted. The acceptance is necessary to the completion of delivery, and is the only proof which can be given of that fact, unless it be delivered to an attorney, previously appointed by a board to receive it. Acceptance, undoubtedly includes approbation, but is the deliberate act of the board, and must appear in their minutes. If it must, a copy of those minutes is, in a suit brought by the bank, the only admissible evidence of the fact.

*I think it worthy of remark, that [*113 among these rules and regulations, not one is found which ordains that a record shall be kept, in which the proceedings of the directors shall be inserted. They are framed upon the idea that one must be kept. We find them speaking of the minutes, as if their existence was indispensable, and need not be prescribed. Imitating the charter, in this respect, it was deemed unnecessary to ordain that a being should write, whose organization gave it not the means of transacting business otherwise than by writing.

The counsel for the plaintiffs has sought to escape the almost insuperable difficulties which must attend any attempt to maintain the proposition that a corporation aggregate can act without writing, by insisting that the directors are not the corporation, but are to be considered merely as individuals who are its agents.

If this proposition can be successfully maintained, it becomes a talisman, by whose magic power the whole fabric which the law has erected respecting corporation is at once dissolved. In examining it, we encounter a difficulty in the commencement. Agents are constituted for special purposes, and the extent of their power is prescribed, in writing, by the corporate body itself. The directors are elected by the stockholders, and manage all their affairs, in virtue of the power conferred by the election. The stockholders impart no authority to them, except by electing them as directors. But, we are told, and are told truly, that the authority is given in the charter. The charter authorizes the directors to manage all the business of the corporation. But do they act as individuals, or in a corporate character? If they act as a corporate body, then the whole law applies to them as to other corporate bodies. If they act as individuals, then we have a corporation which never acts in its corporate character, except in the instances of electing its directors, or instructing them. The corporation possesses many important powers, and is, as a corporation, to perform many important acts, scarcely one of which is to be performed in a corporate character. They are all to be performed by agents, acting as individuals, under general powers conferred by the charter.

*It cannot escape notice, that this [*114 rule, if it be one, would apply to almost all corporations aggregate, and would abolish the

distinction which has been taken between those which act by an individual, and those which act by an aggregate of persons. The first partakes of the qualities of a sole corporation, the last of a corporation aggregate.

This rule would apply to almost every corporation aggregate which exists, or which ever has existed. The exceptions are the very few in which all the members are active, or in which the corporation acts by a single individual who is its head. All others act by boards usually described in the charter. If the president and directors of the Bank of the United States act as individuals then it would seem that the managers of every other corporation, being in like manner created by charter, and being in like manner empowered by charter to transact all the affairs of the corporation, would likewise act as individuals, and the whole doctrines of the law upon the subject, would find nothing to which they are applicable.

But these doctrines grow out of adjudged cases, and courts have always considered those official agents, whose powers are described in the charter, and who act collectively, as acting in a corporate character. The idea has, I believe, never before been suggested, that their acts were to be treated as the acts of individuals. They do not appear as individual acts; they are not in the name of individuals, but of the corporate body. In all the cases which have come before this court that of The Bank of Columbia v. Patterson's Administrators as well as all others directors are considered as acting in their corporate character. In the cases in England, where the bank of England has been a party, and in all others, the same view has always been taken of the subject.

The president and directors form, by the charter, a select body, in which the general powers of the corporation are placed. This body is, I think, the acting corporation; and, according to the 4th article of the fundamental rules, seven of them, including the president, or the director deputed by the president, are necessary to constitute a board. The act of the major part of the board is the act of the whole, and binds the corporation; but this act must 115*] on general *principles, be done at one and the same time, and at a regular meeting held for the purpose. Kyd. Corp. 309. Its validity depends on the legal constitution of the board, and on its being the act of the body. These essential requisites must be shown; and to show them, the board must keep a record of its proceedings. Were the by-laws silent on the subject, this would be, as I think, rendered indispensable by the fact that it is the act of a corporation aggregate.

If there must be a record of their proceedings, and, even were this necessity not absolute, if the by-laws show that there is one, it follows that this record, not the oral testimony of the members, or of bystanders, must prove their acts. Their acceptance of any deeed, or their assent to any contract, if it be their own act, must appear on this record; if it be by agents, authorized for the purpose, the vote giving the authority must appear in like manner.

The 6th article of the fundamental rules directs, that "each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors, in a sum not less than $50,000, with a condition," etc.

As the bond is to be given before the cashier enters upon the duties of his office, it must be given before he can rightfully perform any official act; and it will be admitted, that the sureties to an official bond are responsible only for the official acts of the officer. This bond cannot be given till it is received, for they are different, and equally necessary parts of one and the same act; but, if it could, the law specially requires that it shall be "to the satisfaction of the directors." The "satisfaction" must be as to the sufficiency of the sureties, for the amount of the penalty is fixed by law. This is a subject on which the judgment of the directors must be exercised, and it can be exercised only at a regular meeting of a board, legally constituted. This must appear by the record. Any opinion given otherwise, is the opinion of individual members, but is not the corporate opinion of the board, is not a corporate act binding on the corporation, or of which the corporation can avail itself.

It appears to me that the bond must be received and approved by the board before the cashier can regularly perform any official act. This reception and approbation are *re- [*116 quired by the law which enables the corporation to act. They cannot be dispensed with. That they have been performed must be proved or presumed. If they have been performed, they are upon record, for the very act of performance places them upon record. This record, or an authentic copy of it, must, according to the rules of evidence, be produced, that it may prove itself.

May its existence be presumed in this case? The corporation, which claims this presumption, keeps the record, and is now in possession of it, if it exists. No rule of evidence is more familiar to the profession, than that a paper cannot be presumed under such circumstances.

I have stated the view which was taken by the Circuit Court of this case. I have only to add, that the law is now settled otherwise perhaps to the advancement of public convenience. I acquiesce, as I ought, in the decision which has been made, though I could not concur in it.

Judgment.—This cause came on, etc. On consideration whereof, it is ordered and adjudged, that there was error in the Circuit Court in rejecting the evidence offered by the plaintiffs in the first bill of exceptions stated, and not suffering the same to go to the jury in support of the issues joined in the case; and also, that there was error in the said court in rejecting the evidence offered by the plaintiffs in the second bill of exceptions, and not suffering the same to go to the jury in support of the same issues; this court being of opinion that the evidence was admissible in favor of the plaintiffs, notwithstanding there was no record of any approval of the bond stated in said bills of exceptions by the board

of directors of the bank aforesaid, and that the plaintiffs were at liberty to prove the fact of such approval by the said board, by presumptive evidence, in the same way and manner as such fact might be proved in the case of private persons not acting as a corporation, or as the agents of a corporation. And it is further ordered and adjudged, that for the error aforesaid, the judgment of the said Circuit Court be, and hereby is, reversed and annulled, and that the same be remanded to the said Circuit Court, with directions to award a venire facias de novo.

117*] [*Constitutional Law. Practice.]

WILLIAMS v. NORRIS.

Under the 25th section of the judiciary act of 1789, c. 20, where the construction of any clause in the constitution, or any statute of the United States, is drawn in question, in any suit in a state court, the decision must be against the title or right set up by the party under such clause of the constitution or statute, or this court has no appellate jurisdiction in the case. It is not sufficient that the construction of the statute was drawn in question, and that the decision was against the title of the party; it must appear that his title depended upon the statute.

Where, in such a case, the validity of a statute of any state is drawn in question, upon the ground of its being repugnant to the constitution of the United States, and the decision has been in favor of its validity, it is necessary to the exercise of the appellate jurisdiction of this court, that it should distinctly appear that the title or right of the party depended upon the statute.

The opinion of the court, or the reasons given for its judgment (unless in the case of instruction, to the jury, spread upon the record by a bill of exceptions), form no part of the record within the meaning of the above 25th section. Nor are they made a part of the record in Tennessee, by the local law of that state, requiring the judges to file their opinions in writing among the papers in the cause.

No orders in the state court, after the removal of the record into this court (not made by way of amendment, but introducing new matter), can be brought into the record here. The cause must be heard and determined upon the record as it stood when removed.

THIS cause was argued by Mr. White and Mr. Eaton for the plaintiff,[1] and by Mr. Benton and Mr. Polk for the defendant.[2]

Mr. Chief Justice **Marshall** delivered the opinion of the court:

This is a writ of error to a judgment ren-118*] dered in the *highest court for the state of Tennessee; consequently this court can exercise no other jurisdiction in the case than is given by the 25th section of the judiciary act.

The counsel for the plaintiff in error contend, 1st. That an act of Congress has been drawn into question in the State Court, and that the decision has been against that act.

2d. That an act of the legislature of Tennessee, which impairs the obligation of a contract, has been drawn into question, and that the decision has been in favor of the party claiming under that act.

As preliminary to a consideration of these points, it is necessary to inquire whether some additional papers which have been brought up by a certiorari constitute a part of the record. These papers are, the opinion of one of the judges, which is supposed to have been delivered and filed as the opinion of the court that decided the cause; and some proceedings which took place in the same court after the record had been removed into this court by writ of error.

1. Is the opinion a part of the record?

As a general proposition, every gentleman of the profession will, without hesitation, answer this question in the negative. An opinion not given to the jury, pronounced after a verdict was rendered, and, consequently, having no influence on that verdict, which states merely the course of reasoning which conducted the court to its judgment, may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record.

The counsel for the plaintiff does not contend for the general principle, but insists that an act of the legislature of Tennessee makes the opinion of a part of the record in the courts of that state.

An act passed in the year 1809, "to establish circuit courts, and a supreme court of errors and appeals," enacts "that the judges of the court of errors and appeals, as well as the Circuit Court judges, shall, as to the decisions on all material points, file their opinions in writing among the papers of the cause in which such opinion may be given within ten days from the delivering of the same."

*This sentence amounts to no more [*119 than a provision that the opinion of the judges shall appear, and shall be preserved with the other papers; but does not make that opinion a part of what is technically denominated "the record," more than the other papers in the cause among which it is filed. Depositions, and exhibits of every description, are papers in the cause, and, in one sense of the word, form a part of the record. In some states they are recorded by direction of law. But, in a jury cause, they constitute no part of the record on which the judgment of an appellate court is to be exercised, unless made a part of it by bill of exceptions, or in some other manner recognized by law. But the plaintiffs re-

1.—Miller v. Nicholls, 4 Wheat. Rep. 311.
2.—Martin v. Hunter, 1 Wheat. Rep. 304; Inglee v. Coolidge, 2 Wheat. Rep. 363; Lanusse v. Barker, 3 Wheat. Rep. 147.

NOTE.—As to the jurisdiction of the Supreme Court of the United States, when statute or constitution of United States is drawn in question. See note to Martin v. Hunter's Lessee, 1 Wheat. 304; Houston v. Moore, 3 Wheat. 433; Cohens v. Virginia, 6 Wheat. 264; note to Gibbons v. Ogden, 6 Wheat. 448; Sneed v. Wistar, 8 Wheat. 690.
See also the following:
Am. Ins. Co. v. Cotton, 1 Pet. 545; Ross v. Barland, 1 Pet. 655; Satterlee v. Matthewson, 2 Pet. 380; Weston v. Charleston, 2 Pet. 463; Jackson v. Lampline, 3 Pet. 288; Menard v. Apusla, 5 Pet. 505; Hickie v. Starke, 1 Pet. 98; Satterlee v. Matthewson, 2 Pet. 409; Wilson v. Blackbird Co. 2 Pet. 250; Harris v. Dennie, 3 Pet. 292; Davis v. Packard, 6 Pet. 41; Smith v. Hunter, 7 How. 738.

lies on the succeeding sentence as making the opinions of the judges a part of the record. That sentence is in these words: "And where a writ of error shall be allowed to reverse the judgment of any circuit court, in any cause, the clerk thereof shall send a transcript of the opinion of the judge to the Court of Errors and Appeals, with the balance of the record in the cause properly certified." it is contended that the words "balance of the record" show the intention of the legislature that the opinion of the judge shall constitute a part of that which is technically the record.

The capacity of a legislature to control the proceedings of courts is not questioned, and if its will be unequivocally declared, that will must be obeyed; but, in construing a law, implications are not to be drawn from careless expressions, which would produce unreasonable results, and subvert the usual course of legal proceedings. Can the opinion of the judge introduce any fact into the cause? Where a judgment is rendered on a special verdict, for example, can he, by an opinion filed ten days afterwards, control the facts found in that verdict? Or can he, by anything inserted in his opinion, warrant any legal inferences which the verdict itself would not justify, or in any manner change the legal effect of the finding? If the opinion cannot produce these results, for what purpose is it introduced into the record?

It can be introduced for no other purpose than to suggest to the Superior Court those 120*] arguments which might otherwise *escape its notice, which operated in producing the judgment, and which, in the opinion of the legislature, ought to be weighed by the Superior Court, before that judgment should be reversed or affirmed. If the judgment should be correct, although the reasoning by which the mind of the judge, was conducted to it should be deemed unsound, that judgment would certainly be affirmed in the Superior Court. We cannot, therefore, imply from the loose expression which has been cited, so extraordinary a result, as that the opinion of the court, filed after judgment, as an argument, should be considered as a part of what is technically denominated the record, or should be a supplement to the verdict. In the present case, the opinion which was filed has been inspected, and seems to have been founded on a construction of the laws of the state, without calling into question the constitution of the United States or any act of Congress. This, however, is not relied on, because, as has been stated, the opinion has no other influence on the cause than it would have had if published in a book of reports.

If the court could have doubted on the proper construction of this section, the fact that it has never been understood in the courts of the state, in the sense for which the counsel for the plaintiff in error now contends, would be conclusive on the question. It is also not entirely unworthy of remark, that so much of the section as requires the judges of the Circuit Court to file their opinions in writing, was repealed before the judgment in this case was pronounced; consequently, that part of the section which contains the words by which the doubt was created, form no longer a part of the law.

The certiorari has also brought up a supplemental record, which contains a motion made in the State Court by the plaintiff in error, after the cause had been removed into this court, to amend the record or entries of the judgment, by inserting the questions which were decided by the judges. The reasons for and against this motion are spread upon the record; and the facts which would give jurisdiction to this court, are asserted by the one party and denied by the *other. The court took time for [*121 advisement, and does not appear to have granted or rejected the motion.

This court is decidedly of opinion that no orders made in the court of the state after the removal of the record into this court by writ of error, not made by way of amendment, but introducing new matter, could be brought into it, or could in any manner affect it. The cause must be tried on the record as it stood when removed, not upon the subsequent proceedings, which were pressed in the state court after its final judgment was given. In the present case, nothing is before the court but the original record.

That record exhibits a caveat against the issuing of a grant on a survey, made for the defendant, and assigns various causes why it should not be issued. The plaintiff claimed under a patent from the state of Tennessee; and the caveat was the proper process to contest the right of the defendant. On the trial, a jury, in pursuance of the act of the legislature of that state of 1807, ch. 1, sec. 8, was "impaneled and sworn, for finding such facts as are material to the cause, and not agreed on by the parties." The jury found, 1st, that on the 3d day of May, 1784, Ezekiel Norris made his entry in the office of John Armstrong, entry, taker of western lands, reciting the words of the entry. In the margin, the following words are inserted, "detained for nonpayment."

2d. That on the 18th of November, 1815, a duplicate warrant of survey was issued by the commissioner of West Tennessee to the said Norris, a copy of which is annexed.

3d. The 3d fact is, that the entry was special; and the 4th, that the tract of land which the entry called to adjoin was notorious.

5th. That the original warrant, No. 2047, to Ezekiel Norris, issued and was filed in the comptroller's office of North Carolina, without any indorsement thereon; that it was detained for non-payment. The copy of the warrant is found, and is incomplete, being without the signature of John Armstrong, the entry-taker.

The caveatee required the jury to find, as a fact, that the purchase money was paid by Norris, and that the memorandum in the margin, "detained for non-payment," was a *fraudulent entry. The jury refuse to [*122 find this fact, and in its stead, find, "that it is not proved to them that the consideration, at the rate of £10 per hundred for every hundred acres, for the entry of the said Ezekiel Norris, in question, was duly paid to John Armstrong, entry-taker, etc., and that afterwards it was falsely and fraudulently inserted in the margin of the entry-book containing said entry, and opposite to the same, by some person, 'detained for non-payment.'"

The act of North Carolina, which authorized entries to be made in John Armstrong's office,

contains the following enactment: That every person claiming, before he shall be entitled to enter a claim for any of the said lands, shall pay into the hands of the entry-taker at the rate of £10 in specie, or in specie certificates at their nominal value, etc., for every hundred acres so entered.

The 19th section directs every entry-taker within the state, to make out and deliver to the surveyor, on or before the first day of April and the first day of October annually, the warrants for the several entries (which are not disputed) made in his office, with an indorsement prescribed by law, showing the number and date of the entry.

The Circuit Court for the county of Lincoln decided that Williams, the caveator, had the better right. This judgment was carried to the Court of Errors and Appeals by writ of error, where it was reversed, and the caveat dismissed.

That judgment is now before this court; and in considering it we are confined to the inquiry, whether the record shows any misconstruction of an act of Congress, or of the constitution of the United States.

In 1789, North Carolina ceded her western territory to the United States, reserving to herself the right of perfecting titles, in all cases where entries had been made according to law.

Under this reservation, several acts were passed, directing warrants of survey to be issued on entries made in John Armstrong's office, where the purchase money had been or should be paid.

In 1796, Tennessee was erected into a state. In 1803, North Carolina entered into a compact 123*] with the state of *Tennessee, in which the former ceded to the latter the power to issue grants, and perfect titles to all claims of land lying in the said state, which power had been reserved to herself by North Carolina, in her acts ceding her then western territory to the United States. This compact was assented to by Congres.

In 1806, Congress passed an act, ceding to the state of Tennessee all the rights of Congress to lands lying east and north of a line described in the act.

The land in controversy is within the territory thus ceded by Congress.

If any stipulation in the compact between North Carolina and Tennessee could have affected the controversy between Williams and Norris, it must have been because the title of Norris came within the reservation made by the state of North Carolina in her act of cession to Congress. That reservation was the subject of the compact. As the controversy was not between two persons, claiming under North Carolina, but between a person claiming under North Carolina, and one claiming under the state of Tennessee, and the decision was in favor of the title set up under North Carolina, we cannot perceive how that decision can be considered as a violation of the compact. North Carolina stipulates that titles should be issued by the state of Tennessee for lands to which there were valid claims under her laws, and for which patents might have been issued by her, had the compact not been made. If the title of Norris was valid, according to the laws of North Carolina, then the decision in his favor is in pursuance of the compact; if it was not valid, according to those laws, then the case is not within the compact. In either view of it, the compact has not been violated.

The act which gives the sanction of Congress to this agreement, also cedes to Tennessee a large territory, comprehending the lands in controversy. This cession is made on several conditions, one of which respects all existing claims to lands under the state of North Carolina. Its operation is understood to be, so far as it can affect the case now before the court, precisely the same with that of the compact between the two states. The same observations *apply to it as were applied to that in- [*124 strument. The title, for the benefit of which it was intended, if it has any influence in the case, has prevailed. Consequently, neither the compact between the states, nor the act of Congress which assents to that contract, and which confers on the state of Tennessee the power to perfect titles in the district of country which comprehends the lands in controversy, can have been violated.

A point of rather more difficulty remains to be considered. It is contended that the validity of a statute of the state of Tennessee has been drawn into question in this case, on the ground of its being repugnant to the constitution, and the decision has been in favor of its validity.

The act supposed to be unconstitutional is, "an act for the relief of Ezekiel Norris."

It is not stated in the record that the constitutionality of this act was drawn in question; and the 25th section of the judiciary act declares, that "no error shall be assigned or regarded, but such as appears on the face of the record, and immediately respects the beforementioned questions of validity, or construction of the said constitution," etc. The case of Miller v. Nicholls, 4 Wheat. Rep. 311, has been relied on to prove that it is not necessary to the jurisdiction of the court that the record should, in terms, state a misconstruction of the act of Congress, or that it was drawn in question. It is sufficient to give the court jurisdiction, that the record should show that an act of Congress was applicable to the case.

The case of Miller v. Nicholls was a claim filed by Mr. Dallas, the attorney of the United States, for a sum of money brought into a state court of Pennsylvania to be disposed of by the court. The money belonged to a debtor of the United States, who was also indebted to the state of Pennsylvania. The court decreed the money to the state, in pursuance, it is presumed, of an act of the legislature, giving the state a preference. The case was brought, by writ of error, into this court, upon the allegation that the judgment was in violation of the act of Congress, which gives priority to the United States in all cases of insolvency. This court dismissed the writ of error, because, the fact of *insolvency not having been [*125 shown, it did not appear from the record that the act of Congress, or the constitutionality of the state law, was drawn into question. The court added, that the record need not state, in terms, a misconstruction of the act of Congress, or that it was drawn in question.

The act of Congress applies to every insolvent debtor of the United States, and gives them priority as to all the property of the debtor which he possessed when the insolvency took place; but it applies only to cases of insolvency. Had the record shown that this was a case of insolvency, so that the act of Congress applied to it, that act must have been misconstrued, or its obligation denied, when the court decreed the money to the state of Pennsylvania; and the court was of opinion that the act could not have been evaded by the omission to refer to it in the judgment, or to spread it on the record.

To apply the principle of that case to this, it will be necessary to show that the title of Norris depended on the act passed in his favor by the legislature of Tennessee, and that the act was repugnant to the constitution.

That act is in these words: "Be it enacted," etc., "that the commissioner of West Tennessee be, and he is hereby authorized to issue to Ezekiel Norris, certificates or warrants to the amount of 2,280 acres, being the amount of two entries, No. 2046 for 100 acres, and No. 2047 for 1,280 acres, on which no warrants or grants were issued; provided that the said Ezekiel Norris shall produce sufficient evidence to the said commissioner that the consideration for said entries was paid, and that no warrant or grant ever issued on said entries."

When this act passed, a patent had been granted by the state of Tennessee to the plaintiff in error, comprehending a part of the land covered by the entry of Norris. If its effect was to annul that patent, and to give a new title to Norris, the act would come within the decision of this court in the case of Fletcher v. Peck, as a law impairing the obligation of contracts. In determining whether such was its effect, it is necessary to inquire whether Norris's entry was absolutely void, or gave an in- 126*] cipient title, capable of being *carried into grant. If the purchase money was paid, the entry was valid. If not paid, the entry might be void, or only voidable. The words of the act under which it was made have been cited, and may admit of either construction. It is a question for the legislature and courts of the state, and its decision in one way or the other would not be repugnant to the constitution of the United States. It is apparent that the legislature of North Carolina has not considered these entries, where the purchase money was not paid at the time, as being absolutely void, but has supposed them to be capable of being perfected, and carried into grant, as the legislature might direct.

In 1794 the comptroller was directed to issue warrants in all cases in which the purchase money had been paid.

In 1796 it was enacted that no grants should issue on warrants on entries made in John Armstrong's office, unless it should appear by Armstrong's books, or other sufficient testimoney, that the purchase money had been paid. The next succeeding section of the same act authorizing any person entitled to such entry to pay into the treasury the amount or balance of the purchase money, upon which a warrant may be issued.

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In 1798 the legislature appointed commissioners to investigate the frauds suggested to have been committed in the Secretary's office, and directed that no grant should issue on warrants obtained on entries which the commissioners might deem fraudulent.

The act of 1799, ch. 7, sec. 16, directs warrants to issue on all entries where the requisites of the law have been, or shall be, complied with.

The legislation of North Carolina, to the year 1803, proceeds upon the idea that the entries made in John Armstrong's office, for which the purchase money had not been paid, were not absolutely void, but might be made good by paying the purchase money, or such part of it as remained due. The right seems to have been considered as preserved and suspended until the purchase money should be paid. In this state of things, the power of perfecting titles, which had been retained by North Carolina in her cession act, was transferred to Tennessee, on condition that titles *should [*127 be perfected, or entries made, under the laws of that state, according to the requisites of those laws.

In 1806, c. 1, sec. 45, the legislature of Tennessee appointed commissioners to decide on the validity of entries, with directions to admit no warrants on entries made in John Armstrong's office, if it may appear to the said commissioners that the purchase money has not been paid.

By the act of 1807, c. 20, secs. 25 and 29, it is enacted, that where it shall appear to either of the commissioners that entries have been made in John Armstrong's office, on which the purchase money has been paid, in whole or in part, warrants may issue for so much lands as has been paid for. But it is provided, that the person exhibiting such claim shall produce a certificate from the comptroller of North Carolina, showing what sum was paid on the said entry. This act was continued in force till the 1st of January, 1815. In October, 1815, an act passed, directing that there should be one commissioner in East, and one in West Tennessee, each of whom should exercise the powers which had been vested in commissioners by the act of 1806.

We do not understand that the propriety or obligation of these acts has ever been questioned by the courts of either North Carolina or Tennessee. We do not understand that the courts of either state have ever questioned the legislative construction of the act, opening the office in which this entry was made. That construction is, that entries received by John Armstrong, though not accompanied by the purchase money, were not absolutely void, but would become valid, should the purchase money be afterwards paid; and that such proof of payment might be received as the legislature should prescribe. It cannot be doubted that numerous titles are held under this construction of the law. Its correctness or incorrectness does not seem to involve any constitutional question, or any question which can give this court jurisdiction in a cause which has been determined in a state court.

Had the claim of Ezekiel Norris been decided by the commissioners acting under the general law, it would probably never have been contested. What difference is there, so far as respects its constitutionality, between the act 128*] passed *in his particular case, and the act containing a general reference of all cases of the same description to the commissioner? The difference consists solely in this: the general act admits no other proof of payment than a certificate from the comptroller of North Carolina; the particular act authorizes the commissioner to establish the claim on sufficient evidence; that is, we presume, on such evidence as is generally admissible in a court of justice. We know of no principle which could impose on the legislature of the state the necessity of exacting from the claimant, under an entry made in John Armstrong's office, as indispensable to the establishment of his claim, a certificate from the comptroller of North Carolina that the purchase money had been paid. The act of 1794 left the fact of payment open to legal proof. The act of 1796 required that it should appear by Armstrong's books, or other legal testimony. If, then, the general act of Tennessee had allowed the commissioner to issue warrants, on sufficient proof, such act might have been questioned on the ground of policy, but not of right.

If this be correct, if the legislature might have dispensed with this testimony in a general law, why may it not be dispensed with in a particular law, where its effect on the cause is precisely the same as if it had been general? There are, undoubtedly, great and solid objections to legislation for particular cases. But these objections do not necessarily make such legislation repugnant to the constitution of the United States.

The act "for the relief of Ezekiel Norris," did not authorize the commissioner to grant him a certificate or warrant on his entry, unless he should prove that the purchase money had been paid. The laws had preserved such entries, and, consequently, an act to enable the proprietor of one of them to prosecute his claim, is not necessarily an act impairing the obligation of a contract.

The question whether the judgment of the commissioner was conclusive evidence that the purchase money had been paid, is entirely distinct from the constitutionality of the law, and the decision of the State Court upon it cannot be revised in this court.

129*] *We are of opinion that this record does not exhibit a case of which this court can take jurisdiction, and that the writ of error ought, therefore, to be dismissed.

Judgment.—This cause came on, etc. On consideration whereof, this court is of opinion that there is no error apparent on the face of the record, of which this court can take jurisdiction. It is therefore considered by this court, that the writ of error be dismissed, and that the cause be remanded to the Supreme Court of Errors and Appeals of the state of Tennessee.

6 L. ed.

[Constitutional Law. Construction of Statute.]

MONTGOMERY, Plaintiff in Error,

v.

HERNANDEZ et al., Defendants in Error.

Under the 25th section of the judiciary act of 1789, ch. 20, this court has no appellate jurisdiction from the final judgment of the highest court of a state, in a suit where is drawn in question the construction of a statute of, or a commission held under the United States, unless some title, right, privilege, or exemption, under such statute, etc., be specially set up by the party, and the decision be against the claim so made by him.

Where a suit was brought in a state court upon a marshal's bond, under the act of April 10th, 1806, ch. 21, by a person injured by a breach of the condition of the bond, and the defendants set up as a defense to the action that the suit ought to have been brought in the name of the United States, and the court decided that it was well brought by the party injured in his own name: Held, that the exemption here set up being merely as to the form of the action, and no question arising as to the legal liability of the defendants under the act of Congress, this court had no authority to re-examine the judgment, so far as respected the construction of that part of the act which provides that suits on marshals' bonds "shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards."

Under the 4th section of the same act, although the condition of the marshal's bond is broken by his neglecting to bring money into *court, [*130 directed to be so brought in, or to pay it over to the party, yet, if the proceedings be suspended by appeal, so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued, so as to bar it, if not commenced within six years.

THIS cause was argued by Mr. D. B. Ogden for the plaintiff in error, and by Mr. Key for the defendants in error.[1]

Mr. Justice Trimble delivered the opinion of the court:

This case is brought up by writ of error from the highest court of law of the state of Louisiana.

The case is, that the defendants in error instituted a suit, in their own names, in the District Court of the state for the first judicial district, upon the bond given by Michael Reynolds to the United States, as marshal of the district of Louisiana, conditioned to be void upon his "well and faithfully executing the duties of his said office;" and the plaintiff in error having executed the bond, as one of the marshal's sureties, and the marshal having since died, the suit was brought against the plaintiff in error, and the said Reynolds' personal representative.

The breach of the condition of the bond alleged is, that by the order of the District Court of the United States, for the district of Louisiana, in a suit in admiralty, wherein the defend-

1.—He cited Pothier des Obligations, No. 645; De Prescription, No. 22, 23; 8 Cranch, 91, 92.

NOTE.—As to jurisdiction of Supreme Court of the United States. See note ante, 571.

ants in error were libelants against the schooner Estrella and her cargo, the vessel and cargo were directed, by the court, to be sold by the marshal, and the proceeds of the sale held by the marshal, subject to the order of the court; that the marshal, in pursuance of that order, sold the vessel and cargo, and received the money; that the court of admiralty, by its final decree in the cause, directed the vessel and cargo, or the proceeds thereof, to be restored to the libelants; and that the marshal had failed to pay over to the libelants $3,126, part of the proceeds, as was his duty, under the final order and decree of the court. The suit having been commenced and prosecuted, by petition, accord-
131*] ing to the practice of the civil *law which prevails in Louisiana, the respondent, Montgomery, put in his answer, admitting the execution of the bond, but insisting, that as the bond was executed to the United States, and the defendants in error no parties to it, they had no right or interest in the bond, and could not sue for a breach of the condition thereof; and denying the breaches alleged in the petition. By a supplemental answer, in the nature of a plea of the act of limitations, Montgomery alleged, if any breach had taken place, that more than six years had intervened since the cause of action, before the institution of the suit.

The record states, that the jury sworn in the cause, after hearing testimony, and receiving a charge from the court, returned a verdict for the defendant in error, for the sum of $3,126; for which sum judgment was rendered upon the verdict in their favor. From this judgment Montgomery appealed to the Supreme Court of the state, where the judgment of the District Court was affirmed; and this judgment is sought to be reversed in this court upon the present writ of error.

On the trial of the cause in the District Court, Montgomery objected to the admission, as testimony, to the jury, certain documents, purporting to be accounts of the marshal's sales of the Estrella and cargo; and, his objections being overruled, he excepted to the opinion of the court, admitting the papers offered; and his exception was sealed, and made part of the record.

The appellate jurisdiction of this court, in cases decided in the state courts, is very special and limited in its character. By the 25th section of the judiciary act, made in pursuance of the constitution, it is provided, "That a final judgment or decree, in any suit in the highest court of law or equity of a state, in which a ecision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of
132*] such *validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States; and the decision is against the title, right, privilege, or exemption, specially set up by either party, under such clause of the constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed, by the Supreme Court of the United States."

Under these provisions, we have no authority to re-examine the whole case. We can re-examine so much, and such parts of it only, as come within some one or other of the classes of questions enumerated in the act of Congress, and so much of the case as must necessarily be decided to arrive at such question.

It has been insisted for the plaintiff in error, that the question raised upon the record, whether Hernandez, not being a party to the marshal's bond given to the United States, could maintain a suit upon it in his own name only, without suing in the name of the United States, for his use, is a question which can be re-examined in this court. We are not of that opinion. It is not every misconstruction of an act of Congress by a state court, that will give this court appellate jurisdiction. It is where the party claims some title, right, privilege, or exemption, under an act of Congress, and the decision is against such right, title, privilege, or exemption.

In this case the plaintiff in error did not, and could not, claim any right, title, privilege, or exemption by, or under the marshal's bond, or any act of Congress giving authority to sue the obligors for a breach of the condition; or, at most, his claim to exemption rests upon form, and not substance, as the law expressly charges him, and the objection is only that the name of the United States should have been inserted for the use of the plaintiff.

However we might be inclined to the opinion that, regularly, and in point of form, the suit should have been in the name of the United States, for the use of Hernandez, we have no jurisdiction or authority to re-examine, and either reverse or affirm the decision of the State Court on that ground.

*The only part of the case over which [*133 we can rightfully exercise appellate jurisdiction, is that raised by the supplemental answer, pleading the prescription or bar of six years: in which the party claims an exemption under the laws of the United States, from liability as surety of the marshal; the decision in the state court being against the exemption so specially set up by him.

The act of Congress passed in 1806, relating to bonds given by marshals, enacts, "that all suits on marshals' bonds, if the cause of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards; and all such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards," etc. Ingersoll's Dig. 402.

It is obvious, that whether this act of Congress exempts the plaintiff in and from responsibility or not, must depend upon the time when the right of action accrued to Hernandez & Co., for any injury sustained by reason of the marshal's failure to perform his duty. It was the duty of the marshal under the order of the Court of Admiralty directing him to sell the Estralla and cargo, and hold the proceeds sub-

ject to the future order of the court, to bring the money into court as soon as received by him, in order that it might be deposited in the Branch Bank of the United States. The order of the court directing the marshal to hold the proceeds until the further order of the court, can only be construed to mean that he should hold them in the manner prescribed by law. The law directs the money to be deposited in the name of, and to the credit of the court; and provides, that the money so deposited shall not be drawn out of bank without the order of the court. The object of the law was to prevent the officers of the court from holding money, in such cases, in their own hands, and converting it to their own use. It was only a partial execution of the precept of the court to sell the vessel and cargo; its mandate was not faithfully performed until the proceeds were brought into court by him, in order to be deposited according to law, or until he paid it 134*] over to Hernandez, as *directed by the final decree and order of court. The marshal's failure to bring in the money, or pay it over to Hernandez & Co., was a violation of his duty, and a breach of the condition of his bond.

The Supreme Court of the state decided, that although the breach of the condition of the bond took place more than six years before the institution of this suit, yet the plaintiff's right of action did not accrue until within the six years; and that, consequently, the act of limitations constituted no bar to the action. This court perfectly accords in opinion with the Supreme Court of the state.

If it be true that the condition of the bond was broken at the time the marshal failed to bring the money into court to be deposited in the bank, or pay it over to Hernandez & Co.; and if it be true that the breach of the condition of the bond was to the injury of Hernandez & Co.; yet, it is not true that Hernandez & Co. had, at that time, any right of action. The record of the proceedings in the Court of Admiralty shows that the Estrella and cargo were sold, and the proceeds received by the marshal; and that the suit was finally decided in the District Court on the —— day of ———, 1817; by which final decree the proceeds were ordered to be paid over to Hernandez & Co.

An appeal was presented from that decree in this court, where it was affirmed at the February term in the year 1819, within less than six years before the institution of this suit.

It is perfectly clear that Hernandez & Co. had no right to demand of the marshal the proceeds of the sales, or to sue for the recovery thereof, until after the affirmance in this court. The right of action was suspended, during the pendency of the appeal in the court; and during such suspension, the statute of limitations did not run against him.

We are therefore of opinion that the Supreme Court of Louisiana have misconstrued neither the act of Congress limiting action upon marshal's bonds to six years from the time the right of action accrues, nor any other act of Congress, to the prejudice of the plaintiff in error.

Judgment affirmed with costs and six per cent. damages.

6 L. ed.

[*Practice.] [*135

WINN'S HEIRS v. JACKSON et al.

The judgment of the highest court of law of a state, deciding in favor of the validity of a statute of a state, drawn in question on the ground of its being repugnant to the constitution of the United States, is not a final judgment within the 25th section of the judiciary act of 1789, ch. 20, if the suit has been remanded to the inferior state court, where it originated, for further proceedings, not inconsistent with the judgment of the highest court.

ERROR to the Court of Appeals of Kentucky.

This was an ejectment, originally brought in the Harrison Circuit Court of the state of Kentucky, by the plaintiffs in error, against the defendants in error, and judgment being rendered for the plaintiffs, the cause was carried by writ of error to the Court of Appeals, being the highest court of law and equity of that state. The judgment was reversed in the Court of Appeals, and the cause remanded to the Harrison Circuit Court for further proceedings, not inconsistent with the decision of the Court of Appeals. Whereupon the plaintiffs sued out their writ of error under the 25th section of the judiciary act of 1789, c. 20, and brought the cause before this court, as being a suit where was drawn in question the validity of a statute of the state of Kentucky, on the ground of its being repugnant to the constitution of the United States, and the decision being in favor of its validity.

Mr. Wickliffe moved to quash the writ of error, upon the ground, that although the decision of the Court of Appeals was in favor of the validity of the statute which had been drawn in question as being repugnant to the constitution of the United States, the judgment of that court was not "a final judgment" within the true meaning of the 25th section *of the judiciary act of 1789, ch. 20, the [*136 case having been remanded to the Circuit Court of Harrison for further proceedings.[1]

Motion allowed.

[Constitutional Law.]

THE POSTMASTER-GENERAL of the UNITED STATES v. EARLY et al.

The circuit courts of the Union have jurisdiction, under the constitution, and the acts of April 30th, 1810, ch. 262, s. 29, and of March 3d, 1815, ch. 782, s. 4, of suits brought in the name of "the Postmaster-General of the United States," on bonds given to the Postmaster-General by a deputy-postmaster, conditioned "to pay all moneys that shall come to his hands for the postages of whatever is by law chargeable with postage, to the Postmaster-General of the United States for the time being, deducting only the commission and allowances made by law for his care, trouble, and charges, in managing the said office," etc.

The Postmaster-General has authority to take such a bond, under the different acts establishing and regulating the post-office department, and particularly under the act of April 30th, 1810, ch. 262, s. 29, 42.

1.—He cited Gibbons v. Ogden, 6 Wheat. Rep. 448.

NOTE.—As to final judgments for purposes of review, see notes to 5 L. ed. U. S. 302; 49 L. ed. U. S. 1001; 62 L.R.A. 515.

THIS was an action of debt, commenced in the Circuit Court for the District of Georgia, by the District-Attorney of the United States for that district, in the name of the Postmaster-General of the United States, against the defendants, on a bond executed by them, in June, 1820, to the Postmaster-General of the United States, the condition of which, after reciting that Eleazer Early (one of the co-obligors and defendants in the suit) is postmaster at Savannah, provides, that if he shall perform the duties of his office, "and shall pay all moneys that shall come to his hands for the postages 137*] of whatever is by law chargeable *with postage, to the Postmaster-General of the United States for the time being, deducting only the commission and allowances, made by law, for his care, trouble, and charges, in managing the said office," etc., "then the above obligation shall be void." The breach assigned was, that the said E. Early did not pay to the Postmaster-General the moneys which came to his hands, as postmaster at Savannah, but that the sum of $7,736.64 was still in arrear and unpaid. The defendants pleaded to the jurisdiction of the court, that this was "not a suit in which the United States are a party, nor is the debt declared on one contracted, authorized, or arising, under a law of the United States, and over which jurisdiction has been given to this honorable court." On the argument of the cause in the court below, the opinions of the judges of that court were opposed upon the question of jurisdiction, and it was certified to this court for a final decision.

The cause was argued by the Attorney-General and Mr. Wheaton for the plaintiff, and by Mr. Webster and Mr. Berrien for the defendants.

On the part of the plaintiff, it was contended, (1) That the laws of the United States gave, and were intended to give, the jurisdiction now in question.[1] If there was any apparent discrepancy in the laws on the subject, it grew out of the fact that the post-office department existed long before the establishment of the present constitution, and Congress had dealt with it as an existing institution of the government. The laws now in force, and the usage which had grown up under them, of the Postmaster-General taking bonds to secure the official good conduct of his deputies, and bringing suits on them in the courts of the Union, would be best explained by a recurrence to this historical fact. The post-office act of April 30th, 1810, ch. 262, s. 29, which is a consolidation of the former laws on the subject, directs the Postmaster-General to "cause a suit to be commenced against any postmaster who does not render *his quarterly accounts, and pay over [*138 the balance to the Postmaster-General." And provides, "that all suits which shall hereafter be commenced for the recovery of debts or balances due to the general post-office, whether they appear by bond or obligations made in the name of the existing, or any preceding, Postmaster-General, or otherwise, shall be instituted in the name of the Postmaster-General of the United States." The 42d section of the same act repeals the former post-office laws, with a proviso, saving suits and the bonds given by deputy-postmasters for the faithful execution of their several duties and offices. The act of the 3d of March, 1815, ch. 782, s. 4, declares, "that the district courts of the United States shall have cognizance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority of any act of Congress, shall sue, although the debt, claim, or matter in dispute, shall not amount to $100.00." It was admitted that the clause giving the jurisdiction to the circuit courts, was awkwardly expressed in this last section, which seemed to have been drawn upon the supposition that the jurisdiction already resided in those courts; yet it was insisted that this was equivalent to a declaration of the legislative will, that it should be exercised by them, since the district court could not have

1.—Osborn v. The Bank of the United States, 9 Wheat. Rep. 738, 825, 901, 902.

NOTE.—As to sureties on official bonds. See note to The United States v. Giles, 9 Cranch, 212.

The Postmaster-General has a right to require a bond from a deputy-postmaster, for the faithful performance of the duties of his office, although such bond is not expressly required by law. Postmaster-General v. Rice, Gilp. 554; Same v. Reeder, 4 Wash. C. C. 678.

A bond given by a postmaster, with sureties, for the performance of official duties, does not constitute a binding contract, until approved and accepted by the Postmaster-General. Postmaster-General v. Nowel, Gilp. 106.

A bond with a condition variant from that prescribed by law, extorted from the obligor and his sureties, as the condition of the obligor's remaining in office and receiving its emoluments, is illegal, as obtained by color of office. U. S. v. Tingey, 5 Pet. 115.

An official bond is not invalidated by including in it other things which are separable from the subjects for which it may lawfully be taken. U. S. v. Bradley, 10 Pet. 343.

Where an interlineation was made in a bond after its execution, without the knowledge of the surety, by which additional duties were to be performed by the principle, the bond was held entirely void, and it was held that the sureties were not responsible for money subsequently collected by the principal, and which he failed to pay over, even as to duties stated in the bond before the interlineation. Miller v. Stewart, 9 Wheat. 680; S. C. 4 Wash. C. C. 26.

The sureties upon the official bond of a deputy-postmaster are liable for postage stamps received by their principal. U. S. v. Mason, 2 Bond, 183.

In an action by the United States on a postmaster's bond, the defendant may plead a counter claim, if the items thereof have been presented to the proper department for allowance, and rejected. U. S. v. Davis, Deady, 294.

After a new bond of a postmaster was given, the sureties of a former bond were sued for a sum owing by their principal to the United States. It not appearing that the postmaster had not in his hands, at the time the new bond was given, ready to be paid or applied, all the moneys of the United States with which he was justly chargeable. Held, that it must be presumed he had such moneys in his hands when the new bond was given; and that the sureties were not liable therefor. Alvord v. U. S. 13 Blatchf. 279.

A bond voluntarily given to the United States, though not prescribed by law, may be a valid instrument binding on the parties to it. The United States have in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided by law. It is an incident to the general right of sovereignty. U. S. v. Tingey, 5 Pet. 115; U. S. v. Bradley, 10 Pet. 343; U. S. v. Linn, 15 Pet. 290; Neilson v. Lagow, 12 How. 98; U. S. v. Howell, 4 Wash.C. C. 620; Dixon v. U. S. 1 Brock. Marsh. 177; Postmaster-General v. Rice, Gilp. 554; U. S. v. Maurice, 2 Brock. Marsh. 96.

a concurrent jurisdiction with the circuit courts in such suits, unless the latter had, by law, cognizance of the same. If it should be objected, that though the circuit courts might have cognizance of actions where any officer of the United States sues under the authority of any act of Congress, yet there is no such act authorizing the Postmaster-General to take the bond, on which this suit was brought; it was answered, that the authority to sue on such a bond, given in the 29th section of the act of 1810, is an implied authority to take it, and a legislative recognition of the notorious pre-existing practice of office, which is also strongly confirmed by the proviso in the 42d section, saving all suits and the bonds given by postmasters. Even if it were doubtful whether he could take a bond for the faithful discharge, by his deputies, of their official duties, without 139*]an *express authority by law, a bond might certainly be taken to secure the payment of moneys due to the government in the post-office department, as well as to an individual, or to a corporation.[1] A mere voluntary bond, taken at common law, for a purpose not unlawful, and adapted as means to attain the end contemplated by the statute, would be valid, and a suit might be maintained upon it in a court of competent jurisdiction.[2]

2. If, then, the bond was a lawful bond, and the Postmaster-General was authorized to cause a suit to be commenced on it in his official name, and if the intention of Congress to vest jurisdiction over such suit in the circuit courts was sufficiently manifested, the only remaining question would be, whether the laws conferring this jurisdiction were consistent with the constitution, by which the judicial power is extended to "all cases in law and equity arising under the laws of the United States," and to "controversies to which the United States shall be a party." That this was a case arising under the laws of the Union, was self-evident; and that it was a controversy to which the United States is a party, would appear from an examination of the record. The suit is brought by the District-Attorney of the United States, in the name of the Postmaster-General, not for his own benefit, but as the public agent of the government, and a trustee for the United States. The acts of public officers, within the sphere of their authority, are the acts of the government; and the money to be recovered being the property of the United States when recovered, the United States are parties to the suit.[3] There was a distinction between a formal party to the suit, and a substantial party to the controversy. This distinction might be illustrated by the ordinary principle applicable to assignments of choses in action, where the suit is brought by the assignee in the name of the assignor, but the 140*] latter cannot control it."[4] So, *also, the assignee of the crown has a right to sue in the name of the crown.[5] There the crown is no party to the controversy, though a party to the suit. Here the Postmaster-General is the nominal party on the record, but the United States is the real party to the controversy. In the case of Brown v. Strode, where the suit was brought in the name of "the justices of the peace for the county of Stafford," who were citizens of Virginia, against the defendant, a citizen of the same state, to recover a debt due to a British subject, the alien was there considered as the substantial party to the suit, it being brought for his benefit.[6] So, in England, many suits in which the public is concerned, are not brought in the name of the crown. Thus, at common law, independent of any statutory provision, the Attorney-General exhibits, in his own name, an information of debt, which is called the King's action of debt; or, if a discovery is wanted, an English information in the Exchequer, called the King's bill in equity. Here the Attorney-General is the nominal party, whilst the crown is the substantial party for whose benefit the suit is brought.[7] And the prosecutions under the revenue laws are frequently brought by the commissioners of excise and the customs, or by their order, in the name of the Attorney General; or, in minor cases, by the inferior officers of the revenue; but the public is always considered as the substantial party to the suit.[8]

For the defendants, it was argued, that whatever might be the extent of the judicial power as defined in the constitution, the tribunals inferior to the Supreme Court, and created by Congress, could only exercise such jurisdiction as was expressly conferred upon them by statute. But, it was insisted, that this was not "a case arising under the laws of the United States," nor "a controversy to which the United States are a party." And, in this view, it was, *insisted, (1) That there was no [*141 law of Congress which, in terms, required or authorized the Postmaster-General to take the bond on which the suit was brought. There was, indeed, no express inhibition of such a bond, but the supposed implied authority to take it was negatived by the obvious policy of the post-office laws. That policy was to secure the collection of the dues to the department by requiring prompt settlements, enforced by the personal responsibility of the Postmaster-General, as provided in the 29th section of the act of 1810. It was not meant to rely upon this provision as constituting a ground of defense for a deputy-postmaster sued by the Postmaster-General for official negligence, upon the primary obligation imposed on him by accepting the office, and not accounting for the public moneys received in his official capacity. It was only contended, that it excluded the idea of the Postmaster-General being authorized to take a security not expressly authorized by the law, from an agent appointed by him, removable by him, and accountable to him. This inference was supported by the new provision inserted in the 3d section of the amended post-office act of 1815, expressly authorizing and requiring him

1.—Dugan v. United States, 3 Wheat. Rep. 172.

2.—2 Lord Raym. 1459; S. C., 2 Str. 745; 2 Dall. 122; 6 Binn. 292; 12 Mass. Rep. 367; 1 Peters' C. C. Rep. 47.

3.—Osborn v. The Bank of the United States, 9 Wheat. Rep. 902.

4.—1 Wheat. Rep. 235; 5 Wheat. Rep. 277.

5.—Cro. Jac. 82.

6.—5 Cranch, 303.

7.—Bunb. 225, 262, 558, 223; Parker, 37, 279; Hale, in Hargr. Law Tracts, 216; 2 Anstr. 558; Coop. Eq. Pl. 21, 22; Mitf. Pl. 22; Barton's Eq. 59.

8.—2 East's Rep. 362; 1 Chitty's Com. Law, 801. 824.

to take such a bond. This was a legislative declaration, negativing the right under any pre-existing statute. The question here was not, whether this might not be good as a voluntary bond at common law. Without stopping to inquire whether the United States have a system of unwritten law, to which an official bond, not authorized by any statute of Congress, can be referred for its validity, it was said that the cases cited to show that the bond might be sustained at common law, were foreign to the present inquiry. This was a question of jurisdiction, which depended upon the other question, whether this bond (admitting it to be valid at common law), when made the foundation of an action, presented a case arising under the laws of the United States. To make it a case arising under those laws, the bond must not only be valid, but must be authorized by statute; and the case could no more be said to arise under the laws of the United States than that of a voluntary bond taken by the marshal, or the collector, from their deputies.

142*] *2. But even supposing the bond in question was authorized to be taken by the laws of the United States, jurisdiction of a suit brought upon it could only be vested in the Circuit Court by some express legislative enactment. Though the case may be included in the constitutional grant of jurisdiction, some act of Congress is necessary to enable the courts to exercise it.[1] So far from Congress having conferred this jurisdiction on the circuit courts, the post-office act, whilst it is silent as to the courts of the Union, expressly confers it on the state courts. As to the judiciary act of 1815, s. 4, the title of that act shows the intention of Congress to limit its operation to the state courts and to the district courts of the United States. If it can be construed to extend to the circuit courts of the Union, its effect is merely to give them jurisdiction in the specified cases where "the debt, claim, or matter in dispute, shall not amount to $100.00." The words "concurrent with the circuit courts" were not intended to give jurisdiction to those courts. Similar expressions are found in the 9th and 11th sections of the judiciary act of 1789, but it had never been supposed that such was their effect. It is possible that the act was passed, upon the mistaken supposition that the jurisdiction was already vested in the Circuit Court. But this could not make the law; and the court would not construe this particular act contrary to its plain intent, however erroneous the opinion which produced it.

3. The remaining question was whether the United States were a party to the suit. And even admitting that the proceeds would accrue to their benefit, that the money which the bond was given to secure was their money, for which assumpsit could have been maintained against the principal obligor in their name; still, as it regarded the co-obligors or sureties, this was a new contract, not depending on any pre-existing debt, liability, or obligation from them to the United States. Their obligation arises exclusively from the bond, which binds them to the Postmaster-General alone; no action could be maintained against them by the United

143*] *States, upon the bond, or in the form of an express or implied assumpsit to recover the money, the payment of which the bond was intended to secure. Could, then, the United States be considered as parties to the suit, for the purpose of giving the court a jurisdiction, which it would not take if they were, in fact, parties to the suit, or (in the words of the judiciary act of 1789), "plaintiffs or petitioners?" The jurisdiction, as derived from the character of the parties, must depend, not on the question who is the substantial party in interest, but who is the formal party on the record.[2] Independent of the circumstance that the United States had no interest on the face of the bond, which would entitle them to maintain an action on it, they are inhibited from being parties to the suit, even as against the principal obligor, by the express provisions of the post-office act of 1810, s. 29, which directed that all such suits "shall be commenced in the name of the Postmaster-General of the United States." Even supposing, therefore, that Congress has legislated upon the unfounded assumption that the jurisdiction was already vested in the Circuit Court, or supposing that the case is a casus omissus, can the judicial power correct the mistake, or supply the defect? Even in the case of choses in action, assigned to the United States as collateral security for debts due to the government, the defect of jurisdiction was incontestible, and attended with great practical inconveniences; and yet Congress has recently refused to supply it, by authorizing suits upon such securities to be brought in the courts of the Union. The case of Dugan v. The United States[3] went upon the ground, that in all cases of contract with the United States, they had a right to enforce it by an action in their own names, unless a different mode of suit was prescribed by law. But if, in that case, the treasurer of the United States had been authorized and required to sue, in his official name, on all bills which should be indorsed to him for account of the government, would this court have sustained jurisdiction of an action brought on such bills by the United States in their own name?

*Mr. Chief Justice **Marshall** deliv- [*144
ered the opinion of the court, and after stating the case, proceeded as follows:

The post-office department was established at the commencement of the revolution, under the superintendence of a Postmaster-General, who was authorized to appoint his deputies, and was made responsible for their conduct. Soon after the adoption of the present government, in September, 1789, Congress passed a temporary act, directing that a Postmaster-General should be appointed, and that his powers, and the regulations of his office, should be the same as they last were, "under the resolutions and ordinances of the last Congress." The power of appointing deputies, therefore, and the responsibility for their conduct, still remained with the Postmaster-General.

This act was continued until the first day of June, 1792. In February, 1792, an act was passed detailing the duties and powers of the

1.—Bank of the United States v. Deveaux, 7 Cranch, 85; M'Intire v. Wood, 7 Cranch, 503.

2.—Osborn v. Bank of the United States, 9 Wheat. Rep. 855-857.

3.—3 Wheat. Rep. 172.

Postmaster-General, and fixing the rates of postage. It directs his deputies to settle at the end of every three months, and to pay up the moneys in their hands; on failure to do which, it becomes the duty of the Postmaster-General "to cause a suit to be commenced against the person or persons so neglecting or refusing. And if the Postmaster-General shall not cause such suit to be commenced within three months from the end of every such three months, the balances due from every such delinquent shall be charged to and recoverable from him." This act was to take effect on the first of June, 1792, and to continue for two years. In May, 1794, a permanent act was passed. It retains the provision requiring the Postmaster-General to settle quarterly with his deputies, but omits that which makes it his duty to cause suits to be instituted within three months after failure.

In March, 1799, the subject was again taken up, and Congress passed an act, which retains the clause making it the duty of the deputy-postmasters to settle their accounts quarterly, and re-enstates that which directs the Postmaster-General to cause suits to be instituted against delinquents; substituting six months in the place of three, after the expiration of the quarter, under the penalty of being himself chargeable with the arrears due from such delin-
145*] quent. This *act declares, that all causes of action arising under it may be sued before the judicial courts of the several states, and of the several territories of the United States.

In April, 1810, Congress passed an act for regulating the post-office establishment, which enacts, among other things, that all suits hereafter to be brought for the recovery of debts or balances due to the general post-office, should be instituted in the name of "the Postmaster-General of the United States." This act also authorizes all causes of action arising under it to be sued in the courts of the states and territories.

In March, 1815, Congress passed "an act to vest more effectually in the state courts, and the district courts of the United States, jurisdiction in the cases therein mentioned."

This act enables the state courts to take cognizance of all suits arising under any law for the collection of any direct tax or internal duties of the United States. The 4th section contains this clause: "And be it further enacted, that the District Court of the United States shall have cognizance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law where the United States, or any officer thereof, under the authority of any act of Congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars." On these several acts the question of jurisdiction depends.

The suit is brought for money due to the United States; and, at any time previous to the act of 1810, the suit for the money, had no bond been taken, might have been brought in the name of the United States. It is not certain that, independent of the bond, it could have been instituted in the name of any other party. The courts of the United States had, of course, jurisdiction. The laws make it the duty of the Postmaster-General to "cause suits to be instituted," not to bring them; and it was not until March, 1799, that Congress authorized these suits to be instituted in the state courts. It is obvious, that the right to institute them in those courts, anterior to the passage of that act, was doubted; at any rate, was not exercised; for it could not have *been [*146 deemed necessary to give expressly the power to sue in those courts, had the power been admitted to exist, and been commonly exercised. We must suppose, then, that these suits were usually instituted in the courts of the United States; and no doubt could be entertained on the question of jurisdiction, if they were brought, as they certainly might have been, in the name of the United States.

The act of 1810 directed that all suits for debts, or balances due to the general post-office, should be brought in the name of the Postmaster-General. The manner in which this change in the style of the suit might affect jurisdiction, was not noticed, and no provision was made for this new state of things. These debts and balances which were due to the general post-office, were not due to the officer personally, but to the office, and were to be sued for, and collected for the United States. The money belonged to the nation, not to the individual by whose agency it was to be brought into the treasury. The whole course of opinion, and of legislation, on this subject, is, that, although for convenience, and to save expense to the debtors, recourse may be had to the state courts for the recovery of small sums, yet a right to resort to the courts of the Union in suits for money due to the United States, was never intended to be relinquished. If the effect of any provision in a statute be to abolish this jurisdiction, it must be an effect which was neither intended nor foreseen. That construction which will produce a consequence so directly opposite to the whole spirit of our legislation, ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed.

If the question had rested solely on the act of 1810, it is probable that the aid of the legislature might have been thought indispensable to the jurisdiction of the federal courts, over suits brought for the recovery of debts and balances due to the general post-office. But it does not rest solely on that act. The act of 1815 contains a clause which does, we think, confer this jurisdiction. It cannot be doubted that this clause vests jurisdiction expressly in the district courts, in all suits at common law where any officer of the United States sues under the authority of any act of Congress. *The Postmaster-General is an officer of [*147 the United States, who sues under the authority of the act of 1810, which makes it his duty to sue for debts and balances due to the office he superintends, and obliges him to sue in his own name.

It has been contended, that this clause, if it gives jurisdiction, gives it only where the demand is under one hundred dollars. We do not think the words will sustain this criticism.

The right to take cognizance of suits brought by any officer of the United States, under authority of any act of Congress, is first given in general words, comprehending sums to any amount. The limitation which follows is not a

proviso that the sum shall not exceed the sum of one hundred dollars; it is no restriction on the previous grant, but an enlargement of it, if an enlargement should be thought necessary. This act might be construed, in connection with the judiciary act of 1789, and a general clause giving jurisdiction might be limited as to amount to the sum mentioned in the 9th section of that act. The subsequent words, therefore, of the section we are considering, were introduced for the purpose of obviating this construction, and removing the doubt, which might otherwise exist, of the right to take cognizance of sums less than one hundred dollars. After giving the jurisdiction generally, the words are, "although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars." These words do not confine the jurisdiction previously given to one hundred dollars, but prevents it from stopping at that sum.

The jurisdiction of the district courts, then, over suits brought by the Postmaster-General for debts and balances due the general post-office, is unquestionable. Has the Circuit Court jurisdiction?

The language of the act is, that the district court shall have cognizance concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits, etc. What is the meaning and purport of the words "concurrent with" the circuit courts of the United States? Are they entirely senseless? Are they to be excluded from the clause in which the legislature has [*148 inserted them, *or are they to be taken into view, and allowed the effect of which they are capable?

The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule, that words which have a meaning are not to be entirely disregarded in construing a statute. We cannot understand this clause as if these words were excluded from it. They, perhaps, manifest the opinion of the legislature, that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist. Any other construction would destroy the effect of those words. The district court cannot take cognizance concurrent with the circuit courts, unless the circuit courts can take cognizance of the same suits. For one body to do a thing concurrently with another, is to act in conjunction with that other; it is equivalent to saying, the one may act together with the other. The phrase may imply, that power was previously given to that other; but if, in fact, it had not been given, the words are capable of imparting it. If they are susceptible of this construction, they ought to receive it, because they will otherwise be totally inoperative, or will contradict the other parts of the sentence, which show plainly the intention, that the district court shall have cognizance of the subject, and shall take it to the same extent with the circuit courts.

It has been said, and perhaps truly, that this section was not framed with the intention of vesting jurisdiction in the circuit courts. The title of the act, and the language of the sentence, are supposed to concur in sustaining this proposition. The title speaks only of state and district courts. But it is well settled, that the title cannot restrain the enacting clause. It is true that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law.

But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act *in future. This law express- [*149 es the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction. We think, therefore, that in a case plainly within the judicial power of the federal courts, as prescribed in the constitution, and plainly within the general policy of the legislature, the words ought to receive this construction.

So far as the suits brought by the Postmaster-General were referred to in argument, in the case of The Bank of the United States v. Osborn, this construction was assumed as unquestionable. As the act was referred to for the sole purpose of illustrating the argument on the point then under consideration, it was not examined with the attention which has since been bestowed upon it; but the opinion then expressed, that the section we have been considering conferred jurisdiction on the courts of the United States over suits brought by the Postmaster-General, was correct.

Had this suit been brought to recover the balance due from the deputy-postmaster, on his original liability to pay the money in his hands, no doubt would have been felt respecting the jurisdiction of the court. The act of 1810 gives the Postmaster-General a right to sue for such balances, and the act of 1815 enables him to sue in the circuit or district courts of the United States. But it is contended that he has no right to secure such balances by bond; and, consequently, the bond being unauthorized, the act of Congress cannot be construed to authorize a suit upon it.

Were it even true that an official bond cannot be taken in a case where it is not expressly directed by law, we do not think that a bond taken to secure the payment of a sum of money is void, because it is also an official bond. Even supposing this bond to be void, so far as it is intended to stipulate for the performance of official duties, it is not necessarily void, so far as it stipulates for the payment of money of the United States, which might come to the hands of the deputy-postmaster. That part of the condition which shows the bond was taken to secure the payment of money which should be received for the United States, is not vitiated by that part of it which shows that it was also taken *to secure the general official conduct [*150 of the deputy. Now, a part of the condition is expressly, "that if he shall pay all moneys that shall come to his hands, for the postages of whatsoever is by law chargeable with postage," then the obligation is to be void. The obligation itself, on which the suit is brought, was intended to secure the payment of money collected for the United States, as well as the

official conduct of the deputy; and as no law prohibited such an official bond, we cannot think, although it might not in itself be valid, that it would destroy an obligation taken for a legitimate purpose. As the breach assigned is altogether in the non-payment of the money collected, we do not think that, if a bond would be good, taken for this single object, it is made bad by being extended also to the official conduct of the obligor.

The inquiry, then, is, whether, under a fair construction of the acts of Congress, the Postmaster-General may take bonds to secure the payment of money due, or which may become due to the general post-office.

All the acts relative to the post-office, make it the duty of the Postmaster-General to superintend the department, to regulate the conduct and duties of his deputies, and to collect the moneys received by them for the general post-office. May not these powers extend to taking bonds to the officer who is to perform them? May not these bonds be considered as means proper to be used in the collection of debts, and in securing them?

If this interpretation of the words should be too free for a judicial tribunal, yet if the legislature has made it, if Congress has explained its own meaning too unequivocally to be mistaken, their courts may be justified in adopting that meaning.

The 22d section of the act of 1799, after directing the Postmaster-General to sue for all balances due from his deputies, within six months after the expiration of the three months within which they ought to have been paid, enacts, "that all suits, which shall be hereafter commenced for the recovery of debts or balances due to the general post-office, whether they appear by bond or obligations made in the name of the existing or any preceding Post-151*] master-General, *or otherwise, shall be instituted in the name of the Postmaster-General of the United States."

These words follow immediately the clause which makes it the duty of the Postmaster-General to sue for the money due from his deputies, and are obviously applied to the moneys in their hands. They show the sense of the legislature, that this money may be a "debt" or a "balance," may "appear by bond or obligation," or otherwise; and are, we think, a legislative exposition of the words, describing the power and duty of the Postmaster-General in the superintendence of his department, and the means he may employ for collecting the money due from his deputies.

The 31st section of the same act repeals the previous laws for establishing the post-office department, after the 1st day of the ensuing May; and adds a proviso to the repealing clause, that as to "all bonds, contracts, debts, demands, rights, penalties, or punishments, which have been made, have arisen, or have been incurred," etc., "the said acts shall have the same effect, as if this act had not been made."

It is said by the counsel for the defendants, that these words do not give efficacy to the bonds to which they refer, but leave them as they were anterior to the repealing act. This is true. But they explain the sense of the legislature, respecting the powers of the Post-master-General, and the manner in which he might execute those powers.

An additional proviso extends even to official bonds. After continuing the Postmaster-General and all his deputies in office, it adds, "and also the bonds which they or either of them have or may give for the faithful execution of their several duties, shall continue to have the same force and effect, to all intents and purposes, after the 1st day of May next, as though this act had not been made."

This proviso, also, is no more than a recognition of the validity of those bonds; but it is a recognition of it, and goes the full extent of showing the legislative opinion that they might be taken. The act of 1810 repeals former acts, and contains the same provisions on this subject with the act of 1799.

The court has felt the pressure of this part of the case. *There is always difficulty [*152 in extending the operation of words beyond their plain import; but the cardinal rule of construction is, that where any doubt exists, the intent of the legislature, if it can be plainly perceived, ought to be pursued. It is also a rule, that the whole law is to be taken together, and one part expounded by any other, which may indicate the meaning annexed by the legislature itself to ambiguous phrases. The words describing the power and duty of the Postmaster-General, may be expounded by other parts of the act showing the legislative opinion as to their extent; and if this be true, the sections which have been cited cannot be misunderstood. They show plainly that the legislature supposed it had given the Postmaster-General authority to take these bonds.

A case cannot exist, in which effect may be given to the legislative intent more safely than in this. The bonds are taken in a case where no doubt can exist respecting the right and propriety of giving authority to take them; they are for money due to the United States; and the opinion of the legislature that authority was given, is expressed in as plain words as can be used. The acts of Congress sustain the opinion, that they have been taken with the knowledge and approbation of the legislature, from the first establishment of the offices; and provision is made by law for their being put in suit. The courts of the United States have, until very lately, uniformly given judgments on them.

Under these circumstances, we think ourselves justified in continuing to sustain them, and to certify in this case, that the Circuit Court has jurisdiction of the cause.

[*Devise.] [*153

JACKSON, ex dem. ST. JOHN, v. CHEW.

E. being seized of lands in the state of New York, devised the same, by his last will and testament, to his son Joseph, in fee, and other lands to his son Medcef, in fee, and added: "It is my will, and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, then I give all the property to my brother John E., and my sister Hannah J., and their heirs." Joseph, one of the sons, died without lawful issue, in 1812, leaving his brother Medcef surviving, who

afterwards died without issue. Held, that Joseph took an estate in fee, defeasible in the advent of his dying without issue in the life-time of his brother; that the limitation over was good as an executory devise; and on the death of Joseph, vested in his surviving brother, Medcef.

This court adopts the local law of real property, as ascertained by the decisions of the state courts, whether those decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state.

The court, therefore, considered it unnecessary to examine the question arising upon the above devise, as a question of general law; or to review, and attempt to reconcile the cases in the English courts upon similar clauses in wills, the construction of this clause having been long settled by a uniform series of adjudications in New York, and having become a fixed rule of property in that state.

ERROR to the Circuit Court for the southern district of New York.

The question presented by the special verdict in this case, arose upon the will of Medcef Eden, the elder, bearing date the 29th day of August, 1798, by which will the testator devised to his son Joseph, certain portions of his real and personal property, among which were the premises in question in this cause, "to have and to hold the same to him, his heirs, executors, and administrators, forever." In like manner he devised to his son Medcef, his heirs and assigns, certain other portions of his property, and, after making some other provisions, added the following clause: "Item—It is my 154*] *will, and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths, without lawful issue, then I give all the property aforesaid to my brother, John Eden, of Loftus, in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs." And the question was, what estate Joseph Eden (under whom the lessor of the plaintiff claimed) took in the premises in question. The testator died soon after making his will, leaving his two sons, Joseph and Medcef, living. Joseph died in August, 1812, without issue, leaving his brother Medcef alive. The lessor of the plaintiff claimed title derived from Joseph Eden, under the sale of the premises in question, by virtue of a judgment and execution against him, and sundry conveyances thereafter made of such title as set out in the special verdict. The defendant claimed under a title derived from Medcef Eden, under the above-mentioned clause in his father's will, he having survived his brother. If Joseph Eden took an estate tail, it was by operation of the statute of the state of New York abolishing entails, converted into a fee-simple absolute, and the subsequent limitation became inoperative. That statute (passed the 23d of February, 1786,) declares "That in all cases where any person would, if this act had not been passed, at any time hereafter become seized in fee-tail of any lands, by virtue of any devise before made, or hereafter to be made, such person, instead of becoming seized thereof in fee-tail, shall be deemed and adjudged to become seized thereof in fee-simple absolute." So that if Joseph would have taken an estate tail under the will, if the act of 1786 had not been passed, by operation of the statute he became seized of an estate in fee-simple absolute, which was liable to be sold on the judgment against him, and the title under which the lessor claimed would be complete. But if Joseph took an estate in fee, defeasible in the event of his dying without issue, in the life-time of his brother (which event happened), then Joseph's interest in the land became extinct on his death, and the limitation over to his brother Medcef was *good [*155 as an executory devise, and the defendant would consequently be entitled to judgment.

A judgment was entered upon the special verdict in the court below, for the defendant, pro forma, by consent of parties, for the purpose of bringing the cause before this court.

The case was argued by the Attorney-General and Mr. D. B. Ogden for the plaintiff, and by Mr. Webster and Mr. Wheaton for the defendant.

On the part of the plaintiff, it was insisted, that Joseph Eden took an estate tail under the devise to him, which, by the operation of the statute of 1786, was converted into a fee-simple absolute. The general rule that the words "dying without issue" import an indefinite failure of issue, was relied on to support this construction of the will.[1] And, although it was admitted that there were circumstances which would limit those words to a definite failure of issue, yet it was denied that there were any qualifying expressions in this devise which would have that effect. There were certainly none such, unless the words, "his share or part shall go to the survivor," could be considered as having that effect. The earliest case which would probably be relied upon to show that these expressions limited the failure of issue to issue living at the death of Joseph Eden, was that of Pells v. Brown,[2] where the testator devised to "Thomas, his son, and his heirs, forever, paying to his brother Richard £20 at the age of 21 years; and if Thomas died without issue, living William, his brother, that then William, his brother, should have those lands to him, his heirs and assigns, forever, paying the said sum as Thomas should have paid." Thomas having died without issue, and William having survived him, it was determined that this was a contingent fee to William by way of executory devise. Now, to test the authority of this case as to the effect of the word *"survivor," it was only necessary [*156 to refer to King v. Rumball,[3] decided three years before, in which a devise to three daughters, and if they all died without issue, then

1.—The counsel here referred to all the cases cited, and commented on by Mr. Chancellor Kent, in Anderson v. Jackson, 16 Johns. Rep. 405-424.

2.—Cro. Jac. 590.

3.—Cro. Jac. 448; S. P. Webb v. Heaning, Ib. 415.

NOTE.—That the title to real property by devise, is exclusively governed by the laws of the state, or country, where it is situated. See note to Clark v. Graham, 6 Wheat. 577; and note to Elmendorf v. Taylor, 10 Wheat. 152; and note to Darby v. Mayer, 10 Wheat. 465.

The Supreme Court of the United States adopts the state decisions, because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the state, when applied to the title of lands. Martlett v. Silk, 11 Pet. 1, 22.

over, was held to create an estate tail; and to the case of Chadock v. Crowley,[1] determined four years subsequent to Pells v. Brown, where the same court held, that the word "survivor" had no such effect as is here attributed to it. In that case the testator devised all his lands in Bradmere to Thomas, his son, and his heirs, forever, and his lands in Eastleak, to Francis, his son, and his heirs, forever, and added: "Item—I will that the survivor of them shall be heir to the other, if either of them die without issue." This was held to be an estate tail in Thomas. As to the more modern cases of Porter v. Bradley,[2] and Roe v. Jeffray,[3] which would be relied upon to show that the term "survivor" had this effect; the remarks of Mr. Justice Story, in Lillibridge v. Adie,[4] might be applied to these cases, and would at the same time illustrate the general question. "In respect to terms of years, and other personal estates, courts have very much inclined to lay hold of any words to tie up the generality of the expression, 'dying without issue,' and to confine it to 'dying without issue living at the time of the person's decease.' But, in respect to freeholds, the rule has been rigidly enforced, and rarely broken in upon, unless there were strong circumstances to repel it.[5] The cases of Porter v. Bradley and Roe v. Jeffray, have gone a great way, but they turn on distinctions which, though nice, clearly recognize the general rule." In a recent English case, the word "survivors" was relied upon to raise an inference of restrictive intention; but Sir W. Grant held that the word had the same sense as the word "others," "as (says he) has 157*] *been frequently decided."[6] So, in Massey v. Hudson,[7] in a case of personal property, the presumption that a bequest over to the survivor of two persons, after the death of one without issue, was meant as a personal benefit to the survivor, was held to be repelled by the addition of the words "executors, administrators, or assigns." Roe v. Scott & Smart,[8] presented precisely the same case with that before the court; and yet it was there held that the indefiniteness was not restricted by force of the word "survivor." In the present case it could not be considered as having that effect, because the testator, in using the term "survivor," did not intend the individual brother surviving, but the surviving branch; consequently, if Medcef had died, having issue, in the life-time of Joseph, and Joseph had afterwards died without issue, the issue of Medcef would have taken Joseph's share; and so, also, in case of any more remote failure.

As to the local decisions in the state courts of New York, giving a construction to this and other similar clauses in wills, it was said that the present question did not turn upon the interpretation which the local tribunals had given to the statute of 1786, or upon any other law peculiar to the state; but that the sole question was, whether Joseph Eden took an estate tail, which was a question of general law; and if he did, it was incontestible that the statute converted his estate into a fee simple, and, consequently, the plaintiff was entitled to recover. The decisions of the state courts would receive no more respect in the present case than in any other question at common law which might come before this court; and to show that the state decisions had proceeded upon mistaken grounds, the arguments and authorities urged by Mr. Chancellor Kent, in Anderson v. Jackson,[9] were relied upon and enforced with a great variety of illustrations.

*On the part of the defendant, it was [*158 admitted that a devise to take effect after a preceding estate in fee-simple, upon an indefinite failure of issue, or (which is the same thing) where there are no expressions restricting that failure to a life in being, and the usual allowance for minority and gestation, cannot operate as an executory devise, because it would tend to a perpetual restriction of alienation, and is therefore void. But where the failure of issue is definite, and by plain words or necessary implication, declared to take effect, if at all, within a life in being, a limitation by executory devise is valid, and would be sustained both in England and New York. But the peculiar state of the law of real property in England, would account for the application of a different rule to the construction of these limitations, when applied to real property, from what would prevail in the case of personal property;[10] whilst the institutions of this country might justify and require the application of the same rule to both.[11]

It was not, however, deemed necessary to resort to this distinction, since it was insisted that the construction put upon this devise was sustained by the general current of decisions in Westminster Hall, ever since Pells v. Brown,[12] which had been called by Lord Kenyon "the Magna Charta of this branch of the law," and had never been departed from.[13] In that case, the devise over was in the event of the first taker dying without issue, living his brother William; in this case, the devise over is to the survivor of the two brothers. In grammatical and legal construction, it is impossible to distinguish between a brother surviving, and a brother living at the death of the first taker. All the modern cases confirm the authority of Pells v. Brown, and it was also sustained by the general principles and analogies of the law.[14] As to the anomalous case of Chadock v. Crowley,[15] it *was directly contrary [*159 to the authority of Pells v. Brown, and the long series of decisions following it, and, there-

1.—Cro. Jac. 695.

2.—3 Term. Rep. 143.

3.—7 Term. Rep. 585.

4.—1 Mason's Rep. 236.

5.—Fearne's Ex. Dev. 357-361; Butler's ed. 471-476; Cooke v. De Vandes, 9 Ves. 197; Dansey v. Griffith, 4 Maule & Selw. 61.

6.—Barlow v. Salter, 17 Ves. 479.

7.—2 Meriv. 135.

8.—2 Fearne's Ex. Dev. (4th ed.) 203.

9.—16 Johns. Rep. 397, 424.

10.—Forth v. Chapman, 663.

11.—1 North Carolina Law Rep. 544; 1 Hen. & Mun. 301; 20 Johns. Rep. 483.

12.—Cro. Jac. 590.

13.—Porter v. Bradley, 3 Term. Rep. 143; Lippitt v. Hopkins, 1 Gallis, 460.

14.—1 P. Wms. 534, 565; Porter v. Bradley, 3 Term. Rep. 143; Roe v. Jeffray, 7 Term. Rep. 589; Beacroft v. Broom, 4 Term. Rep. 440.

15.—Cro. Jac. 695.

fore, could not be law, even supposing it to be correctly reported, which might well be doubted. That case states that if the devise had been, "that if he died without issue in the life of the other, or before such an age, that then it should remain to the other, then, peradventure, it should be a contingent devise in tail, if it should happen, and not otherwise." No lawyer would pretend, at this day, that a devise to one and his heirs, and in case he die without issue in the life of another, or if he died before the age of 21, then over, is an estate tail, either vested or contingent. It is, like the present case, an estate in fee-simple, defeasible on the event happening, with a valid executory devise over. The other cases cited by Mr. Chancellor Kent[1] would all be found to range themselves under one of the following classes: (1) Where there are no words to control the indefinite failure of issue.[2] (2) Where the first estate is only for life, and enlarged by implication to an estate tail by the limitation over, or failure of issue.[3] (3) Where the first taker left issue, and the executory devise, in consequence, could not take effect.[4] (4) Several cases cited against the construction insisted on by the defendant in the present case, which are manifestly in favor of that 160*] construction.[5] *In Massie v. Hudson,[6] the master of the rolls considers the words "executors, administrators, and assigns," as showing the intent of the testator to vest the interest, and make it transmissible. But, in the present case, there are no words of limitation annexed; and if it be said they are implied, the same might be said of every legatee, who, if no words of restriction are added, takes an absolute interest transmissible to his executors, etc. But here the interest was neither vested nor transmissible. Barlow v. Salter[7] cannot be reconciled with the general course of English adjudications in cases of personal property, and is entirely inconsistent with the American authorities.[8] As to the notion of the word "survivor" being used to indicate the surviving branch or stock, in the recent case of Wollen v. Andrews,[9] it is expressly laid down, that "survivor or survivors," mean not the surviving stocks, but the surviving children. And Mr. Fearne[10] observes, that though the authorities have established on solid ground the power of testamentary dispositions of contingent and executory estates, and possibilities coupled with an interest, and such as would be descendible to the heir of the object of them dying before the contingency or event on which the vesting or acquisition of the estate depended; yet the decisions do not appear to reach those cases, where the contingent interest is not transmissible from any person, until the contingency decides him to be the object of the limitation. Now, it has been decided, that a testamentary disposition of an estate, devised to the survivor of two persons, while both are alive, is not valid, although the person making the disposition becomes the survivor; because, till by the death of the other he so becomes the survivor, he has no interest whatever in the land.[11] So, also, Mr. Preston observes, that mere possibilities to persons not ascertained, as to the survivor of several persons, are not coupled with an *interest, [*161 and are not devisable, nor, he apprehends, transferable to assignees under a commission of bankrupt.[12] So, again: "titles under possibilities or expectancies are of two descriptions. (1) Possibilities coupled with an interest. (2) Possibilities without any interest. Those possibilities which are not coupled with an interest are not devisable, but all titles under them may be barred, excluded, or bound by estoppel. Such are the expectancies of an heir apparent or presumptive, or of persons where the gift is to the survivor, and both are living."[13] So, a power given to the survivor of two persons cannot be well executed by both of them while alive.[14]

In addition to the argument upon the case, as a question of general law, the counsel referred to the decisions of the state courts of New York, as conclusively establishing the construction contended for on the part of the defendant in error, as a settled rule of property in that state;[15] and to the decisions of this court showing that the law thus established by a long series of adjudications in the local tribunals, would be respected here.[16]

Mr. Justice **Thompson** delivered the opinion of the court, and after stating the case, proceeded as follows:

Questions growing out of devises of this description, are among the most difficult and intricate doctrines of the law; and from the numerous cases that have arisen, as found reported in the books, it will be seen that nice and almost imperceptible distinctions have been resorted to, with the avowed object of carrying into effect the intention of the testator. To review the cases that have arisen in the English *courts on these questions, [*162 would be an arduous, and to reconcile them, a difficult, if not a fruitless undertaking. Nor

1.—Anderson v. Jackson, 16 Johns. Rep. 397-424.

2.—Tenny v. Agar, 12 East, 213; Romilly v. James, 6 Taunt. 263; Brice v. Smith, 1 Willes, 1; Doe v. Tennereau, Dougl. 477; Denn v. Slater, 5 Term Rep. 335; Doe v. Ellis, 9 East, 382; Hunter v. Haines, 1 Wash. 171; Ide v. Ide, 5 Mass. Rep. 500; Royal v. Eppes, 2 Munf. 479.

3.—Webb v. Herring, Cro. Jac. 415; King v. Rumball, Cro. Jac. 448; Sutton v. Wood, Camer. & Norw. 202.

4.—Roe v. Scott, 2 Fearne, 259; Hope v. Taylor, 1 Burr. 268; Doe v. Rivers, 7 Term Rep. 276; Denn. v. Slater, 5 Term Rep. 335.

5.—Kirkpatrick v. Kirkpatrick 13 Ves. 476; Richardson v. Noyes, 2 Mass. Rep. 56; Porter v. Bradley, 3 Term Rep. 143; Roe v. Jeffray, 7 Term Rep. 585; Haver v. Shitz, 3 Yates, 205; Ray v. Enslin, 2 Mass. Rep. 554; Keating v. Reynolds, 1 Bay, 80; Jones v. Rice, 3 Dessaus 165.

6.—2 Meriv. 130.

7.—17 Ves. 479.

8.—Fearne 481, note; 1 Serg. & Rawle, 144-159; 3 Serg. & Rawle, 470.

9.—2 Bingh. 126.

10.—Ex. Dev. (6th Lond. ed.) 545.

11.—Doe v. Tompkinson, 2 Maule v. Selw. 165.

12.—1 Preston on Estates, 76.

13.—Preston's Abstr. tit. 204.

14.—Sugd. Powers, 162; 3 Bro. Ch. 310.

15.—Fosdick v. Cornell, 1 Johns. Rep. 440; Jackson v. Blanshaw, 3 Johns. Rep. 292; Moffat v. Strong, 10 Johns. Rep. 12; Jackson v. Staats, 11 Johns. Rep. 337; Jackson v. Anderson, 16 Johns. Rep. 382; Wilkes v. Lion, 2 Cowen's Rep. 333.

16.—5 Cranch, 32; 9 Cranch, 98; 6 Wheat. Rep. 127; 7 Wheat. Rep. 550; 8 Wheat. Rep. 535-542; 10 Wheat. Rep. 159; 11 Wheat. Rep. 367-8.

are the decisions of the state courts in our own country in perfect harmony with each other. It is not deemed necessary, however, in the present case, to enter into an examination of these various decisions, either for the purpose of attempting to reconcile them, or to extract from them, principles which might be applicable to the case now before the court, if the question was considered entirely an open question. The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals.

This is a principle so obviously just, and so indispensably necessary under our system of government, that it cannot be lost sight of.

The inquiry, then, is, whether the question arising in this case has been so settled in the state courts of New York as to be considered at rest there. Numerous cases have come before those courts upon this question; some on the very clause in the will now under consideration; others on wills containing clauses very analogous, and which, in those courts at least, have been considered identical with the present.

I shall proceed to notice some of the leading cases there decided, to see how the law on this question is held to have been settled in that state. In the case of Anderson v. Jackson, 16 Johns. Rep. 382, decided in the court for the trial of impeachments and correction of errors, in the year 1819, the decision turned solely upon the construction of this very clause in the will of Medcef Eden, the elder, affirming the judgment of the Supreme Court, which had been given without argument, the court considering the question raised to have been settled by former cases; and the Court of Errors, in affirming the judgment of the Supreme Court, put it principally upon the same ground, and considered the question at rest by the repeated and uniform decisions of the Supreme Court for the last twelve or fourteen years. It may be useful to recur to the progress of these 163*] *decisions, to see the steady and uninterrupted course of the courts upon the question, and how firmly the principle has become ingrafted in the law of that state as a rule of landed property.

The first case that arose was that of Fosdick v. Cornell, 1 Johns. Rep. 440, in the year 1806. By the will there in question, the devise over was, "My mind and will is, that if any of my said sons, William, Jacob, Thomas and John, or my daughter Mary, shall happen to die without heirs male of their own bodies, then that the lands shall return to the survivors, to be equally divided between them." And it was held by the court unanimously, that this clause did not create an estate tail, but was to take effect as an executory devise. In the case of Anderson v. Jackson, the doctrine of that case was considered applicable to the Eden will, and to govern its construction. And it was not pretended by the dissenting members of the Court of Errors, but that if the case of Fosdick v. Cornell was correctly decided, it would govern the case then before the court. And the whole strength of the argument in the very elaborate opinions given by the dissenting members, was applied to the purpose of endeavoring to show that the decisions in that case, and in those which rested upon it, had proceeded upon incorrect views of the law, as decided both in the English and American courts. Chancellor Kent here took occasion to announce his change of opinion on this question, and to say, that although he did not deliver the opinion of the court, he would not shelter himself under his silence, but partook of the error; but that he had discovered, years ago, that the case of Fosdick v. Cornell was decided on mistaken grounds. If this should be admitted (which I certainly do not mean to admit), it is an error which has been so repeatedly sanctioned by all the courts of that state, for the last twenty years, that it has ripened into a settled rule of law. And a reference to the cases which followed that of Fosdick v. Cornell, will show that it has become a rule so fastened upon the law of real property in that state as to make it unwise and unsafe to disturb it.

In the case of Jackson v. Blanshaw, 3 Johns. Rep. 289, decided in the year 1808, the question before the court *arose upon a will, [*164 where the testator devised "all his estate, real and personal, to his six children, to be equally divided between them, share and share alike; but if any of them died before arriving at full age, or without lawful issue, that then his, her, or their part, should devolve upon and be equally divided among the surviving children, and to their heirs and assigns, forever." This was held to be a good devise over by way of executory devise; and Chief Justice Kent, in delivering the opinion of the court, refers to the case of Fosdick v. Cornell, and observes, that the court there reviewed the leading authorities, and held, that the devise over was a good executory devise, and that the true construction was, a devise over to take effect on failure of male issue during the life of the first taker. That the ancient case of Hanbury v. Cockrill, 1 Roll. Abr. 835, was quite analogous in favor of the executory devise. The devise there was to the two sons in fee, with a proviso, that if either died before they should be married, or before they should attain the age of 21 years, and without issue of their bodies, then his share should go to the survivor. That Lord Kenyon, in the two cases of Porter v. Bradley and Roe v. Jeffray, 3 Term Rep. 143; 7 Term Rep. 589, supported this established construction in a very forcible manner; and that the case before the court could not be distinguished in principle from those in which this rule of law is settled beyond controversy. Again; in the case of the Executors of Moffat v. Strong, 10 Johns. Rep. 12, decided in the year 1813, the testator, after giving certain specific parts of his real and personal estate to his sons, adds this provision: "And if any of my sons aforesaid should die without lawful issue, then let his or their part or parts be divided equally among the survivors." Although this was a case of personal property, the judgment of the court did not rest upon that distinction. Chief Justice Kent, in delivering the opinion of the court, says: "The greatest difficulty that arises in starting the main point for consideration, is to avoid being overwhelmed and confounded by the multitude of cases.

Lord Thurlow said there were fifty-seven cases on this point, and we know they have greatly increased since." And, after reviewing many of 165*] the leading cases, the Chief *Justice observes, if the limitation rested solely on the words "dying without issue," it would fail; but the will proceeds, and gives the part of the son so dying without issue to the survivors. The term "survivors" will be found to rescue the limitation from the operation of the general principle, and to bring it within the reach of other cases, which have adjudged that expression to be the cause of a different construction, and for the reason that it could not have been intended that the survivor was to take only after an indefinite failure of issue, as that event might happen long after the death of all the survivors. Thus stood the question when the Chief Justice was transferred to the Court of Chancery, no diversity of opinion having existed on the bench upon the question, according to the reported cases. The next case that came before the court was that of Jackson v. Staats, 11 Johns. Rep. 337, in the year 1814; and the construction of a similar clause in a will was under consideration. Spencer, J., in delivering the opinion of the court, observes, that "the point, whether the limitation over operates as an executory devise, or to create an estate tail, admits of very little difficulty. The case of Fosdick v. Cornell is in point; that this is a good executory devise;" and adds, "I believe none of us have ever doubted the correctness of the decision in that case. and it would be a waste of time to review the authorities there cited." So that the law on this point was considered settled, and not open to argument, until it was again stirred, in the case of Anderson v. Jackson, in the Court of Errors, upon the clause in Eden's will, now under consideration; and the rule of construction settled in the Supreme Court was considered applicable to this will, and governed the decision in the Court of Errors. Again, in the year 1823, the construction of this same clause in Eden's will came before the Supreme Court, in the case of Lion v. Burtis, 20 Johns. Rep. 483, and Spencer, Ch. J., in delivering the opinion of the court, referred to the case of Anderson v. Jackson, in the Court of Errors, and said, it was there decided that the devise to Joseph Eden did not create an estate tail, but that the devise over, upon the event of his dying without issue, was a limitation over as an executory devise to Medcef, the survivor. That the opinion of the 166*] *court was, that the devise over to the survivor did not depend on an indefinite failure of issue, but only on a failure of issue at the time of Joseph's death. "This, then," said the Chief Justice, "is the law of the land, and must govern every other case coming within the same principle. And I must be allowed to say, that subsequent reflection has confirmed my conviction of the soundness of the decision in the Court of Errors. Stare decisis is a maxim essential to the security of property. The decisions of courts of law become a rule for the regulation of the alienation and descent of real estate; and when that rule has been sanctioned and adopted in our courts, it ought to be adhered to, unless manifestly wrong and unjust."

Other questions were, however, embraced in this case, and it was afterwards brought before the Court of Errors (2 Owen, 333), and a preliminary question was made, whether the court would hear an argument on the point decided in the case of Anderson v. Jackson. But as that question was so involved with other questions in the cause, it was found difficult entirely to separate them, and the argument proceeded; the president of the court at the same time observing, that he should suppose counsel would not question any point plainly decided in Anderson v. Jackson, both in its principle and object, and that he had no doubt the court would abide by its decision in that case. In the course of the argument, when the bearing of the case of Anderson v. Jackson was fully understood, it was proposed to stop the counsel, so far as the decision in that case was called in question; and the chancellor (Sanford) expressed his determination to adhere to that decision. That he understood it to fix distinctly a construction upon the clause which devises to Joseph Eden, and was prepared to say it did not carry an estate tail, but a fee determinable on his death without issue then living. And although the counsel were allowed to proceed, and the question again fully argued, the court, when they came to pronounce judgment, disclaimed, in very strong language, any intention to call in question the decision of Anderson v. Jackson. Cramer, senator, observes: "The court has been called upon, in a very solemn manner, to review its decision on an important *rule of law affecting titles to real [*167 property. But we have not, in my view of the subject, the power (and by power I mean right) now to question or impeach that judgment rendered by this court, and founded on the uniform decisions of the Supreme Court during a period of more than seventeen years. Wills have been made, and estates settled, on the principle of these cases, which have been deemed and treated as the settled law of the land." And the judgment of the Supreme Court was unanimously affirmed, with the exception of one senator.

After such a settled course of decisions, and two of them in the highest court of law in the state, upon the very clause in the will now under consideration, deciding that Joseph Eden did not take an estate tail, a contrary decision by this court would present a conflict between the state courts and those of the United States, productive of incalculable mischief. If, after such an uninterrupted series of decisions for twenty years, this question is not at rest in New York, it is difficult to say when any question can be so considered. And it will be seen by reference to the decisions of this court, that to establish a contrary doctrine here, would be repugnant to the principles which have always governed this court in like cases.

It has been urged, however, at the bar, that this court applies this principle only to state constructions of their own statutes. It is true, that many of the cases in which this court has deemed itself bound to conform to state decisions, have arisen on the construction of statutes. But the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This court adopts the state decisions, because they

settle the law applicable to the case; and the reasons assigned for this course, apply as well to rules of construction growing out of the common law, as the statute law of the state when applied to the title of lands. And such a course is indispensable, in order to preserve uniformity, otherwise the peculiar constitution of the judicial tribunals of the states and of the United States, would be productive of the greatest mischief and confusion.

168*] *The case of M'Keen v. DeLancy's Lessee, 5 Cranch, 32, arose upon the construction of a statute. And the court say, "If the act then in question was for the first time to be construed, the opinion of the court would be, that the deed was not properly proved, and, therefore, not legally recorded. But in construing the statutes of a state, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state." And whether these rules of land titles grow out of the statutes of a state, or principles of the common law adopted and applied to such titles, can make no difference. There is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other. So, also, in the cases of Polk's Lessee v. Wendal, 9 Cranch, 98, and Thatcher v. Powell, 6 Wheat. Rep. 127, the construction of state statutes respecting real property was under consideration; and the court say they will adopt, and be governed by, the state construction, when that is settled, and can be ascertained, especially where the title to lands is in question. But in the case of Blight's Lessee v. Rochester, 7 Wheat. Rep. 550, which arose in Kentucky, the question was not upon the construction of any statute, but related to the doctrine of estoppel, between vendor and vendee; and it was urged at the bar, that the question was settled by authority in Kentucky, and cases cited to establish the point. The authorities were examined, and considered by the court as not deciding the question; but no intimation is given that they were inapplicable, because the question did not involve the construction of a statute. And the case of Daly v. James, 8 Wheat. Rep. 535, which arose in Pennsylvania, is directly in point. The question there was upon the interpretation of a clause in a will, which had received a judicial construction by the Supreme Court of that state. And it was urged, as it has been here, that it was not one of those cases where the decisions of state courts, on questions of local law, established rules of property which this court could not disturb. But the court said, they always listened with respect to the adjudications of the different states, when they apply. And in a question of so much doubt, 169*] they were disposed, *upon this point, to acquiesce in the decision of the Supreme Court of that state, Smith v. Folwell, 1 Binn. 546, that the word "heirs" in the will is to be construed to be a word of limitation.

In that case this court adopted a single decision of the state court upon the question. But, in the case now under consideration, there have been two decisions in the two highest courts of law in the state upon the identical question now in judgment, and which were in conformity to a settled course of adjudications for twenty years past.

After such a series of adjudications for such a length of time, in the state courts, upon the very point now before us, and relating to a rule of landed property in that state, we do not feel ourselves at liberty to treat it as an open question.

Judgment affirmed with costs.

[Lex Loci. Probate of Testamentary Paper.]

ARMSTRONG

v.

LEAR, Administrator (with the will annexed) of Kosciuszko.

A testamentary paper, executed in a foreign country, even if executed so as to give it the effect of a last will and testament by the foreign law, cannot be made the foundation of a suit for a legacy in the courts of this country, until it has received probate here, in the court having the peculiar jurisdiction of the probate of wills and other testamentary matters.

APPEAL from the Circuit Court for the District of Columbia.

The bill, filed on the chancery side of the Circuit Court, stated that Thaddeus Kosciuszko, on the 5th of May, 1798, placed a fund in the hands of Thomas Jefferson, and executed a will, as follows: "I, Thaddeus Kosciuszko, being just on my departure from America, do hereby declare and *direct, that, should [*170 I make no other testamentary disposition *of my property in the United States, I hereby authorize my friend, Thomas Jefferson, to employ the whole thereof in purchasing negroes, from among his own, or any others, and giving them liberty in my name, in giving them an education in trade or otherwise, and in having them instructed for their new condition in the duties of morality, which may make them good neighbors, good fathers or moders, husbands or wives, in their duty as citizens, teaching them to be defenders of their liberty and country, and of the good order of society, and in whatsoever may make them happy and useful. And I make the said Thomas Jefferson my executor of this. (Signed) T. KOSCIUSZKO, 5 May, 1798."

The bill farther stated that the said Kosciuszko, about the 18th of June, 1806, being then domiciled in Paris, executed a certain will or writing testamentary, as follows: "Know all men by these presents, that I, Thaddeus Kosciuszko, formerly an officer of the United States of America, in their revolutionary war against Great Britain, and a native of Liloane, in Poland, at present residing in Paris, do hereby will and direct, that, at my decease, the sum of $3,704, current money of the aforesaid

NOTE.—As to effect of the probate of wills in another state, see note to Darby's Lessee v. Mayer, 10 Wheat. 465; and as to effect of judgments and decrees of one state in another, see note to Mills v. Duryee, 7 Cranch, 481.

A foreign will is admissible in evidence by pro-

United States, shall of right be possessed by, and delivered over to the full enjoyment and use of Kosciuszko Armstrong, the son of General John Armstrong, minister plenipotentiary of the said States at Paris; for the security and performance whereof, I do hereby instruct and authorize my only lawful executor in the United States, Thomas Jefferson, President thereof, to reserve, in trust for that special purpose, of the funds he already holds belonging to me, the aforesaid sum of $3.704 in principal, to be paid by him, the said Thomas Jefferson, immediately after my decease, to him, the said Kosciuszko Armstrong, and in case of his death, to the use and benefit of his surviving brother. Given under my hand and seal, at Paris, this 28th day of June, 1806.

"(Signed)

"THADDEUS KOSCIUSZKO. [Seal.]

"In presence of

("Signed) Charles Carter.

James M. Morris."

171*] *That the said testator, on the day of the date of the said writing, signed and sealed it in presence of two competent witnesses, who attested the same, and acknowledged it on the same day, as his act and deed, before Fulwar Skipwith, commercial agent, and agent for prize causes for the said United States at Paris, and delivered it to the said John Armstrong. That the complainant is advised that the said paper is a last will and testament, and must operate as such, and revokes, pro tanto, the bequests and appropriation made in the will first mentioned. That General Kosciuszko died the 15th of October, 1817, leaving said testament unrevoked. That said Jefferson refused to take letters testamentary under said will, and that the defendant was duly appointed administrator with the will annexed; that the estate has come to his hands, and that he has been often requested to pay to complainant the $3,704 aforesaid, with interest, and refuses to pay until an order or decree of this court in the premises. The bill prayed for a discovery of the funds in defendant's hands, and whether the said writing made at Paris is authentic, and payment of said legacy with interest, and for general relief.

The answer of the defendant admitted that he was administrator with the will annexed of General Kosciuszko, and that the instrument mentioned in complainant's bill, and exhibited with it, was executed and acknowledged as it purports to be, and that said Kosciuszko was at the time domiciled and resident at Paris; but submitted whether he was bound to pay said legacy upon an instrument so executed and acknowledged, inasmuch as Mr. Jefferson received a letter from General Kosciuszko dated as late as the 15th of September, 1817, in which he thus affirms his first will: "After my death you know its invariable destination," (speaking of this fund). The answer admitted that Mr. Jefferson renounced, and the defendant was appointed, administrator with the will annexed, as stated in the bill. The defendant admitted funds to have come to his hands to an amount larger than stated in the bill. The answer further stated that among the papers received by the defendant from Mr. Jefferson, is a letter from Mr. Politica to said Jefferson, inclosing a dispatch from the Vice-Roi of Poland *to him, by which it appears that [*172 the whole estate of said Kosciuszko may hereafter be claimed by a Major Estko, as the heir-at-law of said Kosciuszko; that there were also two letters from a Mr. Zeltner to Mr. Jefferson, by which it appears that Kosciuszko had disposed of the greater part of his fortune in favor of the children and other relations of Zeltner.

The cause was set down for a hearing in the court below upon the bill and answer, and a pro forma decree dismissing the bill was entered by consent, and an appeal taken to this court.

Mr. E. Livingston and Mr. Wheaton for the appellant, argued, (1) that the testamentary paper of 1806 was a revocation of the will of 1798 pro tanto.[1]

(2) That the will of 1798 was to be considered as wholly void, as being contrary to the laws and policy of Virginia and Maryland, and the defendant considered as a trustee for the first will.[2]

(3) That supposing the case was to be determined by any peculiar law, as affecting the testator or his property, it must be either the law of France, where he was domiciled in 1806, when the will was made, or of this country, where he had placed the fund in question, and of which he might be considered a citizen, or the conventional law between France and the United States.

The rule of international law as to personal property appeared to be settled by the general current of authority, that as to successions ab intestato, they are to be governed by the law of the country where the party was domiciled at the time of his death; and in the case of a will, by the law of the place where it was made.[3]

1.—2 Atk. 86; 2 Phillm. Eccl. Rep. 35-51; 1 Bro. Civ. and Adm. Law, 293, 333; Swinb. pt. 1, p. 74, note 75, and cases cited by Powel, Ed.

2.—4 Wheat. Rep. 1; 5 Harris & Johns. 392; Bridg. Duke's Charit. Uses, 349, 466; Com. Dig. tit. Charitable Use (N.) 1.

3.—Huber. tom. 2, l. t. 3; 2 Bos. & Pull. 229, note (a); 6 Bro. Parl. Cas. 566; 5 Ves. Jun. 785; 1 Binn. 336, 349, note (a); 1 Mason, 381, 408; 3 Ves. Jun. 201.

ducing in the same way as a domestic will a probate by a probate court within the state, granted either upon original proof or upon production there of an exemplified copy of a foreign probate. Ancillary probate thus granted within the state, is equivalent as evidence to original probate here Bromley v. Miller, 2 Thomp. & Cook, N. Y. 575; Townsend v. Downer, 32 Vt. 183, 216; Miller v. James' L. R. 3 Perry & D. 4.

The foreign exemplification, even if itself receivable in evidence, by virtue of the act of Congress (U. S. Rev. Stat. secs. 905, 906), and competent on the question of the rights and liabilities of the parties arising in such other state, cannot be received for the purpose of affecting title to land within the state (unless expressly authorized by the statutes of the state); but if it has not been recorded in a probate court, within the state, the original will must (for such purpose) be produced, or its loss accounted for so as to admit secondary evidence. Abbott's Trial Ev. 128; Robertson v. Barbour, 6 T. B. Monr. Ky. 523; Graham v. Whitely, 26 N. J. L. 260.

Whether the original is competent without such probate, depends on the local statutes. Ives v. Allen, 12 Vt. 589; Barstow v. Sprague, 40 N. H. 27.

But in a recent case in the Ecclesiastical 173*] Court *in England, Sir J. Nicholl had considered the authorities as rather applying between different parts of the same empire, than between different countries entirely foreign to each other.[1] If the law of France was to be applied, although the will was not executed in strict and literal conformity with the forms provided by the code Napoleon, it might be sustained as a donation mortis causa; a species of donation which the best commentators were of opinion was not abolished by the code, it having been preserved in Chancellor D'Aguesseau's ordinance of 1731.[2] And perhaps it might also be considered a valid donation mortis causa by our law.[3] In the case above cited, determined by Sir J. Nicholl, he refers to the Duchess of Kingston's case, and confirms it, where a will, "though made in France, where she was domiciled, being made by an English subject in the English language, and according to English forms, and to be executed in England, was valid as to personal property in England, though (neither being holographic nor made before a notary) it would, by the French law, have been of no validity. Nay, not only was it held good, but if the opinion of an eminent lawyer (M. Targat), as stated in the Collectanea Juridica, be correct, it was good, and would operate on the property in France."[4] But it was further insisted that the execution of the testamentary paper before the consul at Paris was conclusive of its validity, and dispensed with the necessity of probate in the courts of this country. This was inferred from the conclusive effect attributed to what are termed "authentic acts" by the law of France, taken in connection with the provisions in the convention of 1800 between France and the United States (art. 7, 10), and the statute of Congress of April, 1792, ch. 126, s. 2, relat-174*] ing to the powers of consuls *in the verification of such acts, among which testamentary papers are included.[5]

The Attorney-General and Mr. Lear for the respondent, contended that the question whether the paper of 1806 was to be considered as a revocation pro tanto of the will of 1798, depended upon its being authenticated as a testamentary disposition in the manner prescribed by the laws of this country. They referred to the well-known rule, which had been frequently recognized in this court, that foreign laws must be proved as facts, or they could not be taken notice of judicially by our courts.[6] That consequently it was a case for the application of the ordinary principle, that a suit could not be maintained in a court of equity for a legacy, without first showing a probate in the proper court, of the will under which it was claimed. The admission in the defendant's answer did not dispense with this preliminary, because it was merely intended to admit that "the instrument was executed and acknowledged as it purports to be," submitting its effect and operation to the judgment of the court. Nor did the treaty and the act of Congress, which had been referred to, dispense with the necessity of probate of the will in the appropriate local tribunal, where all parties interested would have a right to contest its validity. The utmost effect that could be attributed by the conjoint operation of the law of France, the treaty, and the statute of Congress, to the execution and acknowledgment of such an act as a will or a codicil, before the consuls of the United States in France, would be to make it conclusive evidence, on which a court of probates in the United States might proceed; but it could not be considered as dispensing with all the local laws of the states on the probate of wills, and inverting the whole order of proceeding in cases of this sort, by which the paper must be ascertained, by the court having peculiar jurisdiction of testamentary causes, to be a will, before a court of equity can be called on to give a construction to it, and to decree a legacy under it. Nor could it be considered as a donation *mortis causa, and therefore not [*175 requiring probate; since, to constitute such a donation, the gift must be made in extremis, and must be accompanied with an actual delivery.[7]

Mr. Justice Story delivered the opinion of the court:

The bill in this case is brought against the administrator, with the will annexed, of General Kosciuszko, for the purpose of establishing a right of the plaintiff to receive payment out of the assets of the testator, of a certain bequest to him, contained in a supposed testamentary writing, executed by the testator at Paris, in France, in June, 1806. This supposed testamentary writing is set forth in the bill, and averred to be in the nature and of the effect of a last will or writing testamentary; but it does not appear to have been admitted to probate, either in France or in the proper Orphans' Court of this district. The answer admits the existence and authenticity of the instrument, and submits to the court its import and legal effect, and whether it is to be deemed a last will and testament; and it also admits assets in the hands of the administrator sufficient to discharge the bequest. The cause was heard in the court below upon the bill and answer, and from the decree dismissing the bill the present appeal has been brought to this court.

The cause has been argued here upon several points, involving a good deal of learning, and some doctrines of international law. We do not enter into an examination of them, because our judgment proceeds upon a single point, and will in no event prejudice the merits of the plaintiff's claim.

By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs to the ecclesiastical courts; and before any testamentary paper of personalty can be admitted in evidence, it must receive probate in those courts. Lord Kenyon, in The King v. Inhabitants of Netherseal, 4 Term

1.—Curling v. Thornton, Adams' Rep. 21.
2.—Merlin, Repertoire, tom. 4, p. 144; Paillet, Droit Français, p. 159.
3.—1 Swinb. 54; Prec. in Ch. 300; 2 Bro. Ch. 612; 2 Ves. Jr. 120; Lowndes on Legacies, 449; 1 P. Wms. 406, 441; 2 Ves. 437.
4.—2 Adams' Rep. 21.
5.—Pothier, Oblig. pt. 4, ch. 1; Code Napoleon, art. 1317-1319; Paillet, p. 159, note 2.
6.—2 Cranch, 237.
7.—2 Bl. Com. 514; Just. Inst. l. 2, t. 7, s. 1; Dig. l. 39, t. 6; Prec. in Ch. 269; 1 P. Wms. 406, 441; 3 P. Wms. 357; 2 Ves. 431.

Rep. 258, said, "we cannot receive any other evidence of there being a will in this case, than such as would be sufficient in all other cases 176*] where titles *are derived under a will; and nothing but the probate or letters of administration, with the will annexed, are legal evidence of the will, in all questions respecting personalty." This principle of the common law is supposed to be in force in Maryland, from which this part of the District of Columbia derives its jurisprudence; and the probate of wills of personalty to belong exclusively to the proper Orphans' Court here, exercising ecclesiastical jurisdiction. If this be so—and nothing has been shown which leads us to a different conclusion—then it is indispensable to the plaintiff's title to procure, in the first instance, a regular probate of this testamentary paper in the Orphans' Court of this district, and to set forth that fact in his bill. The treaty stipulations, the act of Congress, and the principles of the law of France, which have been cited at the argument, attributing to them the full force which that argument supposes to establish the validity of the instrument, do not change the forum which is entitled, by the local jurisprudence, to pronounce upon it as a testamentary paper, and to grant a probate. It is one thing to possess proofs which may be sufficient to establish that a testamentary instrument had been executed in a foreign country, under circumstances which ought to give it legal effect here; and quite a different thing to ascertain what is the proper tribunal here, by which those proofs may be examined for the purpose of pronouncing a judicial sentence thereon.

For this reason the decree of the court below is to be affirmed, but without prejudice, so that the instrument may be submitted to the decision of the proper probate court.

177*] [*Judgment Lien. Local Law.]

RANKIN & SCHATZELL,
Plaintiffs in Error,
v.
SCOTT, Defendant in Error.

The lien of a judgment on the lands of the debtor, created by statutes, and limited to a certain period of time, is unaffected by the circumstance of the plaintiff not proceeding upon it (during that period), until a subsequent lien has been obtained and carried into execution.

Universal principle that a prior lien is entitled to prior satisfaction out of the thing it binds, unless the lien be intrinsically defective, or is displaced by some act of the party holding it, which shall postpone him at law or in equity.

Mere delay in proceeding to execution is not such an act.

Distinction created by statute, as to executions against personal chattels, and reasons on which it is founded.

ERROR to the District Court of Missouri.

This was an action of ejectment, brought in the court below by the defendant in error, Scott, to recover the possession of a house and lot in the town of St. Louis. At the trial, a special verdict was found, stating, that in the year 1816, John Little married Marie Antoinette Labadie, who was then seized in fee of the house and lot in question. She died without issue, leaving the husband seized in fee of a moiety of the premises. He soon afterwards died without issue, and intestate. In April, 1821, judgment was rendered in the Circuit Court of the county where the premises lay, against the administrator of Little, in favor of Schatzell and another, for $2,747.19. In March following, another judgment was rendered against the same, in favor of B. Pratte, for $1,241. Execution was immediately issued upon the latter judgment, and the premises in question sold under it to Scott, the plaintiff in ejectment; and soon afterwards, another execution issued upon the first judgment, and the same premises were sold to Schatzell, one of the defendants below, and conveyed to him by the sheriff's deed. Rankin, who was tenant to Little in his life-time, remained in possession of the premises after his death, and *attorned to Schatzell. The [*178 question raised upon these facts was, whether the sale by the sheriff, under the second judgment and first execution, devested the lien of the first judgment? The court below determined it in the affirmative; and the cause was brought, by writ of error, before this court.

Mr. Benton, for the plaintiffs in error, relied upon the express provisions of the statute of Missouri, to show that the local law made the first judgment a lien upon the land for the term of five years, within which time it was enforced, and Schatzell purchased under it.[1] For the general effect of a judgment lien, he cited the authorities in the margin.[2]

1.—Geyer's Dig. L. L. Missouri, 264, 267.

2.—1 Johns. Cas. 224; 13 Johns. Rep. 463, 533; 1 Dall. 481, 486; 4 Dall. 450.

Note.—Lien of judgments, and how suspended or lost.

The lien of a jpudgment upon real estate is not lost if, after a fieri facias has been levied and returned, the plaintiff in the action order proceedings to be stayed. It is otherwise if personal property be levied upon and left in the hands of the defendant. Green v. Allen, 2 Wash. C. C. 280.

The lien of a judgment is suspended during an imprisonment of the judgment debtor on a capias, and a judgment obtained by another creditor during that time gains a priority of lien on the debtor's property; or the debtor may sell the property and give to the purchaser a title discharged of the incumbrance of the judgment. Griswold v. Hill, 2 Paine, 492.

If a judgment becomes dormant, its lien is lost as against a mortgage executed by the judgment creditor during the continuance of the judgment lien. Tracy v. Tracy, 5 McLean, 456; 5 Ohio, 178 10 Ohio, 403; 15 Ohio, 435.

A judgment creditor who proves his debt against a bankrupt, thereby surrenders his judgment as a lien on the lands of the bankrupt. Briggs v. Stephens, 7 Law Rep. 281.

A conveyance of the land, after a judgment has become a lien upon it, does not affect the lien. Kemper v. Bavey, 5 McLean, 507.

The court cannot presume the existence of judgments against a party who has been dead for ten years. Hepburn v. Dunlop, 1 Wheat. 175, 195.

Under the judiciary act of 1789, the courts of the United States have uniformly adopted the principles of state jurisprudence on the subject of the lien of judgments, so far as applicable. Lombard v. Bayard, 1 Wall. Jr. C. C. 196.

Judgments and decrees rendered in the courts of the United States are liens upon the defendant's

Mr. Talbot, contra.[1]

Mr Chief Justice Marshall delivered the opinion of the court, and after stating the case, proceeded as follows:

The act of the then territorial government of Missouri, on which this question depends, is in these words: "Judgments obtained in the general court shall be a lien on the lands and tenements of the person or persons against whom the same has been entered, situate in any part of this territory; and judgments obtained in a court of Common Pleas of any district, shall be a lien on the lands and tenements of the person against whom the same has been entered, situate in such district." The act contains a proviso, "that no judgment hereafter entered in any court of record within this territory, shall continue a lien on the lands and tenements against whom the same has been entered, during a longer term than five years from the first return day of the term of which such judgment may be entered, unless the same shall have been revived by scire facias," etc.

179*] *Since the territory of Missouri was erected into a state, the general court has received the appellation of the Superior Court, and the Court of Common Pleas for the district has been denominated the Circuit Court for the county. The execution on the first judgment was issued within a short time after it was rendered, and while the lien it created was in full force, unless it was removed by the execution and sale under the second judgment.

There is no expression in the law of Missouri which can suggest a doubt on this subject. By that law, judgments are to be a lien on all the lands of the debtor. This lien commences with the judgment, and continues for five years. The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution, has never been considered as such an act. Take the common case of mortgages. It has never been supposed that a subsequent mortgage could, by obtaining and executing a decree for the sale of the mortgaged property, obtain precedence over a prior mortgage in which all the requisites of the law had been observed. If such a decree should be made without preserving the rights of the prior mortgagee, the property would remain subject to those rights in the hands of the purchaser. So, in cases of judgment, where an elegit may be sued out against the lands of the debtor. The implied lien created by the first judgment retains the preference over the lien created by a second judgment, so long as an elegit can issue on the first. A statutory lien is as binding as a mortgage, and has the same capacity to hold the land so long as the statute preserves it in force.

The cases cited of executions against personal property, do not, we think, apply. In those cases, the lien is not created by the judgment, or by any matter of record. The purchaser of the goods cannot suppose that the officer has committed any impropriety in the performance of his duty, *and this circumstance has [*180 induced parliament to secure him. It is stated by Ashhurst, Justice, in 1 Term Rep. 731, that this was the sole object of that part of the statute of frauds which relates to this subject. In the case at bar, the judgment is notice to the purchaser of the prior lien, and there is no act of the legislature to protect the purchaser from that lien.

We think, then, that the deed made by the sheriff to the purchaser, under the first judgment, conveyed the legal title to the premises; and that the judgment on the special verdict ought to have been in favor of the plaintiff.

Judgment reversed.

1.—1 Term Rep. 729; 1 Lord Raym. 251; 1 Burr. 20; 8 Co. Rep. 171; Cro. Eliz. 181; 1 Salk. 320.

real estate in all cases where similar judgments or decrees of the state courts are made liens by the law of the state. Ward v. Chamberlain, 2 Black, 430; Williams v. Benedict, 8 How. 107; Massingill v. Downs, 7 How. 760; Myers v. Tyson, 13 Blatchf. 242; Barth v. Makeever, 4 Biss. 206.

A judgment at law is not a lien upon real estate in the District of Columbia, which, before the judgment was rendered, had been conveyed to trustees with a power of sale to secure the payment of the debts of the grantor described in the deed of trust. Morsell v. First Nat. Bank, 1 Otto, 357.

The lien of a judgment upon land of the judgment debtor does not prevent the claim of a former owner to have his deed to the judgment debtor set aside upon the ground that it was procured from him by duress. Brown v. Pierce, 7 Wall. 205; Baker v. Morton, 12 Wall. 150.

A judgment of a court of the United States becomes a lien on lands throughout the district in which it is recovered. Carroll v. Watkins, 1 Abb. U. S. 474; U. S. v. Humphreys, 3 Hugh. 201; 7 Reporter, 330.

A judgment rendered by a United States court sitting in Pennsylvania is a lien on real estate of the defendant anywhere in the state, notwithstanding the judgment may have been rendered in one of the judicial districts into which the state is divided, while the property lies in another. Prevost v. Gowell, 12 West. Jur. 369; 5 Reporter, 616.

The satisfaction of a judgment by payment, in whole or in part, will release the lien to the extent of the payment; and it cannot be restored as a lien by any subsequent agreement between the parties. De la Vergne v. Everton, 1 Paige, 181; Troup v. Wood, 4 John. Ch. 228, 247; Winslow v. Clark, 3 Lans. N. Y. 377, 380; Garvey v. Jarvis, 54 Barb. 179; S. C. affirmed, 46 N. Y. 310; Deland v. Hiett, 27 Cal. 611.

If the amount of the judgment be paid by one who is not a party and not liable thereon, the judgment will be extinguished or not, according to the desire of the party paying. Alden v Clark, 11 How. Pr. N. Y. 209; Harbeck v. Vanderbilt, 20 N. Y. 395.

Where a creditor recovers a new judgment on a judgment, the lien of the earlier judgment is not affected by the recovery of the new judgment, if of no higher degree than the former. Harvey v. Wood, 5 Wend. 221; Millard v. Whitaker, 5 Hill, 408; Andrews v. Smith, 9 Wend. 53; Jackson v. Shaffer, 11 John. 513; Mumford v. Stocker, 1 Cow. 178.

[Practice.]

THE UNITED STATES
v.
TILLOTSON et al.

Where the burthen of proof of certain, specific defenses set up by the defendant is on him, and the evidence presents contested facts, an absolute direction from the court, that the matters produced and read in evidence on the part of the defendant were sufficient in law to maintain the issue on his part, and that the jury ought to render their verdict in favor of the defendant, is erroneous; and a judgment rendered upon a verdict purporting to have been given under such a charge will be reversed, although the record was made up as upon a bill of exceptions taken at a trial before the jury upon the matters in issue, no such trial ever having taken place, and the case having assumed that shape by the agreement of the parties, in order to take the opinion of the court upon certain questions of law.

THIS cause was argued by the Attorney-General and Mr. Coxe for the plaintiffs, and by Mr. Webster and Mr. Wheaton for the defendants.

Mr. Justice Story delivered the opinion of the court:

This cause comes before us from the Circuit Court for the southern district of New York, as upon a bill of exceptions taken 181*] *to the opinion of the court, upon a trial before a jury upon the matters in issue. In reality no such trial was had; but the case assumed this shape by the agreement of the parties, in order to have the opinion of the court upon certain questions of law. We must, however, consider the case exclusively upon principles applicable to it as a bill of exceptions taken at a real trial.[1]

Upon the argument in this court, various important questions have been elaborately discussed by counsel, upon which we forbear to express any opinion, as our judgment of reversal proceeds upon a ground which renders any decision on them unnecessary.

The bill of exceptions admits the due execution of the bond in controversy, and the breaches stated in the declaration are answered by special notices of defense set up as bars to the suit. The burthen of proof of these defenses, in point of fact, rested on the defendants. The court is supposed to have charged the jury, that the matters produced and read in evidence on the part of the defendants were sufficient in law to maintain the issue on their part, and that the jury ought to render their verdict in favor of the defendants. This charge can be maintained in point of law only upon the supposition that the evidence presented no contested facts; for otherwise it would withdraw from the jury their proper functions, to determine the facts upon the evidence in the cause.

Upon examining the record, we think that there is contradictory evidence, or rather evidence conducing to opposite results, in respect to a point material to many of the specifications of defense, and particularly as to the matters in the third, fifth, sixth, seventh, eighth and ninth. It is this: whether the contract of the 7th of June, 1820, between Col. Gadsden, as agent of the war department, and Samuel Hawkins, was ever a consummated agreement, binding on the United States, in virtue of an original authority given to him, *or was a preliminary agreement de- [*182 pendent for its validity upon the ratification of the war department; and if that was withheld, (which there was direct evidence to prove), the agreement was a mere nullity. The bill of exceptions does not in terms find that the agreement was such a consummated agreement. It merely states, that "on or about the 7th of June, 1820, Col. James Gadsden, then acting as the agent for fortifications at Mobile Point, and thereto duly authorized by the said war department, did enter into an agreement or contract with the said Samuel Hawkins, touching the foregoing contract, with the said Benjamin W. Hopkins, and the erection of the fort therein provided for," etc. The word "thereto" may be applied either to the next antecedent, the agency of fortifications, or to the subsequent clause stating the agreement. It may mean, having a due authority as agent for fortifications, or having a due authority to enter into the agreement. The recital in the agreement itself, that Col. Gadsden entered into it "in pursuance of the instructions of the secretary of the war department," would not be decisive of the point, supposing it to be entitled to the fullest weight as matter of recital. But the case does not rest here. In another part of the record, evidence is introduced on the part of the United States, to establish that the agreement so made had never been ratified on the part of the war department; and also to show that it was understood by that department, that without such ratification the contract was not obligatory. We allude to that part of the record where it is stated that the agreement, as soon as executed at Mobile Point, was transmitted to the war department, and that a letter was written by the authority of that department, under date of the 10th July, 1820, to the defendants, as Hawkins's sureties, inclosing a copy of the agreement, and requesting them, if they would sanction it, to send certificates of the fact, and "signify their approval, and authorize it to be carried into effect"—and it is added, "should you object, the contract will be carried on as before," that is, the original contract. It is further found by the case, that the agreement "was not ratified by the secretary of war, nor ever acted upon, except so far as it may appear to have *been ratified and acted upon [*183 by the said transcript" (of the treasury accounts, contained in the record.

It appears to us, that, taking this evidence together, it was not a conceded point, but a matter of controversy between the parties, whether the agreement was obligatory upon the United States, and had become absolute by the assent of all the persons who had authority to perfect the same. This being so, it was a matter of fact to be decided by the jury, and the charge of the court was erroneous in withdrawing it from the consideration of the jury.

For this reason it is our opinion that the judgment of the Circuit Court was erroneous, and ought to be reversed, and the cause be remanded, with directions to award a venire facias de novo.[1]

Rev'g—1 Paine, 305.

1.—The cause was argued and determined in the court below upon a case agreed upon between the parties, containing a state of facts; but as the state of facts was not annexed to the transcript of the record, this court could not take notice of it.

1.—See 1 Paine's Rep. 305, S. C.

[Bill Of Exchange And Promissory Note. Sale With Warranty.]

THORNTON, Plaintiff in Error,
v.
WYNN, Defendant in Error.

An unconditional promise, by the indorser of a bill or note, to pay it, or the acknowledgment of his liability after knowledge of his discharge from his responsibility by the laches of the holder, amounted to an implied waiver of due notice of a demand from the drawee, acceptor, or maker.

Upon a sale with a warranty of soundness, or where, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and the contract being thereby rescinded, it is a defense to an action for the purchase money, brought by the vendor, and will entitle the vendee to recover it back if it has been paid.

So, if the sale is absolute, and the vendor afterwards consent unconditionally to take back the article, the consequences are the same.

But if the sale be absolute, and there be no subsequent consent to take back the article, the contract remains open, and the vendee must resort to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time.

184*] *THIS cause was argued by Mr. C. C. Lee for the plaintiff in error,[1] and by Mr. Worthington for the defendant in error.[2]

Mr. Justice Washington delivered the opinion of the court:

This was an action brought by the defendant in error against the plaintiff in error, in the Circuit Court for the District of Columbia and county of Washington, upon a promissory note given by one Miller to Thornton, and by him indorsed to Wynn. The declaration contains a count upon the note, and also the common counts for money laid out and expended, and for money had and received.

At the trial of the cause upon the general issue, the defendant below took two exceptions to the opinion of the court which are to the following effect: The first states that the plaintiff gave in evidence the note and indorsement mentioned in the declaration, and in order to dispense with the proof of the ordinary steps of diligence in presenting and demanding the note of the drawer, and giving notice to the indorser, the plaintiff offered evidence to prove that a few weeks before the institution of this suit the note in question was presented to the defendant, who, being informed that Miller, the drawer, had not paid the note, said, "he knew Miller had not, and that Miller was not to pay it; that it was the concern of the defendant alone, and Miller had nothing to do with it; that the note had been given for part of the purchase money of a certain race-horse called Rattler, and that the defendant offered to take up the said note if the plaintiff's agent would give time, and receive other notes mentioned in payment:" to the admission and competency of which evidence the defendant objected; but the court overruled the objection, and *admitted the evidence as [*185 competent to support this action, without any further proof of demand upon the drawer or notice of the indorser.

That the said evidence being so admitted by the court, the defendant offered evidence to prove that the said note was given for part of the purchase money of the said race-horse, then celebrated for his performances on the turf, sold by the plaintiff to the defendant, and the said Miller, the drawer of the note, for $3,000, of which $2,000 had been paid; that the plaintiff, at the time of so selling this horse, warranted him sound, and declared him capable of beating any horse in the United States, and recommended the purchasers to match him against a celebrated race-horse in New York, called Eclipse; that he also gave a representation of his pedigree, which he described as unexceptionable, and promised to procure his pedigree and send it to the defendant. And the defendant then offered evidence to prove that the said horse, at the time of the said sale, was utterly unsound, and broken down, and had been broken down whilst in the plaintiff's possession, and was reputed and proven by persons in the neighborhood of the plaintiff,

1.—2 H. Bl. 609; 1 Moore's Rep. C. P. 535; 3 Camp. 57; 11 East's Rep. 114; 4 Dall. 109; 4 Taunt. 93; 1 Esp. 261; 6 East's Rep. 110; 1 H. Bl. 17.

2.—1 Term Rep. 405; 2 Term Rep. 703; 1 Esp. 302; 12 East's Rep. 171; 4 Cranch, 141; 2 Johns. Rep. 1; 7 Mass. Rep. 449; 5 Mass. Rep. 170; 11 Johns. Rep. 180; Peake's N. P. Cas. 203; 1 Taunt. 12; 2 Term Rep. 713; 15 East's Rep. 275; Cowp. 888; Dougl. 24; 1 Term Rep. 133; 7 East's Rep. 274; 2 Taunt. 2; 14 Johns. Rep. 416; 2 East's Rep. 320.

NOTE.—Promise by indorser to pay, waiver of notice.

An unconditional promise by the drawer or indorser of a bill or note to pay it, made after knowledge of his discharge from responsibility by the laches of the holder, amounts to a waiver of due notice of a demand from the drawee, acceptor, or maker. Sigerson v. Matthews, 20 How. 496; Morris v. Gardner, 1 Cranch, C. C. 215; Perry v. Rhodes, 2 Cranch, C. C. 37; Lundie v. Robertson, 7 East, 231; Hopes v. Alden, 6 East, 16; Porter v. Rayworth, 13 East, 417; Story, Prom. Notes, sec. 364; 2 Daniels' Neg. Instr. sec. 1093.

So, an acknowledgment after maturity of the indorser's liability to pay, or a promise to pay the note or bill, or to see it paid, or an acknowledgment that it must be paid, with knowledge of the laches of the holder, is a waiver of notice, and renders the indorser liable. Duryee v. Denison, 5 John. 248; Yeager v. Folwell, 13 Wall. 12; Reynolds v. Douglass, post, 497; Bank of U. S. v. Lyman, 20 Vt. 666; Read v. Wilkinson, 2 Wash. C. C. 514; Sherman v. Clark, 2 McLean, 91; Martin v. Winslow, 2 Mas. 41; Thornton v. Stoddert, 1 Cranch, C. C. 534; Good v. Spring, 2 Cranch, C. C. 172; Cassaway v. Jones, 2 Cranch, C. C. 334; Sigerson v. Matthews, 20 How. 496; Salisbury v. Renick, 44 Mo. 554; Hughes v. Bowen, 15 Iowa, 446; Spurlock v. Union Bank, 4 Humph. 336; Hazard v. White, 26 Ark. 280; Matthews v. Allen, 16 Gray, 594; Smith v. Curlee, 59 Ill. 221; Story on Notes, 274, 275; 1 Parsons' N. & B. 594; Edwards on Bills, 650, 651, 652; Daniels on Neg. Instr. sec. 1147; Ross v. Hurd, 71 N. Y. 18; Harrison v. Bailey, 99 Mass. 620.

Due presentment for payment and notice of nonpayment are conditions precedent to the liability of an indorser of a promissory note. Cayuga County Bank v. Warden, 1 Comst. N. Y. 413; S. C. 2 Seld. N. Y. 19.

By omitting either of these acts, the holder loses his right of recourse to the indorser, who is thereby discharged. Spies v. Gilmore, 1 Comst. 321.

These omissions of the holder may, however, be waived by a subsequent promise to pay the bill or note, if the promise is made with knowledge on the part of the drawer or indorser, that he has been discharged by the neglect of the holder. Tebbetts v. Dowd, 23 Wend. 379; Cram v. Sherburne, 14 Me. 48; Martin v. Ingersoll, 8 Pick; Beck v. Thompson, 4 Harr. & J. 531; Farrington v. Brown, 7 N. H. 271; Porter v. Hadenpuyl, 9 Mich.

who afterwards communicated the same to the purchaser; and was wholly unfit for, and incapable of, the action and fatigue necessary to a race-horse; and that the plaintiff had wholly failed to procure and furnish the pedigree of the horse as he had agreed, and that a pedigree was an essential term in the purchase of the horse, or ordinarily is so in the purchase of such horses, without which this horse was worth nothing; and that the said Miller, as soon as it had been ascertained by repeated trials that the horse was incurably unsound, offered to return him to the plaintiff, who refused to take him back, although the former offered to lose what he had already paid for the horse, which offer was made after the note fell due. Whereupon the court instructed the jury, at the prayer of the plaintiff, that if they should be of opinion, from the said evidence, that the said horse was, at the time of the said sale, utterly unsound and broken down, and had been broken down whilst in the plaintiff's possession, and was wholly unfit for, and incapable of, the action 186*] and fatigue necessary *to a race-horse, but that the said facts were not known to the plaintiff at the time of the said sale, the said facts are not a sufficient defense in this action to prevent the plaintiff from recovering.

Upon these instructions of the court, the jury found a verdict for the plaintiff, and the cause now comes before this court upon a writ of error.

This bill of exceptions presents two questions for the decision of this court. The first is, whether the evidence offered by the plaintiff, and admitted by the court, dispensed with the necessity of proving a demand of payment of the maker of the note, and due notice to Thornton of non-payment; and, secondly, whether the court below erred or not, in stating to the jury that the alleged breach of the warranty of the horse, if proved to their satisfaction, was not a sufficient defense in this action to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff at the time of the sale.

In the argument of the first question, the counsel on both sides considered the evidence offered by the plaintiff as presenting a double aspect. 1st. As authorizing a conclusion, in point of fact, that the note of hand on which the suit is brought, was made and passed to Thornton without consideration, and merely for his accommodation; and, 2d. As amounting to a promise to pay the note, or at least to an admission by Thornton of his liability to pay it, and of the right of the plaintiff to resort to him, whether it was made solely for his accommodation, or was given for value in the ordinary course of trade.

As to the first, the counsel treated the note throughout as an accommodation note, and submitted to the decision of this court the question, whether the indorser of such a note was entitled to call for proof of a demand of payment of the maker, and notice to himself?

Whether this question was ever raised in the court below, or in what manner it was there treated, does not appear from the bill of exceptions. It is possible that that court may have intended nothing more by their direction to the jury than to sanction the admissibility of the evidence, and its sufficiency to authorize a verdict for the plaintiff, *without other [*187 proof of demand and notice, provided the jury should be of opinion that it warranted the conclusion that the note was given without consideration. But such is not the language of the court as stated in the bill of exceptions. The jury were informed that the evidence was competent to support the action without such further proof of demand and notice, without leaving the inference of fact that the note was given without consideration to be drawn by the jury. Had the court distinctly stated to the jury that this was such a note, and, therefore, that further proof of demand and notice was unnecessary, the incorrectness of the direction could have been doubted by no person, since the court would, in that case, have inferred a fact from the evidence, which it was competent to the jury alone to do. And yet it seems difficult to distinguish the supposed case from the one really presented by the bill of exceptions, upon the hypothesis that the court below decided anything as to the particular character of this note, since it is very obvious that no question of fact was submitted to the consideration of the jury. It is, therefore, due from this court to the one whose decision we are revising, to conclude, that that decision did not proceed upon the assumption that this was a note drawn for the accommodation of the indorser.

It remains to be considered whether the direction was correct upon the other aspect of the evidence.

It is now well settled as a principle of the

11; Blodgett v. Durgin, 32 Vt. 361; Robbins v. Pinckhard, 5 Sm. & Marsh. 51; Moore v. Tucker, 3 Ired. 347; Tobey v. Berly, 26 Ill. 426.

But nothing short of the clearest assent, express or implied, will amount to a waiver. Oswego Bank v. Knower, Hill & Denio, 122.

Defendant's knowledge that he had not received regular notice may be inferred, as a fact, from the promise under the attending circumstances, without requiring clear and affirmative proof of knowledge. Tebbetts v. Dowd, 23 Wend. 379, and cases cited. Abbott's Trial Ev. 436; Meyer v. Hibsher, 47 N. Y. 273.

A promise which is made in ignorance of the fact that no notice has been given, will not be sufficient. Jones v. Savage, 6 Wend. 658; Otis v. Hussey, 3 N. H. 346; Kennon v. McRea, 7 Port. Ala. 175; Fleming v. McClure, 1 Brev. 428; Hunt v. Wadleigh, 26 Me. 271; Hunter v. Hook, 64 Barb. 468.

A waiver of notice of demand is no waiver of demand, and does not dispense with the demand itself. Backus v. Shipherd, 11 Wend. 629; Buchanan v. Marshall, 22 Vt. 561; Drinkwater v. Tebbits, 17 Me. 16; Wait's Actions and Defenses, 635; Low v. Howard, 11 Cush. 268.

Knowledge, on the part of the drawer or indorser, that the holder has been in default, in not making due presentment and giving notice, is an indispensable element of the waiver, according to the American text-writers on the subject, and the great body of the adjudicated cases. Ford v. Dallam, 3 Cold. 67; Ticknor v. Roberts, 11 La. 14; Plum v. Bidwell, 2 La. An. 43; Walker v. Rogers, 40 Ill. 278; Van Wickle v. Downing, 19 La. An. 83; Barkerville v. Brown, 7 N. H. 271; Gawtry v. Doane, 48 Barb. 148; U. S. Bank v. Southard, 2 Harr. 473; Barkalow v. Johnson, 1 Harr. 397; Bank of U. S. v. Leathers, 10 B. Mon. 64; Walker v. Rodgers, 39 Ill. 279; Cheshire v. Taylor, 29 Ia. 492; Salisbury v. Renick, 44 Mo. 454; Newberry v. Trowbridge, 13 Mich. 264; Arnold v. Dresser, 8 Allen, 435; Kelley v. Brown, 5 Gray, 108; 1 Parsons N. & B. 601; Story on Bills, sec. 320; 2 Daniels' Neg. Instr. sec. 1149.

law merchant, that an unconditional promise by the drawer or indorser of a bill, to pay it, after full knowledge of all the circumstances necessary to apprise him of his discharge from his responsibility by the laches of the holder, amounts to an implied waiver of due notice of a demand of the drawer or acceptor, and dispenses with the necessity of proving it. Such are the cases of Borrodaile v. Lowe, 4 Taunt. 93, Donaldson v. Mears, 4 Dall. 109, and others which need not be cited. So if, with the knowledge of these circumstances, he answer, that the bill "must be paid," "that when he comes to town he would set the matter right," "that his affairs were then deranged, but that he would be glad to pay it as soon as his accounts with his agents were settled," or "that he would see it paid," or if he pay a part 188*] of the bill; in all *these cases it has been decided that proof of regular notice is dispensed with. 2 Term Rep. 713; Bull. N. P., 276; 2 Campb., 188; 6 East, 16; 2 Stra. 1246.

The principle upon which these decisions proceed is explained in many of the above cases, and particularly in that of Rogers v. Stephens, 2 Term Rep. 713. It is this: that these declarations and acts amount to an admission of the party that the holder has a right to resort to him on the bill, and that he had received no damage for want of notice. See also Stark. Evid. 272.

The same principle applies with equal force to promissory notes, which, after indorsement, partake of the character of bills of exchange, the indorser being likened to the drawer, and the maker to the acceptor of a bill. The case of Lefingwell & Pearpoint v. White, Johns. Cas. 99, is that of a promissory note, where the indorser, before it became due, stated that the maker had absconded, and that, being secured, he would give a new note, and requested time. The court say that the defendant had admitted his responsibility, treated the note as his own, and negotiated for further time for payment, by which conduct he had waived the necessity of demand of the maker, and notice to himself. Taylor v. Jones, 2 Campb. 105, Vaughan v. Fuller, 2 Stra. 1246, and Aman v. Bailey, Bull. N. P. 276, were all cases of actions on promissory notes against the indorser. In this case, the defendant below, upon being informed that Miller, the maker of the note, had not paid it, observed, that he knew he had not, and that he was not to pay it; that it was the concern of the defendant alone, and that Miller had nothing to do with it, it having been given for part of the purchase money of a horse. These declarations amounted to an unequivocal admission of the original liability of the defendant to pay the note, and nothing more. It does not necessarily admit the right of the holder to resort to him on the note, and that he had received no damage from the want of notice, unless the jury, to whom the conclusion of the fact from the evidence ought to have been submitted, were satisfied that the defendant was also apprised of the laches of the holder in not making a regular demand of payment of the note, by which he was discharged 189*] *from his responsibility to pay it. The knowledge of this fact formed an indispensable part of the plaintiff's case, since without it it cannot fairly be inferred that the defendant intended to admit the right of the plaintiff to resort to him, if, in point of fact, he had been guilty of such laches as would discharge him in point of law. For anything that appeared to the court below from the evidence stated in the bill of exceptions, the admissions of the defendant may have been made upon the presumption that the holder had done all that the law required of him in order to charge the indorser. That due notice was not given to the defendant he could not fail to know; but that a regular demand of the maker of the note could not be inferred by the court from the admissions of the defendant.

For the reasons above stated, the judgment of the court below must be reversed, and the cause remanded for a new trial.

But since the second question before mentioned has been distinctly brought to the notice of this court, has been fully argued, and must again be decided by the court below, it becomes necessary that this court should pass an opinion upon it. That question is, whether the alleged breach of the warranty of the horse, the price of which formed part of the consideration of the note, if proved to the satisfaction of the jury, was a sufficient defense in this action to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff below at the time of the sale.

The question is not whether the purchaser of a horse which is warranted sound, has a remedy over against the vendor, upon the warranty, in case it be broken, but whether, in an action against him for the purchase money, he can be permitted to defend himself by proving a breach of the warranty.

The cases upon this subject are principally those where the vendee, having executed the contract on his part, by paying the purchase money, brought an action of indebitatus assumpsit against the vendor as for money had and received to his use. But it is perfectly clear that the reasoning of the court in those cases applies with equal force to *a case [*190 where the breach of the warranty is set up by the vendee as a defense against an action against him to recover the purchase money.

The first case we meet with on this subject, is that of Power v. Wells, of which a very imperfect report is to be seen in a short note in Dougl. 24, and in Cowp. Rep. 818. There the plaintiff gave a horse and 20 guineas to the defendant, for another horse, which he warranted to be sound, but which proved otherwise. The plaintiff offered to return the horse, which was refused, and the plaintiff brought two actions, one for money had and received, to recover back the 20 guineas which he had paid, and an action of trover for the horse, possession of which the plaintiff had delivered to the defendant. The court decided that neither action could be maintained; not the second, because the property had been changed. This case was referred to by the judge who had decided it at Nisi Prius, in the case of Weston v. Downes, Dougl. 23, which soon after came before the court of King's Bench. That was an action for money had and received, and the case was, that the plaintiff had paid a certain sum to the defendant for a pair of horses, which the defendant agreed, at the time, to

take back, if they were disapproved of, and returned within a month. They were returned accordingly within the stipulated period, and another pair was sent in their stead, without any new agreement. These were likewise returned, and accepted by the vendor, and a third pair were sent, which being likewise offered to be returned, the vendor refused to take them back. Lord Mansfield was against the action, because the contract, being a special one, the defendant ought to have notice by the declaration that he was sued upon it. Ashhurst, J., was of the same opinion; but added, that if the plaintiff had demanded his money on the return of the first pair of horses, this action would have lain, but that the contract was continued; from which expression nothing more is understood to have been meant than that the contract remained open. The ground upon which Buller, J., thought that the action could not be maintained was, that, by refusing to take back the horses, the defendant had not precluded himself from entering into the na-
191*] ture *of the contract, and that, whenever that is open, it must be stated specially.

The meaning of these latter expressions is distinctly stated by the court, and particularly by this judge, in the case of Towers v. Barret, 1 Term. Rep. 133, which followed next in order of time; that was also an action for money had and received. The money was paid for a horse and chaise, to be returned in case the plaintiff's wife should not approve of them. They were accordingly sent back to the defendant in three days after the sale, and left on his premises against his consent to receive them.

Lord Mansfield, Ch. J., and Willis, J., distinguish this case from that of Weston v. Downes, upon the ground that that was an absolute, and this a conditional agreement, which was at an end by the return of the horse and chaise, and was no longer open. Both the judges treat the case as if the vendor had taken back the property, although, in fact, he had not consented to do so. Ashhurst, J., was of opinion that this case would have resembled that of Weston v. Downes, if, in that, the plaintiff had returned the horses. It is very clear, from what was said by the same judge in that case, that his meaning in this was, if the plaintiff had returned the first pair of horses, and then demanded his money; for, he adds, that in that case there was an end of the first contract by the plaintiff's taking other pairs, and this constituted a new contract, not made on the terms of the first. But in this case the contract was conditional, and when the horse and chaise were returned, the contract was at an end, and the defendant held the money against conscience. Buller, J., is still more explicit. He says that the defendant, by the contract, had put it in the power of the plaintiff to terminate it, by returning the horse and chaise, and that the plaintiff had no option to refuse to take them back; and that, being bound to receive them, the case was the same as if he had actually accepted them. He adds, that the distinction between those cases where the contract is open, and where it is not, is, that if it be rescinded, either by the original terms of the contract, as in this case, where no act remains to be done by the defendant, or by a subsequent assent by him, the plaintiff may recover back his whole *money, and then this [*192 action will lie. But if it be open, the plaintiff's demand is only for damages arising out of the contract.

The court proceeded upon this distinction in deciding the case of Payne v. Whale, 7 East's Rep. 274, which followed the one just noticed. The action was to recover back money paid to the defendant for a horse sold by him to the plaintiff, which he warranted sound. The plaintiff offered to return the horse upon an allegation of his unsoundness, which the defendant denied, and refused to take him back, but agreed that, if he was in fact unsound, he would take him back, and return the purchase money. The unsoundness was proved at the trial; but the court was of opinion that the action could not be supported, and distinguished this case from the preceding one by observing, that in that the plaintiff had an option, by the original contract, to rescind it on a certain event; but here it was no part of the original contract that the horse was to be taken back, and that the subsequent promise amounted to no more than that he would take him back if the warranty were shown to be broken, which still left the question of warranty open for discussion, and then the form of the action ought to give the defendant notice of it by being brought upon the warranty.

The case of Lewis v. Congrave, 2 Taunt. 2, was precisely like the present, in which the same distinction, and the same principles, were recognized by the judge who tried the cause at Nisi Prius. It was an action on a bill drawn for the price of a horse, which, on the sale of him, was warranted sound, but turned out not to be so. The defendant offered to return the horse, which was refused, and the defendant left him in the plaintiff's stable without his knowledge. The judge decided, that as the plaintiff had refused to take back the horse, the contract of sale was not rescinded, and, consequently, that the defendant must pay the bill, and take his remedy by action for the deceit. But upon a rule to show cause why a new trial should not be granted, the court said, that it was clear the plaintiff knew of the unsoundness of the horse, which was clearly a fraud, and that no man can recover the price of an article sold under a *fraud. See [*193 also the cases of Fortune v. Lingham, 2 Campb. 416, and Solomon v. Turner, 1 Stark, 51.

The result of the above case is this: If, upon a sale with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defense to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received in case the purchase money has been paid. The consequences are the same where the sale is absolute, and the vendor afterwards consents, unconditionally, to take back the property; because, in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase money in the one case, or to recover it back in the other. But if the sale be absolute, and there be no

subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time. We are therefore of opinion that the direction of the court in this case, upon the second exception, was entirely correct. The judgment is to be reversed, and the cause remanded to the court below for a new trial.

[Practice.]

MALLOW et al. v. HINDE.

Where an equity cause may be finally decided as between the parties litigant, without bringing others before the court, who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court, if its proofs cannot reach them; or if they are citizens of another state.

194*] *But if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties.

But the court may, in its discretion, where the purposes of justice require it, retain jurisdiction of the cause on an injunction bill as between the parties regularly before it, until the plaintiffs have had an opportunity of litigating their controversy with the other parties in a competent tribunal, and if it finally appear by the judgment of such tribunal that the plaintiffs are equitably entitled to the interests claimed by the other parties, may proceed to a final decree upon the merits.

THIS cause was argued by Mr. **Bond** and Mr. **Brush** for the appellants, and by Mr. **Doddridge** and Mr. **Scott** for the respondents.

Mr. Justice **Trimble** delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court for the district of Ohio, dismissing generally, with costs, the bill of the appellants, who were plaintiffs in that court.

The suit was a contest for land in the district set apart on the north-west side of the Ohio, for the satisfaction of the bounty lands due to the officers and soldiers of the Virginia line, or continental establishment, in the revolutionary war.

The plaintiffs set up claim to the land by virtue and under a survey, No. 537, in the name of John Campbell. It appears that John Campbell, before his death, made his last will and testament, whereby he devised his land warrants, entries and surveys, in the military district, to Col. Richard Taylor and others, his executors, in trust for the children of the testator's sister, Sarah Beard; and that Taylor alone qualified as executor, and took upon himself the trust. Taylor never conveyed or assigned the warrants, entries, or surveys, to Mrs. Beard's children, but permitted them, as the bill charges, to take the management of them into their own hands.

Elias Langham made sundry executory contracts with Mrs. Beard's children, after they arrived at full age, which contracts are set out in the bill, whereby, as the complainants allege, Langham became equitably en- [*195 titled to survey No. 537; and afterwards sold, and made deeds of conveyance for the land of the complainants; who, in consequence of their purchases from Langham, took possession of, and improved the land.

Thomas S. Hinde, having purchased and procured an assignment of a military warrant from Col. Richard Taylor, and belonging to him in his own right, made an entry thereof in Hinde's own name in the principal surveyor's office; and having caused a survey to be made thereupon, covering survey No. 537, in the name of Campbell, Hinde obtained a patent for the land from the government.

Being thus clothed with the legal title, Hinde instituted actions of ejectment in the Circuit Court against the appellants, and obtained judgments of eviction against them.

They filed their bill praying for an injunction against the judgments at law; and also praying that Hinde should be decreed to release and convey to them his legal title, and for general relief.

The bill charges that Col. Richard Taylor, with full notice that the appellants were, in virtue of Langham's contract with the cestuis que trust, and Langham's sale to them, equitably entitled to, and in possession of, survey No. 537, fraudulently combined with Hinde and others, and improperly and without authority, withdrew the entry on which survey No. 537 had been made, and re-entered and caused it to be surveyed elsewhere; and that Hinde availing himself of such improper and unauthorized withdrawal, had entered, surveyed and patented the land in his own name, he also having notice of all the circumstances attending the claim of the appellants; and that Taylor and the Beards refuse to perfect the survey by obtaining a patent, and refuse to convey or transfer it to the appellants.

The bill also alleges that Langham had become equitably and legally entitled to the survey No. 537, as a purchaser thereof for taxes due thereon to the state of Ohio.

Hinde filed his answer, in which he denies the charges of fraud and collusion; insists the land had become vacant by the withdrawing of the entry in the name of Campbell, and by surveying it elsewhere; and that he had legally appropriated it by his entry, survey [*196 and grant; he neither admits nor denies the execution of the contracts alleged between Langham and the Beards, and puts the complainants upon proof; and he further insists that such contracts, if made, conferred upon Langham no equitable title: first, because the Beards had no power to sell, without the concurrence of Taylor, the trustee; and, second, because Langham had obtained the contracts by fraud, and had not paid the consideration stipulated.

Neither Taylor, the trustee, nor the cestuis que trust, with whom the complainants allege Langham contracted for the land, are made defendants, they being out of the limits of the jurisdiction of the court.

No attempt has been made in the argument to support the validity of the tax sale, and it may be laid out of the case.

For the appellees it is insisted, that the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims. And we are all of that opinion. It is plain that the appellants cannot set up the survey No. 537 against the appellees' title, without first showing themselves entitled to that survey. They claim that survey, not by any assignment, or other instrument, investing them with a legal right to it, but by executory agreements, the validity and obligation of which the parties to them have a right to contest.

We cannot try their validity, and decide upon their efficacy, by affirming they confier upon the appellants an equitable right, without manifest prejudice to the rights of those not before the court. The complainants can derive no claim in equity to the survey, under, or through Langham's executory contracts with the Beards, unless these contracts be such as ought to be decreed against them specifically by a court of equity. How can a court of equity decide that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to all the rules which govern courts of equity, and against the principles of natural justice. Taylor, too, is the legal proprietor of the warrant, by virtue of which the entry and survey No. 537 was made, and in general the right of removal is incidental to the right of property. 197*] But it is alleged *he has parted with that incidental right, although the general legal title of ownership remains in him; or that he has exercised this incidental right fraudulently and improperly, to the prejudice of the appellants.

Can any court justly strip him of this incidental right, or convict him of fraud unheard? Besides, if the court should, by its decree, compel Hinde to release his legal title to the complainants, upon the grounds that the entry and survey No. 537 are superior to his title, it would be giving to the complainants that which belongs to Taylor as trustee, and to his cestuis que trust, unless by their acts and agreements they have parted with their right to the survey. If the courts of the United States were courts of general jurisdiction, it could not be doubted that Taylor, William and Joseph Beard, and Mr. M. Gowan and wife, would be necessary and indispensable parties, without whom no decree upon the merits could be made. But it is contended that the rule which prevails in courts of equity generally, that all the parties in interest shall be brought before the court, that the matter in controversy may be finally settled, ought not to be adopted by the courts of the United States, because from the peculiar structure of their limited jurisdiction over persons, the application of the rule in its full extent would often oust the court of its acknowledged jurisdiction over the persons and subject before it.

It is true, this equitable rule is framed by the court of equity itself, and is subject to its sound discretion. It is not, like the description of parties, an inflexible rule, the failure to observe which turns the party out of court, merely because it has no jurisdiction over his cause; but being introduced for the purposes of justice, is susceptible of considerable modifications for the promotion of these purposes. Accordingly, this court in the case of Elmendorf v. Taylor, 10 Wheat. 167, has said, "That the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may *be completely decided, [*198 as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be the resident of some other state, ought not to prevent a decree upon its merits."

This doctrine was applied to the case where a small interest was outstanding in one not before the court, as tenant in common.

In that case, the right of the party before the court did not depend upon the right of the party not before the court; each of their rights stood upon its own independent basis; and the ground upon which it was necessary, according to the general principle, to have both before the court, was to avoid multiplicity of suits, and to have the whole matter settled at once.

In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.

We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.

We have no doubt the Circuit Court had jurisdiction between the complainants and the defendant, Hinde, so far as to entertain the bill, and grant an injunction against the judgments at law, until the matter could be heard in equity.

And if it had been shown to the Circuit Court, that from the incapacity of that court to bring all the necessary parties before it, that court could not decide finally the rights in contest, the court, in the exercise of a sound discretion, might have retained the cause, and the injunction, on the application of the complainants, until they had reasonable time to litigate the matters of controversy between them, and Taylor and the Beards, in the courts of the state, or *such other courts as [*199 had jurisdiction over them; and if then it was made to appear by the judgment of a competent tribunal, that the complainants were equitably interested with the rights of Taylor, the trustee, and the cestuis que trust in the survey No. 537, the Circuit Court could have pro-

ceeded to decree upon the merits of the conflicting surveys.

Such a proceeding would seem to be justified by the urgent necessity of the case, in order to prevent a failure of justice; and the cause would have remained under the control of the Circuit Court, so as to have enabled it to prevent unreasonable delay, by the negligence or design of the parties, in litigating their rights before some competent tribunal.

The cause having been brought to a hearing before the Circuit Court in its present imperfect state of preparation, that court could not do otherwise than dismiss the bill; but as no final decision of the rights of parties could properly be made, the dismission, instead of being general, ought to have been without prejudice. So much of the decree as dismisses the bill generally, must be reversed, and the decree, in all things else, affirmed; and the cause is to be remanded to the Circuit Court, with directions to dismiss the bill without prejudice.

[Fraudulent Agreement.]

CONNOR et al., Appellants,
v.
FEATHERSTONE et al., Respondents.

A question of fact upon a bill filed to set aside the sale and assignment of a land warrant, upon the ground that it was obtained by fraudulent misrepresentation, and taking undue advantage of the party's imbecility of body and mind.
Evidence deemed insufficient, and bill dismissed.

THIS cause was argued by Mr. White for the appellants, and by Mr. Isaacks for the respondents.

200*] *Mr. Justice Trimble delivered the opinion of the court:

This case comes before the court by appeal from the decree of the Circuit Court for the western district of Tennessee.

The bill was instituted by James Hibbits in his life-time, and after his death the suit was revived in the names of the appellees, his heirs-at-law, after which the defendants, now appellants, appeared and answered.

The object of the suit was, to have delivered up to the complainant a land warrant of 5,000 acres, which had been issued in the name of James Hibbits, upon an entry made by him in John Armstrong's office, No. 394, and to restrain James and Henry W. M. Connor, and each of them, from procuring a grant upon a survey which had been made and returned for the use of James Connor, by virtue of the warrant, under color of certain assignments alleged by James and Henry Connor to have been made by Hibbits, and to have those assignments set aside.

It appears that James Connor held a writing under seal, dated the 25th of September, 1796, purporting to be signed and executed by James Hibbits, to the following effect: "I, James Hibbits, of the county of Iredell, and state of North Carolina, for and in consideration of the sum of ninety-three pounds ten shillings, of the state aforesaid, have granted, bargained, and sold, to James Connor, of Mecklenburgh county, and state aforesaid, a 5,000 acre warrant entered in Colonel John Armstrong's office, No. 394, and I do authorize Colonel William Polke, or any of his deputies, or any other surveyor, to issue the returns, when the land is surveyed, in the name of James Connor."

The execution of this assignment is contested by the bill, which suggests, that a mere order for the delivery of the warrant was given, without any terms of transfer; but its due execution is expressly averred by the answer, and clearly sustained by evidence.

It appears, from the statements of the bill and answer of James Connor, that although this assignment purports to be general and absolute, there was a parol agreement and understanding between the parties at the time of its execution, qualifying its general import. But the parties *differ very materially as to the char- [*201
acter and extent of this parol agreement. Both admit that Hibbits was indebted to Connor a sum of money, which it was not convenient then to pay, but they differ as to its amount. Both agree that the sum so due from Hibbits to Connor, and Connor's agreement to pay to government a balance due upon the entry of about twenty-four pounds, with the interest thereon due to the state, and for which the warrant was detained, was the consideration of the assignment. Hibbits insists, that by the agreement and understanding of the parties, the assignment was intended as a mortgage or security for the debt, together with the advance to be made to the government; but Connor, in his answer, expressly denies such was the character of the agreement, and insists it was, that Connor should be proprietor of the warrant, so far as these sums would go, at the rate of sixty pounds per thousand acres, and that the residue should be held by him in trust for Hibbits. It appears that Connor paid to the government £ 45 17 4, the balance due upon the entry, with interest, and procured the warrant to issue, and be delivered to him, on the 29th of November, 1797. It appears that the adjustment and settlement of their respective interests in the warrant was the subject of occasional correspondence and negotiation between them from that time until 1817; but that, as the land lay in the Indian country, and could not lawfully be surveyed until the Indian title should be extinguished by the general government, the matter lay over until that period.

It appears that in June, 1817, James Connor sent his son, Henry W. M. Connor, with a power of attorney, and instructions, from North Carolina, to James Hibbits, in Tennessee, to adjust the business within, either by selling to Hibbits, Connor's interest in the warrant, or purchasing Hibbits' interest in it. That on the ——— day of June, 1817, at Hibbits' own house, a contract was made by Henry Connor, as agent of James Connor, with Hibbits, by which Hibbits agreed to transfer and assign to James Connor, or his agent for his use, all Hibbits' interest in the warrant, for which Connor agreed to convey to Hibbits, by deeds with special warranty, Connor's right in two by the urgent necessity of the case, in order to

202*] grants of 1,000 acres, *in Connor's name, calling to lie on Swift Creek; and also give a bond for the conveyance of 150 acres in Bedford county; in execution of which agreement an assignment of the whole warrant was accordingly executed by Hibbits, and deeds for the two grants of 1,000 acres each, on Swift Creek, and a bond for the 150 acres in Bedford county, were executed by Henry W. M. Connor, as agent for James Connor.

The bill charges that this assignment was procured by Henry W. M. Connor "most fraudulently, and in the following manner:" "That Hibbits was confined to his bed by a severe and long spell of sickness, under the influence of which he had labored several months; that his intellect and his faculties were so much debilitated and impaired, that he scarcely knew any thing he was doing; that Henry Connor represented all the lands he proposed giving for the warrant as good and valuable lands; and he moreover represented that the land called for in said warrant lay south of, and without the limits of the state of Tennessee; all of which assertions and allegations of said Henry were false, and known by him to be so at the time. He had been correctly informed that the land lay in this state (Tennessee), and that it was very valuable; he had been offered for part of it six dollars per acre, and he also knew that the two tracts of 1,000 acres each on Swift Creek had never been surveyed; and that the 150 acres in Bedford county had been taken by a better claim."

This is the substance of the charges of fraud and misrepresentation made in the bill, all of which are substantially denied by the answer.

At the hearing of the cause, the Circuit Court decreed that the assignment of the ——— day of June, 1817, should be set aside and held for naught; that neither of the Connors should hold any interest in the warrant by virtue of that assignment, and then proceeded to direct what interest the parties should respectively hold in the warrant, under the assignment and contract of 1796, and directed a release of the proportion allotted by the decree to the complainants accordingly.

It is plain that if the assignment of 1817 ought not to be set aside, the decree must be 203*] considered not only erroneous, *but there can be no necessity for inquiring what interest each party should hold in the warrant under the contract and assignment of 1796. independently of the assignment of 1817. That matter was adjusted by the contract and assignment of 1817; and unless that assignment should be set aside for fraud and imposition, we cannot go behind it.

It is argued that James Hibbits was so diseased in mind and body as to be incapable of controlling his own conduct. and that undue advantage was taken of his imbecility by Henry W. M. Connor. We do not think the allegation supported by sufficient proof. The answer denies it; and William Cawley is the only witness who speaks directly to the purpose. William Alexander swears he was once at Hibbits' house in the summer of 1817; that Hibbits was in great agony, and then incapable of transacting business; but whether from the excess of bodily pain only, or conjointly from that and mental imbecility, he is silent. The former we think the fair and only import of his evidence, as he says nothing of the state of Hibbits' mind, but speaks expressly of bodily disease. Besides, it is uncertain whether this was before or after the contract; and cannot, therefore, furnish a circumstance in aid of Cawley's statements. Many other witnesses depose as to Hibbits' mental condition, whose statements are irreconcilable with Cawley's impressions. A letter written by Henry W. M. Connor to Adam Miller, in which he says, "Mr. Hibbits has found out that I made an advantageous trade with him, that the land was in the state of Tennessee, contrary to his expectation, and complains heavily that I took an advantage of him, that he was a little deranged at the time," is greatly relied on in argument, not only to prove Hibbits' insanity, but to prove Henry W. M. Connor misrepresented the situation of the entry of 5,000 acres, and thereby deceived and defrauded Hibbits.

So far as the letter alludes to the state of Hibbits' mind at the time of the contract, and to "an advantage" having been taken of him, the writer evidently means to state only Mr. Hibbits' subsequent complaints, and not the facts or circumstances actually attending the transaction. The letter cannot, then, prove that Hibbits' was deranged, or that Connor took advantage of him, unless it is inferable from other parts *of the letter. He says, Hibbits [*204 had found out that Connor had made an advantageous trade; but it would be a very strained construction of this language to suppose Connor meant anything more by it than a good bargain.

He says, Hibbits had found out the land lay in Tennessee, contrary to his expectation; and it has been insisted in argument, that this fixes decisively upon Henry Connor the imputation of fraud and misrepresentation, as to the situation and value of the 5,000 acres of land. We do not think so. In the very doubtful state of the question, where the state boundary would run, when ascertained by public authority, the various conjectures and opinions then existing on the subject, the near proximity of the land to the line, as afterwards established, no inference unfavorable to the fairness of Connor's conduct can justly be drawn from Hibbits' expectation at the time of the contract that the land was not in Tennessee, unless it were shown that Connor, by his representations, superinduced that expectation. There is nothing in the letter, and we can discover nothing elsewhere in the evidence, conducing to prove that Connor, at the time of the contract, made any representation on the subject of the land being without or within Tennessee.

In the existing state of circumstances, in relation to the position of the state line, which was not fixed or known until long after, it could at most be but matter of opinion or conjecture, whether the land would or would not fall within Tennessee. It is not shown that Henry W. M. Connor expressed even an opinion to Hibbits on the subject; and if Hibbits entertained an erroneous opinion, it would be going too far, in a matter apparently involved at the time in uncertainty, to hold Connor responsible for that error.

The bill charges Connor with falsely representing the value of the 5,000 acres; but that is

also denied by the answer, and there is no proof in support of the bill.

It is further argued, that the deeds made by Connor to Hibbits for the two tracts of 1,000 acres each, calling to be on Swift Creek, being drawn by Henry W. M. Connor, and containing only a clause of special warranty, is evidence of the fraud and undue advantage taken of Hibbits' situation. The clause of warranty in the conveyances is to the following effect, to 205*] *wit: "That he, the said James Connor, for himself and heirs, shall and will warrant and defend the above-named grant from the lawful claim or claims of any person or persons whatever; but it is hereby understood that the said Henry W. M. Connor, as agent for James Connor, does not obligate himself to warrant the land called for in the grant, but only to warrant the grant itself from all legal claims of any person or persons."

Whatever singularity may, at first blush, appear in this clause of warranty, it vanishes when the state of the country, and the titles in it, are understood. The 5,000 acre entry of Hibbits, and the land given in exchange for it, in the contract, of 1817, at that time all lay in the Indian country, and the Indian title thereon had not been extinguished. Although the warrant upon the 5,000 acre entry had issued, it had not been surveyed, and could not be lawfully surveyed until the Indian title should be extinguished by the general government. Although grants had issued for the two tracts of 1,000 acres each, calling to lie on Swift Creek, it was very probable that they had issued, as is understood to have been the case in many instances, without actual surveys having been executed on the grant. By the laws and usages of the state, as understood to exist at the time, duplicate warrants could be procured, and located on other lands, whenever it appeared the land granted could not be identified for want of a survey, or was lost by a superior interfering claim. In such a state of things, it was evidently a risking bargain on both sides; and the peculiar clause of warranty must be presumed to secure to Hibbits the benefit of procuring warrants for the grants, if the land could not be held by the grants themselves. The same remark may be applied to the 150 acres in Bedford county, with this additional observation, that as Henry W. M. Connor did not execute a deed of conveyance for it at the time of the contract, but a bond for a conveyance, if the 150 acres is lost, or he is otherwise unable to convey, he is liable upon his bond, unless he afterwards made a conveyance agreeably to his bond; and in that case Hibbits would derive the same advantage of being entitled to a warrant for that 206*] quantity, notwithstanding *the opinion of Henry W. M. Connor, as expressed in his letter to Miller to the contrary.

The only remaining ground of argument relied upon in support of the decree of the Circuit Court is, that the consideration agreed to be given for the last assignment has failed, and the assignment ought, therefore, to be set aside. But the consideration agreed upon has not failed. Hibbits, as must be inferred from the deeds for the two tracts of 1,000 acres each, was not to have a good and indefeasible title; but such title only as the grants might give, with the incidental advantages resulting from them by the laws of the country. The 150 acres may constitute a claim for damages, but furnishes no ground for setting aside the assignment of 1817.

This court is of opinion there is not sufficient evidence to show that the assignment, dated the ——— day of June, 1817, was procured by fraud, or undue advantage taken of the situation of Hibbits; and that the said assignment ought not to have been set aside. The decree of the Circuit Court is therefore deemed erroneous, and must be reversed, and the cause remanded to the Circuit Court, with directions to dismiss the bill, with costs.

[Local Law.]

EDWARDS' LESSEE v. DARBY.

Under the act of North Carolina of 1782, for the relief of the officers and soldiers in the continental line, etc. the commissioners having determined that the French lick was within the reservations of the statute, as public property, and having surveyed the said reservation in 1784, the same was protected from the individual survey and location, although it exceeded the quantity of 640 acres.

The French lick reservation has not been since subjected to appropriation, by entry and survey, as vacant land, by any subsequent statute of North Carolina or Tennessee.

*THIS cause was argued by Mr. Talbot for the plaintiff, and by Mr. Eaton for the defendant. [*207

Mr. Justice Trimble delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit Court for the western district of Tennessee.

The plaintiff prosecuted an action of ejectment in that court, to recover possession of a small tract of 20 or 30 acres of land, which had been laid out in lots and squares as part of the town of Nashville, the tenants in possession being the owners or occupiers of such lots.

In the year 1818, Patrick H. Darby appropriated, by entry and survey, all that part of the town from lot No. 141, to lot No. 165, the latter inclusive; and having obtained a grant therefor from the state of Tennessee, he, before the institution of the suit, conveyed the land by deed to Edwards. This was the plaintiff's title.

The legislature of North Carolina, by an act passed in the year 1782, entitled, "An act for the relief of the officers and soldiers in the continental line, and for other purposes therein mentioned," enacted, that certain bounties in land should be granted to the officers and soldiers in the line of that state, on continental establishment.

The seventh section of the act, after reciting that, "Whereas, in May, 1780, an act passed reserving a certain tract of country to be appropriated to the aforesaid purposes, and that it had been represented to the assembly that sundry families had, before the passing of the said act, settled on the said tract of country, enacts that 640 acres of land shall be granted to

each family, or head of a family, and to every single man of 21 years or upwards (to include their improvements), settled on said land before the first day of June, 1780, for which they shall have the right of pre-emption; provided no such grant shall include any salt licks or salt springs, which are hereby declared to be reserved as public property, together with 640 acres of the adjoining lands, for the common use and benefit of the inhabitants of that country, and not subject to future appropriations; and all the remainder of the aforesaid tract of 208*] country *shall be considered as subject to partition as by this act directed."

The eighth section appoints commissioners in behalf of the state, "to examine and superintend the laying off the land in one or more tracts, allotted to the officers and soldiers."

The eleventh section authorizes the commissioners to appoint one or more surveyors, for the more speedy and effectual laying off and surveying said lands.

The commissioners, in the exercise of their powers in carrying this act into effect, determined the French lick to be within the scope of its provisions, and a proper object of such reservation, and caused a survey to be made of said reservation as early as 1784, which turns out to include six hundred and sixty-seven and three-quarter acres, instead of six hundred and forty, and embraces within its limits the whole of the lots laid off in the town of Nashville, and the land covered by the grant to Patrick H. Darby.

In the year 1784, the legislature of North Carolina, by its act, appropriated 200 acres, part of said reservation, for the establishment of the town of Nashville, to be laid off at the bluff on the Cumberland River, nearest the French lick; and commissioners are designated in the act to lay out the proposed town in streets, lots, and squares; to cause a plan thereof to be made out; and to sell and dispose of the lots in the town when thus laid off.

Upon the trial of the general issue in the Circuit Court, after the plaintiff had given in evidence the grant to Darby, and conveyance from Darby to Edwards, already recited, the defendants gave evidence conducing to prove that the survey made of the reservation around the French lick, by the commissioners, as early as 1784, included the whole of the land granted to Darby, and then in controversy; and also, that the commissioners, or trustees, for laying off the town of Nashville, had, in the year ——, laid off and disposed of a part of the town lots; and that, afterwards, the commissioners had laid off and disposed of the additional lots, to 165 inclusive, about the year 1789, or 1790; but it appeared that the quantity of 200 acres was thereby exceeded by 20 or 30 acres, such excess 209*] covering the lots *from 141 to 165 inclusive, but the whole of which lay within the French lick reservation, as laid off by the commissioners about the year 1784.

The court instructed the jury, that if they found the land in controversy, and within Darby's grant, was also within the boundary of the town as actually laid off, although that boundary exceeded the quantity of 200 acres, or if they found it was within the actual survey of the French lick reservation, as laid off in 1784, although it exceeded the quantity of 640 acres, the land was protected from individual appropriation by entry and survey, both by being so within the town boundary as laid off, and within the reservation as laid off, or if not by both, it was so protected by being included within the latter; and that, consequently, the grant to Darby was void.

To this opinion and instruction the plaintiff excepted, and his exception was sealed, and made part of the record.

It is not necessary to decide whether the land in controversy would, or would not, have been protected from individual appropriation by being actually laid off and disposed of as town lots, beyond the quantity of two hundred acres, as we are all of opinion it was so protected by being within the French lick reservation, as laid off.

It is argued, that the commissioners, appointed by the act of 1782, were not authorized to cause surveys to be made of the reservations of 640 acres around the reserved salt licks and springs, that the reservation was by quantity only, and that no legal effect can therefore be attributed to the survey. We admit the statute does not give the authority to survey the reservations, in express terms, but do not admit that the authority may not, and does not, result by necessary implication from the duties they were expressly required to perform, and from the general provisions of the statute. They were not expressly required by the statute to determine what licks and springs were proper objects for reservation, and came within the provisions of the statute; but they were required to lay off and cause to be surveyed the lands granted to the officers and soldiers, subject to, and so as not to interfere with, these reservations. The right of pre-emption granted by law to the settlers, of 640 acres each, including their *settlements, were also to be avoided. [*210 It seems to result necessarily from these provisions, that the commissioners must first determine what were the proper subjects of reservation, and having determined that a given salt lick or spring came within the provisions of the law, the power and duty of laying off by survey the 640 acres reserved, and to be avoided, around the lick, seems necessarily and irresistibly to result to the commissioners, in all cases where they might deem it necessary to do so, in order to enable them to lay off the lands for the officers and soldiers, so as to avoid these reservations. The adjacency of pre-emption rights, too, might render it both necessary and proper that they, as well as the reservations, should be laid off, because both were to be avoided. But more especially, it was indispensable wherever the commissioners were about to lay off lands for the officers and soldiers, adjacent to a salt lick or spring, to have a survey made of the reservation, to give it figure and fixed locality; otherwise, the reservation being of quantity only, without boundary, one of two consequences must have resulted, namely, that it might, lawfully, be encroached upon on one side, and if on one, on any other side; or that, practically, its uncertainty must have excluded a much larger quantity than was intended by law to be reserved from the satisfaction of the claims of the officers and soldiers.

In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. The law was not only thus construed by the commissioners, but that construction seems to have received, very shortly after, the sanction of the legislature. By the third section of an act passed by the legislature of North Carolina in 1789, entitled, "An act directing the sale of the salt licks and springs, with the adjoining land, within the district of Mero," it is enacted, that the commissioners appointed to carry that act into effect "shall cause to be surveyed, where such surveys have not already been made, all the said salt licks and springs, with the six hundred and forty acres of adjoining land."

This provision must be construed as recog-211*] nizing the validity *of, and as ratifying the surveys which had been made by the commissioners under the act of 1782.

The circumstance of the survey containing a considerable surplus we think immaterial. It was a public act, done by a public authorized agent of the government, and afterwards recognized by the government itself. None but the government itself ought, therefore, to be permitted to call it in question.

It is argued, that, however this may be, the legislature, by the act of 1789, above recited, have declared the whole of the reservation, not otherwise appropriated to the Davison Academy, the 200 acres vested in the town, that the land granted to John M. Nairy, to be vacant, unappropriated land, subject to individual appropriation by entry, survey, and grant, in the ordinary mode; and that as the land granted to Darby is not embraced by either of these prior appropriations, his grant is valid.

We are not of that opinion. The second section of the act of 1789 directs the county courts to make out lists "of all the salt licks and springs in their respective counties, which said courts shall deem fit for the purpose of manufacturing salt, including all such licks and springs as were set apart by commissioners heretofore appointed for that purpose, as public property, viz.: Heaton's lick, Denton's lick, the French lick, etc., which list shall be entered on the records of said courts, and copies thereof delivered to the commissioners appointed by this act; and all other salt licks and springs, with the adjoining lands, not deemed by the court fit for the manufacturing of salt, be, and they are hereby declared vacant land, and liable to be located and entered in the same manner as other vacant land."

The act then proceeds to direct how the commissioners appointed by that act shall proceed to sell the salt licks and springs, with the adjoining lands, listed as deemed fit for manufacturing salt. From these provisions, it was obviously the intention of the legislature, that all the salt licks and springs deemed fit for the manufacturing of salt, with the adjoining lands to each, shall be sold in the manner specially directed by the act; and the French lick is, by the act itself, enumerated as one belonging to that class.

212*] *It was only those not deemed fit for the manufacture of salt, with the reserved lands adjoining them, that were declared vacant land, subject to be appropriated by location and entry. We can discover no other law of North Carolina, or of Tennessee, which subjects the reservation about any of the licks deemed fit for manufacturing salt, to appropriation by entry and survey, as vacant land.

We, therefore, accord in opinion with the Circuit Court, that the grant to Patrick H. Darby is void.

The Circuit Court, as appears by the bill of exceptions, permitted evidence to be given, for the purpose of showing the court had no jurisdiction; and instructed the jury, that if they believed the facts which this evidence conduced to prove, the court had no jurisdiction over the cause. This was certainly irregular and improper. The jury were sworn to try the general issue, and the facts involved in it, not to try facts involved in a question of jurisdiction.

The instructions of the court were calculated to lead and divert the attention of the jury from the subjects of inquiry properly before them, to others in no way connected with the issue. For this error, the judgment of the Circuit Court must be reversed, the cause remanded to the Circuit Court, with directions to set aside the verdict, and for new proceedings to be had therein, not inconsistent with the judgment of this court.

[Practice.]

DEVEREAUX

v.

MARR.

This court cannot take jurisdiction of a question on which the opinions of the judges of the Circuit Court are opposed, where the division of opinion arises upon some proceeding subsequent to the decision of the cause in that court.

IN this case, the judges of the Circuit Court of West Tennessee, after a judgment had been rendered in that court, *divided in [*213 opinion upon the question as to the amount of the security bond, to be given by the party applying for a writ of error, whether the amount of the bond ought to be sufficient to cover the whole debt, or only for the costs and increased damages on the party failing to prosecute his writ of error with effect. Whereupon the division of opinions was certified to this court, under the 6th section of the judiciary act of the 29th April, 1802, ch. 291.

The cause was argued by Mr. Eaton for the plaintiff, and by Mr. White for the defendant.

This court was of opinion that it had no jurisdiction of the question on which the opinions of the judges of the Circuit Court were opposed, the division of opinions having arisen after the decision of the cause in that court.

Certificate accordingly.

[Constitutional Law.]

OGDEN, Plaintiff in Error,
v.
SAUNDERS, Defendant in Error.

The power of Congress "to establish uniform laws on the subject of bankruptcies throughout the United States," does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by Congress, and the state laws conflict with those of Congress.

A bankrupt or insolvent law of any state, which discharges both the person of the debtor, and his future acquisitions of property, is not "a law impairing the obligation of contracts," so far as respects debts contracted subsequent to the passage of such law.

But a certificate of discharge, under such a law, cannot be pleaded in bar of an action brought by a citizen of another state, in the courts of the United States, or of any other state than that where the discharge was obtained.

ERROR to the District Court of Louisiana.

This was an action of assumpsit, brought in 214*] the court below *by the defendant in error, Saunders, a citizen of Kentucky, against the plaintiff in error, Ogden, a citizen of Louisiana. The plaintiff below, declared upon certain bills of exchange, drawn on the 30th of September, 1806, by one Jordan, at Lexington, in the state of Kentucky, upon the defendant below, Ogden, in the city of New York (the defendant then being a citizen and resident of the state of New York), accepted by him at the city of New York, and protested for non-payment.

The defendant below pleaded several pleas, among which was a certificate of discharge under the act of the legislature of the state of New York, of April 3d, 1801, for the relief of insolvent debtors, commonly called the three-fourths act.

The jury found the facts in the form of a special verdict, on which the court rendered a judgment for the plaintiff below, and the cause was brought by writ of error before this court. The question, which arose under this plea as to the validity of the law of New York as being repugnant to the constitution of the United States, was argued at February term, 1824, by Mr. Clay, Mr. D. B. Ogden, and Mr. Haines for the plaintiff in error, and by Mr. Webster and Mr. Wheaton for the defendant in error, and the cause was continued for advisement until the present term. It was again argued at the present term (in connection with several other causes standing on the calendar, and involving the general question of the validity of the state bankrupt, or insolvent laws), by Mr. Webster and Mr. Wheaton against the validity, and by the Attorney-General, Mr. E. Livingston, Mr. D. B. Ogden, and Mr. Jones, and Mr. Sampson, for the validity.

The editor has endeavored to incorporate the substance both of the former and the present argument, into the following summaries:

Mr. Wheaton argued that the state laws now in question were repugnant to the constitution of the United States, upon two grounds:

1st. That the power of establishing "uniform laws on *the subject of bankruptcies [*215 throughout the United States" was exclusively vested in Congress.

2d. That the state laws in question were "laws impairing the obligation of contracts," the power of passing which was expressly prohibited to the states.

1. The state laws, the validity of which is now drawn in question, are, the act of the legislature of New York of the 3d of April, 1801, for the relief of insolvent debtors on the application of three-fourths of their creditors, by discharging their persons, and future property, from liability for their debts, upon a cessio bonorum, and the act of the 3d of April, 1813, granting the same relief upon the application of two-thirds of the creditors. The judgment of one of the learned judges of this court, in the case of Golden v. Prince, was referred to in this part of the argument, and its reasoning relied upon, to show that the power of establishing uniform laws on the subject of bankruptcies throughout the Union was, from its nature, an exclusive power, and that the exercise of a similar power on the part of the states was inconsistent.[1]

2. These legislative acts are laws impairing the obligation of contracts. That they are such, in respect to contracts in existence when the laws are passed, has already been determined by the court upon solemn argument.[2] It was also supposed to have been decided, that, in such a case, it was immaterial whether the contract was made before or after the passage of the law.[3] But the whole question might now be considered as open for discussion.

To determine it, the nature and terms of the constitutional prohibition must be examined. "No state," etc., "shall coin money, emit bills of credit, make anything but gold and silver coin a tender in the payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." These are comprehensive terms, studiously designed to restrain the state legislatures, from acts of *injustice, both in criminal and civil [*216 matters. And (1) the prohibition of issuing bills of credit, or making anything but gold and silver coin a tender in the payment of debts, was intended to cut up paper money by the roots. The commercial credit of the nation had severely suffered from this fatal scourge; and the anxiety to be relieved from it, was one of the most pressing motives which induced the formation of the new constitution. It might, perhaps, be doubted, whether the power of coining money, which was given to Congress, and denied to the states, taken in connection with the prohibition to them to emit bills of credit, or make anything but gold and silver coin a tender in the payment of debts, was not intended to give to Congress the exclusive power of regulating the whole currency of the country; although the framers of the constitution probably did not foresee how completely this provision would be evaded by the

NOTE.—As to the constitutionality of state insolvent laws, see note to 4 L. ed. U. S. 529, and cases, 4 L. ed. U. S. 552, 5 L. ed. U. S. 224.

1.—5 Hall's Law Journ. 502, 508.

2.—Sturges v. Crowninshield, 5 Wheat. Rep. 122; Farmers' and Mechanics' Bank v. Smith, 6 Wheat. Rep. 131.

3.—M'Millan v. M'Neil, 4 Wheat. 209.

multiplication of banking corporations in the different states. The term "bills of credit," alone, would reach the ordinary case of paper money; but the prohibition of tender laws was meant to expand the same thought so as to reach valuation and appraisement laws, and all that prolific brood of similar pernicious enactments which disfigure the pages of our history from the peace of 1783 until the establishment of the present constitution in 1789. (2) "Bills of attainder, and ex post facto laws," were prohibited, in order to restrain the state legislatures from oppressing individuals by arbitrary sentences, clothed with the forms of legislation, and from making retrospective laws applicable to criminal matters.[1] (3) The prohibition of "laws impairing the obligation of contracts," was intended to prevent the remaining mischiefs which experience had shown to flow from legislative interferences with contracts, and to establish a great conservative principle, under which they might be protected from unjust acts of legislation in any form.

To give complete effect to this last salutary prohibition, the court has constantly given it an interpretation sufficiently broad and liberal to accomplish the ends which the framers 217*] *of the constitution had in view. For this purpose the prohibition has been considered as extending to contracts executed, as well as executory; to conveyances of land, as well as commercial contracts; to public grants from the state to corporations and individuals, as well as private contracts between citizens; to grants and charters in existence when the constitution was adopted, as well as those existing previously, and even before the revolution; and to compacts between the different states themselves.[2] In most of these cases, the impairing act was applied to a specific contract or grant, and affected only the rights of particular individuals. But the principles laid down by the court apply to whole classes of contracts; and surely it will not be pretended, that a law repealing all charters of a certain description, or impairing a general description of contracts, or abolishing all debts of a certain nature, would not be reached by the prohibition. The constitution necessarily dealt in general terms; and such is the intrinsic ambiguity of all human language, that it could not entirely avoid difficulties of interpretation. But the fault of tautology has never been imputed to this instrument, and terms of such significant import would hardly have been added to this clause, if it had been intended merely to repeat and amplify the same thought which had already been expressed in the prohibition of paper money, and other tender laws. On the other hand, if it had been intended merely to prohibit those particular species of laws impairing the obligation of contracts, which the history of the times shows to have been the object of peculiar censure, they would have been mentioned by name. Paper money and tender laws may be, and undoubtedly are, laws impairing the obligation of contracts; but they were such notorious and flagrant evils, that it was deemed necessary to prohibit them expressly, and by name. But the convention would have stopped there, had they not *intended to include any, and every [*218 law, impairing the obligation of contracts. And if they had intended to include only such as installment and suspension laws, they would have mentioned them specifically. It is believed that the reasoning of the court in Sturges v. Crowninshield is conclusive on this head. This reasoning receives confirmation from the historical fact, that in the original draughts of the proposed constitution, this prohibition of laws impairing the obligation of contracts was not included, although the other prohibitions were contained both in Mr. C. Pinckney's draught, and in that of the committee of nine. The prohibition now in question was subsequently added in the revised draught, which shows, at least, that it was studiously inserted.[3]

Since, then, the convention intended to prohibit every possible mode in which the obligation of contracts might be violated by state legislation, the question recurs, are state bankrupt laws within the prohibition? The clause must be construed in connection with other parts of the constitution, and must be considered with reference to those extrinsic circumstances in the then condition of the country which affect the question. One of the great objects of the constitution was to restore violated faith, and to raise the country from that state of distress and degradation into which it had been plunged by the want of a regular administration of justice in the relation of debtor and creditor. The motives for giving the power of establishing bankrupt laws to Congress are explained in the cotemporaneous expositions of the constitution.[4] Had not this power been granted to the Union, it might have been argued with more show of reason, that the states were not meant to be prohibited from exercising the power so as to impair the obligation of contracts. In enumerating the prohibitions to the states, each particular class of laws was not specified, for the reasons before mentioned. The plan of the framers of the constitution excluded this prolixity of detail. Even in *the Federalist, the authors have only [*219 commented upon such parts as were subjected at the time to popular discussion. Their observations upon the present subject are very general and concise; not, as has been supposed, because the concession by the state was not so extensive as we now contend, but because it was almost universally regarded as indispensably necessary.

It is said, in a learned judgment delivered from a tribunal entitled to great respect, that all contracts are to be construed and executed according to the lex loci contractus, and the obligation of the contract is, what the law of the place makes it. Hence it is inferred, that the insolvent laws of the state in which any contract is made, form a part of the obligation of the contract.[5]

1.—Calder et ux. v. Bull, 3 Dall. Rep. 386.

2.—Fletcher v. Peck, 6 Cranch, 87; New Jersey v. Wilson, 7 Cranch, 164; Terrett v. Taylor, 9 Cranch, 43; Town of Pawlet v. Clark, 9 Cranch, 292; Dartmouth College v. Woodward, 4 Wheat. Rep. 518; Society, etc. v. New Haven, 8 Wheat. Rep. 464, 481; Green v. Biddle, 8 Wheat. Rep. 1.

3.—Journ. Fed. Convention, 79, 227, 359.

4.—Federalist, No. 42.

5.—Mather v. Bush, 16 Johns. Rep. 233, 249, per Spencer, Ch. J.

The principle may be admitted without conceding the inference. It is sought to be illustrated by supposing the law incorporated into the agreement of the parties. But it is only to suppose the clause of the constitution now in question to be also inserted in their agreement, and it will be seen that this imaginary reference of the contracting parties to any particular law, leaves the question just where it found it. To this reasoning may be opposed the authority of another learned judge of the same state, who, though he expresses an opinion that the prohibition ought to be applied to restrospective laws only, repudiates this argument. "For," says he, "if parties are to be presumed to contract with reference to existing laws, they must be presumed to mean laws made in pursuance of the constitution."[1] And it may be added, that the same argument would apply with equal force to a law making paper money, or anything else but gold and silver coin, a tender in the payment of debts. But it will hardly be pretended that the existence of such a law at the time and place where the debt was contracted, would prevent the creditor from recovering it in specie.

It may, indeed, be admitted, that there is a difficulty in distinguishing between the obligation of a contract and the remedy given by the law to enforce it. It may be admitted, 220*] *that the states have a right to modify the remedy, so far as respects their own courts; that the lex fori may be changed in many respects; that the process for the collection of debts may be altered; still it does not follow, that a law taking away all remedy whatever, and, in effect, abolishing the debt, would be a valid act. Unless such an act be a law impairing the obligation of contracts, it is difficult to conceive of such a law. Wherever there is a right, there must be a remedy.[2] The remedy may be modified, but it may not be so modified as to impair or destroy the obligation. A discharge of the person only, upon a cessio bonorum, under a state insolvent law, may not impair the obligation of his contracts, and may be effectual within the territory of the state, and in the state courts. But a discharge of the person, and the future acquisitions of property of the debtor, under a state bankrupt law, absolutely extinguishes the debt, and cannot, therefore, be valid in any place where the authority of the constitution of the United States extends. The distinction between bankrupt and insolvent laws is sufficiently clear for all practical purposes. Both in Great Britain and on the European continent, the bankrupt laws are limited to merchants and traders, and the discharge is absolute. On the other hand, both by the insolvent system of England, and the cessio bonorum of the countries governed by the Roman civil law, the benefit of the cession is extended to all classes of persons; but it discharges the person only, leaving the subsequent acquisitions of the debtor liable to the demands of his creditors.[3] The cessio bonorum does not, therefore, impair the obligation of the contract. It only suspends and modifies the remedy. "Neither a civil nor a natural obligation (says Ayliffe) is dissolved by a cessio bonorum; though it produces a good exception in law, and suspends the force of an obligation for a time; the extinguishment of an obligation being one thing, and the cessation *of it [*221 another; for, when an obligation is once extinct, it never revives again."[4]

Supposing, then, that the prohibition ought to be construed as extending to state bankrupt laws, what reason is there to believe that the convention meant to restrict it to laws operating upon existing contracts only? They had already expressly prohibited retrospective laws in criminal matters; and retrospective laws, applicable to civil cases, hardly required any positive and express prohibition. In every system of jurisprudence such laws are considered as contrary to the first principles of natural justice; and even in those countries where the courts do not feel themselves at liberty to disobey the will of the legislature when clearly expressed, however unreasonable or unjust, they will not give effect to it unless it is thus expressed.[5] Had retrospective laws, affecting vested rights acquired under contracts, been alone intended, more appropriate and restrictive terms would have been used. But, thus limited in its operation, the prohibition would have been wholly ineffectual. The prohibition of paper money, and tender laws, was certainly meant to apply to prospective, as well as retrospective acts. To prohibit debts from being compulsively satisfied with anything but gold and silver coin, and yet to permit the states to make laws for discharging debts without payment of any kind, is an absurdity of which the convention cannot be suspected. It is universally admitted, that the prohibition covers installment and suspension laws. These confessedly involve all the mischiefs meant to be corrected; and yet we are told the states may pass them ad libitum, provided they only make them prospective in their operation. The history of the times will show that many of the laws which the convention must have had in their eyes, were prospective, either in effect, or in express terms.[6] *The prohibition [*222 is associated in the same clause with other prohibitions, all intended to promote the same object—that of securing the observance of good faith in matters of contract. "No state shall make anything but gold and silver coin a tender in the payment of debts," or "pass any law impairing the obligation of contracts." What debts? All debts, both those contracted before and after the passage of the tender law. What contracts? All contracts, both those made before, and those made after the impairing law.

What is this "obligation of contracts," which is prohibited from being impaired by any act of state legislation? We answer, it is the civil obligation, the binding efficacy, the coersive power, the legal duty of performing the con-

1.—Per Kent, Ch. 7 Johns. Ch. Rep. 376.

2.—3 Bl. Com. 23.

3.—Inst. de Act. s. 40; Dig. l. 4; De cessione bonorum, 3 Pothier; Pandect. Just. in Nov. Ord. Dig. 174, B. 42; Encyclop. Meth. art. Jurisprudence, Cession. Code du Commerce, art. 568; Kent's Com. Vol. I. p. 396; 16 Johns. Rep. 244, 245, note (a) (b).

4.—Ayliffe's Civ. Law, l. 4, tit. 1.

5.—Bracton, l. 4, fol. 228; Dig. 50, 17, 75; Code Napoleon, art. 2; Dash v. Van Kleeck, 7 Johns. Rep. 477, 500; Kent's Comm. Vol. I. part 3. lect. 20.

6.—State Papers, Vol. I. p. 23; Mr. Hammond's correspondence with Mr. Jefferson.

tract. The constitution meant to preserve the inviolability of contracts, as secured by those eternal principles of equity and justice which run throughout every civilized code, which form a part of the law of nature and nations, and by which human society, in all countries and all ages, has been regulated and upheld. It is said that the obligation of contracts is derived from the municipal law alone: Obligatio est juris vinculum, quo necessitate astringimur alicujus rei solvendæ secundum nostræ civitatis jure.[1] This is what we deny. It springs from a higher source; from those great principles of universal law, which are binding on societies of men as well as on individuals. The writers on natural law are full of this subject.[2] And the court itself has given a practical 223*] *exposition to the clause, which cannot be reconciled to the supposition, that the obligation of contracts depends alone on the municipal laws of the states. In the case of Green v. Biddle,[3] it was determined, that certain acts of Kentucky were repugnant to the constitution of the United States, as impairing the obligation of the compact of 1789, between the states of Virginia and Kentucky, respecting the titles to land in the latter state. Here the contract was a treaty between two sovereign states of the Union. Whence was its obligation derived but from the law of nature and nations?

When it is contended that the obligation of contracts depends upon universal law, it is not meant to assert that the state legislatures may not change their present municipal codes. But it is denied that they may change them so as to affect that "great principle which the convention intended to establish that contracts should be inviolable." Many perplexing cases may be imagined, where it would be difficult to ascertain the precise extent to the constitutional limitation upon the power of the states. In a new system of government, so complicated as ours, it will not be easy, nor is it necessary, to adjust by anticipation the precise limits of its conflicting authorities. "Moral lines are strong and broad," and it is not possible to 224*] mark them with mathematical *precision. What we insist upon is, that the prohibition was designed to guarantee to the people of the whole Union, of each state, and to foreigners, the inviolability of contracts, the impartial administration of civil justice, the observance of good faith, that ligament of the social union, so as to enforce the execution of agreements in some effectual mode. The prohibition is universal. All manner of contracts are included in it, and their obligation is forbidden from being impaired by any legislative act whatsoever. "No state shall pass any law impairing the obligation of contracts." It is not merely any law impairing a particular contract, but it is any law impairing the obligation, or binding efficacy of contracts in general. It is any such law, general or special, applicable to a specific contract, or to all contracts, or to a particular class of contracts; to contracts made between citizens of the same state, or with citizens of different states, or aliens; between the state and individuals or corporations, and between the states themselves; whether the contract was in existence when the constitution was adopted, or subsequently made; and (as we contend) whether the law was made subsequent to the contract, or the contract to the law. It has, indeed, been attempted to carve out of the universality of the prohibition, an implied exception of such laws as were in existence when the constitution was formed, or which the states had been accustomed to pass in the ordinary course of their domestic legislation. But nothing can be more arbitrary than this distinction. It is said, that insolvent laws were in existence when the constitution was formed and adopted, and had existed from very early colonial times. So were paper money and tender laws, installment and suspension laws. Yet these are confessedly meant to be prohibited; and whenever such laws have been inadvertently or designedly passed by any state since the adoption of the constitution, no care has been taken to make them prospective only in their operation. If it be said that paper money and tender laws are expressly prohibited, the answer is, that the extent of the prohibition does not depend upon the particular kind of law being specified, but that, if it is once ascertained that any law falls within the general prohibition, its being limited to future cases only will not rescue *it from the grasp of that prohibition. [*225 The general legislative power of the states over contracts is left untouched by the clause in question. The states may still provide what shall, and what shall not, be the lawful subject of contracts; in what form they shall be made, and whether in writing, under seal or by parol; and by what solemnities they shall be attested; who may contract, and who are disabled from contracting; what contracts are forbidden by the policy of the state, either as respects its internal commerce, its police, its

1.—Just. Inst. l. 3, tit. 14.

2.—Grotius (De J. B. de P.): "On this subject we are supplied with noble arguments from the divine oracles, which inform us that God himself, who can be limited by no established rules of law, would act contrary to his own nature, if he did not perform his promises. From whence it follows, that the obligation to perform promises, spring from the nature of that unchangeable justice, which is an attribute of God, and common to all who bear his image in the use of reason." B. 2, ch. 11, s. 1. "It is a most sacred command of nature, and guides the whole order of human life, that every man fulfill his contracts." B. 3, ch. 4, s. 2.

Burlamaqui: "It is as ridiculous to assert that before the establishment of civil laws and society, there was no rule of justice to which mankind were subject, as to pretend that truth and rectitude depend on the will of man, and not on the nature of things." Vol. II. p. 158.

Vattel, Droit des Gens: "It is shown by the law of nature, that he who has made a promise to any one, has conferred on him a true right to require the thing promised; and that, consequently, not to keep a perfect promise, is to violate the right of another, and is as manifest an injustice as that of depriving a person of his property. There would be no more security, no longer any commerce between mankind, did they not believe themselves obliged to preserve their faith and to keep their word. This obligation is then as necessary as natural, and indubitable, between the nations that live together in a state of nature, and acknowledge no superior on earth, to maintain order and peace in their society." B. 2, ch. 12, s. 163.

Pothier, des Obligations: "Natural law is the cause, mediately at least, of all obligations; for if contracts, torts, and quasi torts, produce obligations, it is because the natural law ordains that every one should perform his promises, and repair the wrongs he has committed." Pt. 1, ch. 1.

3.—8 Wheat. Rep. 1.

4.—Sturges v. Crowinshield, 4 Rep. 206.

health, its finances, its morals. In short, the dominion of the states over the entire field of civil legislation is complete, except so far as it has been surrendered, expressly, or by fair implication, to the national government, or as its exercise is expressly prohibited to the states. But still the question recurs, how far has it been surrendered, and how far has its exercise thus been prohibited? The states may enact laws forbidding certain kinds of contracts from being made; or any contract being made by certain individuals; or requiring them to be made in certain prescribed forms, and attested with certain solemnities, and proved by certain species of testimony. Contracts made contrary to these regulations may be void in their inception, and never have a legal obligation; or those which are permitted to be made, may be discharged by performance, by payment, or by prescription and the presumption arising from the lapse of time as a rule of evidence. The states may make any and all regulations respecting contracts, provided they do not include among these regulations a provision that lawful contracts shall have no obligation. The constitution makes the binding obligation an inseparable incident to the contract. Without doubt, the supreme power of the nation may make laws impairing the obligation of contracts. Congress, not being prohibited in the constitution, may make laws having that effect, wherever it is a necessary consequence of the exercise of any legislative power given by the constitution. Thus, the war-making power necessarily involves in its exercise the dissolution of contracts of affreightment, and charter-party of insurance, and partnership, and other conventions connected with a commercial intercourse with the public enemy. But the radical vice of the opposite argument consists in as- [*226] suming that the *states are supreme in respect to this matter. They have parted with the power of making all laws impairing the obligation of contracts, and they have given the power to Congress, so far as it is involved in the enactment of bankrupt laws, or of any other law which Congress has authority to make.

As to what may be said in respect to the consequences of the decision, the court is called upon to pronounce, they have been very much exaggerated in all the discussions which have taken place on this subject. Few of the states have ever had bankrupt laws. Most of them have confined their regulations to a discharge of the person only. Others have already modified their insolvent laws, and conformed them to the recent decisions of this court. There is a general disposition to acquiesce in those decisions. The person of the debtor is everywhere free. The statute of limitations is fast obliterating stale demands; and it is consolatory to believe, that although the perseverance of this high tribunal, in its former resolutions, might be attended with some temporary and partial evils, they would soon find their appropriate remedy in the exertion of the constitutional power of Congress. Whatever difficulties may attend the question, relating to a uniform code of bankrupt laws, they must ultimately be overcome by the legislative wisdom of the country. The establishment of such a code is imperiously demanded by our peculiar situation as a confederacy of numerous states, closely connected by an active commercial intercourse, with various partial and conflicting regulations concerning the relation of debtor and creditor; by the policy of reciprocating the laws of foreign countries upon the same subject; and by the general interests of commerce, interwoven as they are with our grandeur and power as a nation, and with all the sources of public and private prosperity.

The Attorney-General, Mr. E. Livingston, Mr. Clay, Mr. D. B. Ogden, Mr. Jones, Mr. Sampson, and Mr. Haines, argued, contra, (1) that the power of establishing "uniform laws on the subject of bankruptcies throughout the United States," as given to Congress in the constitution, was not exclusive of the states over the same subject. (2) That the laws of the *state of New York, now in ques- [*227 tion, were not laws "impairing the obligation of contracts," in the sense of the constitution.

[The editor regrets that, from the number of counsel who argued on this side of the question, and the great variety of topics insisted on by them, he has been obliged to condense the whole argument into the following summary, which he hopes will be found to contain the substance of their reasoning, although it does not distinctly assign to each his appropriate portion of the argument, and is far from doing justice to the learning, eloquence, and ability with which the subject was discussed.]

1. It was stated to be the settled doctrine of this court, that any state of the Union has a right to pass a bankrupt law, provided such law does not impair the obligation of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law. Although some of the powers of Congress are exclusive, from their nature, without any express prohibition of the exercise of the same powers by the states, the power of establishing bankrupt laws is not of this description.[1] The court had determined that the right of the several states to pass bankrupt laws is not extinguished by the enactment of a uniform bankrupt law throughout the Union by Congress, but only suspended so far as the two laws conflict.[1] One of the laws of New York, now in question, was originally passed on the 21st of March, 1788, was re-enacted in 1801, among the revised laws of that year, and continued in force until long after the discharge of the plaintiff in error was obtained. And although a uniform bankrupt law of Congress was in force during a part of this period, it was repealed before the discharge; and, consequently, supposing the state insolvent law did conflict in any respect with the bankrupt law of Congress, it was [illegible] so far, suspended in its operation, and [illegible] the repeal of the law of Congress, was re[illegible] in all its effects. The other act—that of 18[illegible] was *passed after the repeal of the bank- [*[illegible] rupt law of Congress of 1800.

But supposing this to be an open question, in order to determine it, it was said to be necessary to look, not merely at the great fe[illegible] objects for which the constitution was ordained, but to the antecedent condition of the p[illegible]

1.—Sturges v. Crowinshield, 4 Wheat. Rep. 19[illegible] Wheat. 12[illegible]

to the compact. They were soverign states, with all the powers of municipal government, which they had long exercised; and with regard to this particular power of passing insolvent and bankrupt laws, they had been in the actual exercise of it for many years before the adoption of the constitution, and even from the earliest colonial times. The English bankrupt laws, and the temporary acts which were occasionally passed by the British parliament for the relief of insolvent debtors, were not extended to the colonies. The several states had insolvent laws in force at the adoption of the constitution, and they continued, after the adoption, to alter, revise, and re-enact those laws, manifestly unconscious that they had parted with this power. This was, indeed no proof that they had not parted with it, if there was any other party having at once a right and an interest to make the objection. But the people of the Union, represented in Congress, so far from contesting the power of the states over this matter, had never exercised the power of making bankrupt laws, except in a single instance, and then with an express saving of the state insolvent laws.[1] So, the people of the several states, represented in their respective local legislatures, had all exercised this power. Here, then, was a significant declaration of the people that they had not parted with this power in their state capacities; and that the grant of a similar authority, in their new capacity of a federal union, did not, by the mere grant of it, exclude the exercise of it by them in their state capacities, at least until superseded by a general and permanent law of Congress. Cotemporaneous construction had always been considered as of great weight in matters of constitutional law; and in the ques- 229*]tion relating to the power of Congress *to establish such corporations as the Bank of the United States, was considered as decisive. There are only three cases in which the states are excluded from the exercise of any power antecedently possessed by them. (1) When a power is granted to Congress in exclusive terms. (2) When the states are expressly prohibited from exercising it in a specific form. (3) When a power is granted to Congress the cotemporaneous exercise of which by the states would be incompatible. It was not asse-ted on the other side that the power now in question falls under either of the two first heads; nor could it, by any fair course of reasoning be shown to fall under the third head, of being an incompatible power, except when the incompatibility arises from its actual exercise by Congress. The grant of the power of establishing "a uniform rule of naturalization," and "uniform laws on the subject of bankruptcies," being contained in the same clause, and expressed in similar terms, had justly been considered as subject to the same interpretation. Before the adoption of the constitution, the states had various incongruous rules of naturalization, and laws on the subject of bankruptcies, some of which discharged the person only of the debtor, and others his future acquisitions of property. Then came this provision of the constitution, which manifestly looks to the antecedent condition of things existing in the several states. The word "uniform" was significantly used as applicable to that condition of things. In any other view, the expression has no peculiar meaning, and does not qualify the general grant of power; for all the laws of Congress, on general subjects, are necessarily "uniform throughout the United States." The censure of the state regulations, implied in the terms in which the power to correct them is given to Congress, was pointed against their want of uniformity. The policy and necessity both of bankrupt and naturalization laws, was clearly recognized. The sole object of granting to Congress any power over these subjects, was to secure that uniformity which the conflicting regulations of the different states could not attain. But the terms in which the grant is conceived were not mandatory. Congress was left free to exercise it, or not, at its discretion; and the only *consequence of an [*230 actual exercise of the power by Congress, was to supersede, during such exercise, the state laws, so far as they conflict with the laws of Congress.[2]

2. The clause relied upon as virtually abolishing this power, is found in a subsequent and remote section of the constitution, wherein, after an enumeration of certain specified laws which the states may not pass, it is added, "nor any law impairing the obligation of contracts." From this it was inferred, that the states cannot pass bankrupt laws, although the power is not exclusive in Congress. The states may pass bankrupt laws, it had been said, provided they do not impair the obligation of contracts. But all bankrupt laws do impair the obligation of contracts; i. e., they discharge the debtor from his debts without payment; and, therefore, the states cannot pass them, even when the power is not actually exercised by Congress. It had, however, been conceded, that they may pass insolvent laws which discharge the person only, because these do not impair the obligation, but only effect the remedy. It had been said they affect the remedy only, because they still leave the obligation entire to be enforced against the future property of the debtor. But suppose the state law should deny the creditor any power of coercion whatever, whether against the body or the estate of the debtor, it would still act upon the remedy only, and yet would strip the contract of all its binding efficacy, except merely that moral obligation, that scintilla juris, which, though it might form a sufficient consideration for a new promise, was in itself no ground of action. As the obligation of the contract does not depend upon municipal law, the withdrawal of all the means of coercion which that law *gives, can- [*231 not impair the obligation, since it only takes away the remedy. Thus, according to this distinction between the right and the remedy,

1.—Bankr. Law of 1800, ch. 173, s. 61.

2.—"It may be exercised or declined as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws on the subject of bankruptcies ought not to be established, it does not follow that partial laws many not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts."—Sturges v. Crowninshield, 4 Wheat. Rep. 196.

health, its finances, its morals. In short, the dominion of the states over the entire field of civil legislation is complete, except so far as it has been surrendered, expressly, or by fair implication, to the national government, or as its exercise is expressly prohibited to the states. But still the question recurs, how far has it been surrendered, and how far has its exercise thus been prohibited? The states may enact laws forbidding certain kinds of contracts from being made; or any contract being made by certain individuals; or requiring them to be made in certain prescribed forms, and attested with certain solemnities, and proved by certain species of testimony. Contracts made contrary to these regulations may be void in their inception, and never have a legal obligation; or those which are permitted to be made, may be discharged by performance, by payment, or by prescription and the presumption arising from the lapse of time as a rule of evidence. The states may make any and all regulations respecting contracts, provided they do not include among these regulations a provision that lawful contracts shall have no obligation. The constitution makes the binding obligation an inseparable incident to the contract. Without doubt, the supreme power of the nation may make laws impairing the obligation of contracts. Congress, not being prohibited in the constitution, may make laws having that effect, wherever it is a necessary consequence of the exercise of any legislative power given by the constitution. Thus, the war-making power necessarily involves in its exercise the dissolution of contracts of affreightment, and charter-party of insurance, and partnership, and other conventions connected with a commercial intercourse with the public enemy. But the radical vice of the opposite argument consists in as-
226*] suming that the *states are supreme in respect to this matter. They have parted with the power of making all laws impairing the obligation of contracts, and they have given the power to Congress, so far as it is involved in the enactment of bankrupt laws, or of any other law which Congress has authority to make.

As to what may be said in respect to the consequences of the decision, the court is called upon to pronounce, they have been very much exaggerated in all the discussions which have taken place on this subject. Few of the states have ever had bankrupt laws. Most of them have confined their regulations to a discharge of the person only. Others have already modified their insolvent laws, and conformed them to the recent decisions of this court. There is a general disposition to acquiesce in those decisions. The person of the debtor is everywhere free. The statute of limitations is fast obliterating stale demands; and it is consolatory to believe, that although the perseverance of this high tribunal, in its former resolutions, might be attended with some temporary and partial evils, they would soon find their appropriate remedy in the exertion of the constitutional power of Congress. Whatever difficulties may attend the question, relating to a uniform code of bankrupt laws, they must ultimately be overcome by the legislative wisdom of the country. The establishment of such a code is imperiously demanded by our peculiar situation as a confederacy of numerous states, closely connected by an active commercial intercourse, with various partial and conflicting regulations concerning the relation of debtor and creditor; by the policy of reciprocating the laws of foreign countries upon the same subject; and by the general interests of commerce, interwoven as they are with our grandeur and power as a nation, and with all the sources of public and private prosperity.

The Attorney-General, Mr. E. Livingston, Mr. Clay, Mr. D. B. Ogden, Mr. Jones, Mr. Sampson, and Mr. Haines, argued, contra, (1) that the power of establishing "uniform laws on the subject of bankruptcies throughout the United States," as given to Congress in the constitution, was not exclusive of the states over the same subject. (2) That the laws of the *state of New York, now in ques- [*227
tion, were not laws "impairing the obligation of contracts," in the sense of the constitution.

[The editor regrets that, from the number of counsel who argued on this side of the question, and the great variety of topics insisted on by them, he has been obliged to condense the whole argument into the following summary, which he hopes will be found to contain the substance of their reasoning, although it does not distinctly assign to each his appropriate portion of the argument, and is far from doing justice to the learning, eloquence, and ability with which the subject was discussed.]

1. It was stated to be the settled doctrine of this court, that any state of the Union has a right to pass a bankrupt law, provided such law does not impair the obligation of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law. Although some of the powers of Congress are exclusive, from their nature, without any express prohibition of the exercise of the same powers by the states, the power of establishing bankrupt laws is not of this description.[1] The court had determined that the right of the several states to pass bankrupt laws is not extinguished by the enactment of a uniform bankrupt law throughout the Union by Congress, but only suspended so far as the two laws conflict.[1] One of the laws of New York, now in question, was originally passed on the 21st of March, 1788, was re-enacted in 1801, among the revised laws of that year, and continued in force until long after the discharge of the plaintiff in error was obtained. And although a uniform bankrupt law of Congress was in force during a part of this period, it was repealed before the discharge; and, consequently, supposing the state insolvent law did conflict in any respect with the bankrupt law of Congress, it was only so far, suspended in its operation, and upon the repeal of the law of Congress, was revived in all its effects. The other act—that of 1813—was *passed after the repeal of the bank- [*228
rupt law of Congress of 1800.

But supposing this to be an open question, in order to determine it, it was said to be necessary to look, not merely at the great federal objects for which the constitution was ordained, but to the antecedent condition of the p[illegible]

1.—Sturges v. Crowinshield, 4 Wheat. Rep. 122. Wheat. 12.

to the compact. They were soverign states, with all the powers of municipal government, which they had long exercised; and with regard to this particular power of passing insolvent and bankrupt laws, they had been in the actual exercise of it for many years before the adoption of the constitution, and even from the earliest colonial times. The English bankrupt laws, and the temporary acts which were occasionally passed by the British parliament for the relief of insolvent debtors, were not extended to the colonies. The several states had insolvent laws in force at the adoption of the constitution, and they continued, after the adoption, to alter, revise, and re-enact those laws, manifestly unconscious that they had parted with this power. This was, indeed no proof that they had not parted with it, if there was any other party having at once a right and an interest to make the objection. But the people of the Union, represented in Congress, so far from contesting the power of the states over this matter, had never exercised the power of making bankrupt laws, except in a single instance, and then with an express saving of the state insolvent laws.[1] So, the people of the several states, represented in their respective local legislatures, had all exercised this power. Here, then, was a significant declaration of the people that they had not parted with this power in their state capacities; and that the grant of a similar authority, in their new capacity of a federal union, did not, by the mere grant of it, exclude the exercise of it by them in their state capacities, at least until superseded by a general and permanent law of Congress. Cotemporaneous construction had always been considered as of great weight in matters of constitutional law; and in the ques- [*229] tion relating to the power of Congress *to establish such corporations as the Bank of the United States, was considered as decisive. There are only three cases in which the states are excluded from the exercise of any power antecedently possessed by them. (1) When a power is granted to Congress in exclusive terms. (2) When the states are expressly prohibited from exercising it in a specific form. (3) When a power is granted to Congress the cotemporaneous exercise of which by the states would be incompatible. It was not asserted on the other side that the power now in question falls under either of the two first heads; nor could it, by any fair course of reasoning be shown to fall under the third head, of being an incompatible power, except when the incompatibility arises from its actual exercise by Congress. The grant of the power of establishing "a uniform rule of naturalization," and "uniform laws on the subject of bankruptcies," being contained in the same clause, and expressed in similar terms, had justly been considered as subject to the same interpretation. Before the adoption of the constitution, the states had various incongruous rules of naturalization, and laws on the subject of bankruptcies, some of which discharged the person only of the debtor, and others his future acquisitions of property. Then came this provision of the constitution, which manifestly looks to the antecedent condition of things existing in the several states. The word "uniform" was significantly used as applicable to that condition of things. In any other view, the expression has no peculiar meaning, and does not qualify the general grant of power; for all the laws of Congress, on general subjects, are necessarily "uniform throughout the United States." The censure of the state regulations, implied in the terms in which the power to correct them is given to Congress, was pointed against their want of uniformity. The policy and necessity both of bankrupt and naturalization laws, was clearly recognized. The sole object of granting to Congress any power over these subjects, was to secure that uniformity which the conflicting regulations of the different states could not attain. But the terms in which the grant is conceived were not mandatory. Congress was left free to exercise it, or not, at its discretion; and the only *consequence of an [*230] actual exercise of the power by Congress, was to supersede, during such exercise, the state laws, so far as they conflict with the laws of Congress.[2]

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creditors are left completely at the mercy of state legislation, notwithstanding the boasted efficacy of this constitutional prohibition.

But (it was asked), what is the true import of this clause, forbidding the states from passing "any law impairing the obligation of contracts?" A contract is not merely that which the parties expressly stipulate. It is that also which the existing laws of the country where the contract is made annex as conditions to it at the time when it is formed. It had been admitted that a state might prohibit contracts altogether. If so, it may permit them, sub modo, with such conditions as it thinks fit to annex; and the parties who make a contract in that state, make it subject to the conditions. These conditions enter into the contract, and form a part of it as completely as if they had been expressly stipulated by the parties themselves. These conditions are sometimes beneficial to one party, sometimes to the other; sometimes they add to the contract, sometimes they diminish it. But in every instance they receive the tacit assent of the parties, and are not considered as impairing the obligation of the contract. A gives B a bond for $1,000, payable on demand. There is no stipulation for interest. But the law annexes the tacit condition that the obligee shall receive interest, and that at a certain fixed rate. So in the contract of exchange, the drawer of a bill does not stipulate to pay it if the drawee refuses. In the same manner, the liability of the indorser to the holder is implied by the law, and cannot be collected from the bill itself. Still less is his right to be discharged for want of due notice of the dishonor of the bill to be found in the written contract. But the law implies it, and, therefore, it might be said to impair the obligation of the actual contract between the parties, which contained no such condition. How did it happen that this was not considered a violation of the constitution? It could only be because the law of the place has annexed that condition to the contract, and made it as much a part of the contract as if the parties had expressed it. The same principle applies to the custom of adding days of grace to 232*] *the specified time of payment in bills and notes, which are various in different countries, and make the contract of the parties, whatever the law of the place where the payment is to be made says shall be the contract.[1] So, where the law of the place gives a peculiar remedy to the creditor on a bill or note, more summary and strict than in ordinary cases, the party shall be intended to have renounced the benefit of the ordinary law, and to have submitted himself to the extraordinary process provided for the particular case.[2] And so of many other cases, in which whatever is considered as discharging the contract by the law of the place where it was made, or with a view to which it is made, is considered as discharging it everywhere else, in whatever jurisdiction the creditor may attempt to enforce it, although no such condition is expressed in the terms of the contract itself.[3] This proceeds, not upon the idea that the foreign law can impair the obligation of the contract, or the foreign court refuse to execute it, but that they will give the same effect to it which is given by the law and the courts of the country where it is made; they will regard that as the contract of the parties which the lex loci declares to be the contract of the parties.[4] So, in the present case, the contract being made in a state, where the local law, existing at the time, annexed to the contract the condition that, in certain events, beyond the control of the contracting parties, the contract should be discharged, the parties contracting in the place of the law, and with a knowledge of the law, are presumed to assent to it.

But, it had been said, that if the local law be a part of the contract, so also in the constitution. This might be admitted, without in any manner affecting the question. The constitution does not define "the obligation of contracts." It does not say that the express stipulations of the *parties alone shall [*233 form the contract. The contract is formed of express and implied consent, of convention, and of law. The constitution contemplates it in its legel sense, and in all its parts. If, then, the local laws in force when the contract is made, form a part of the contract, this is the contract which the constitution says shall not be impaired. So that it was not the plaintiff in error who sought to impair the obligation of his contract. It was the creditor who would impair the obligation, by striking out of the contract one of the conditions annexed to it by the law of the place.

Admitting, then, that the states could not pass bankrupt laws which shall discharge antecedent contracts, it did not follow that they might not pass bankrupt laws under which debts consequently contracted might be discharged. In the latter case, the law annexes conditions to the express contract of the parties, to which it implies their assent. All the different restraints on state legislation which are associated in the same prohibitory clause, were intended to prevent certain unjust, oppressive, and impolitic laws, both in civil and criminal matters. It had not been denied on the other side that the prohibition of bills of attainder, and ex post facto laws, were exclusively aimed at acts retrospective, partial and unjust in their operation; and it would not be difficult to show that none of the other prohibitions were intended to affect the sovereign power of the states over their civil and criminal codes, when exercised, as all legislative power ought to be exercised, by general, impartial and prospective regulations. The history of the times, and the cotemporaneous expositions of the clause, at the formation and adoption of the constitution, together with the subsequent judicial interpretations of it in cases which had since arisen, all concurred to prove that the evils complained of, and the remedies meant to be applied for their correction, exclu-

1.—Renner v. The Bank of Columbia, 9 Wheat. Rep. 556.

2.—The Bank of Columbia v. Oakley, 4 Wheat. Rep. 235.

3.—2 Str. 733; Cooke's Bankrupt Law, 314; 5 East's Rep. 124; 3 Term Rep. 609; 1 East's Rep. 6; 1 Dall. 188, 229.

4.—3 Ves. Jun. 449; 1 Bl. Rep. 257; 2 Burr. 1077; 1 Bos. & Pull. 138; 16 Johns. Rep. 233, 250; Huberus Prælect. tom. 2, lib. 1. tit. 3; De Conflictu Legum, cited in note to 3 Dall. 370.

sively referred to legislative acts affecting vested rights, or past transactions.[1] The his-
234*] tory of the legislation *of the state whose acts were now under consideration, would afford a strong illustration of this topic of argument. A system of insolvent laws had existed in that state, with some short interruptions, for sixty years past; and subsequent to the adoption of the constitution, such laws had repeatedly passed the scrutiny of the council of revision, always composed of able statesmen and learned jurists, and, in some instances, of those who had taken an active part in the formation of the constitution, without even a suggestion that these acts were prohibited by the clause in question.[2] In every instance in which this court had hitherto applied the prohibition to a state law, it was to some act operating upon antecedent existing contracts. Such, too, was the plain and obvious meaning of the words of the prohibition. How could any law be said to impair the obligation of a contract not in existence when the law was passed? The obligation must first be contracted before it can be impaired. Some right must be vested under a contract before any party can have a right to complain of a law impairing its obligation. The party who supposes himself to be injured, cannot complain of a law in existence when his contract was made, because (as had been shown) the law formed a part of that contract, and, therefore, could not impair its obligation.

It was asked, what is the contract and what the obligation of the contract? And it was answered, that the contract was what the parties understood it to be, and they understood it as the law declares it to be. Whatever is expected on one side, and known to be expected on the other, is a part or condition of the contract.[3] The obligation of the contract is not the contract itself, but something arising out of it. The moral obligation is that which binds the conscience only. The legal obliga-
235*] tion is that which the law imposes. *It binds the contracting party to do that which the law says he shall do, under certain contingencies which may arise. There is nothing of mere human institution (and it is with this that the constitution deals), which binds to the performance of any contract, except the laws under which that contract is made, and the remedies provided by them to enforce its execution. The insolvent acts form a part of those laws, and of the remedies provided to enforce the contract. The obligation of a contract may be impaired by interference in favor of the creditor, as well as in favor of the debtor. But here the existing remedies secured to both by the law (which is a part of the contract), are preserved with integrity, and there is consequently no violation of the constitutional provision, which was intended equally to protect the rights of both debtor and creditor. Indeed, the proceedings under some of these laws are compulsory against the debtor, and force him to make a surrender and assignment of his property for the benefit of his creditors, on their application. Bankrupt and insolvent laws have existed, in various forms, in every age and every civilized and commercial country, as one of the means of securing a fair and impartial distribution of the effects of insolvents among all their creditors, or as a relief which society has found it necessary to extend to the honest debtor, who has become unable from misfortune to satisfy the demands of his creditors. The states have, therefore, the same right to pass these laws (supposing the power not to be exclusively vested in Congress), which they have to pass laws of limitation, or usury, or divorce, or any other ordinary regulation respecting contracts. All these laws might be said to have the effect of impairing the obligations of contracts, since they alter, increase, lessen or diminish what would otherwise be the effect of the agreement of the parties, by annexing conditions other and different from those expressed by the parties. If it were possible to suppose a commercial contract made independent of any of those regulations which the municipal code of every civilized country prescribes, it would be stripped of all these conditions, and reduced to the mere naked agreement of the parties, without any means of enforcing its performance. But the municipal law gives effect to the actual contract of *the parties, by implying a [*236 multitude of clauses and conditions not expressed by them, and by providing adequate means to enforce it. Every municipal code contains a provision determining at what age a person shall be deemed capable of contracting, and the period of majority is different under different systems of law. This a positive rule of society. In a state of nature, there is no definite age at which an individual becomes capable of contracting. Is not the whole of this subject under the control of state legislation? and would a law, extending the period of minority, be said to be a law impairing the obligation of contracts? So, also, the power of contracting which is permitted to a married woman, is more or less limited under different systems of jurisprudence, and there is nothing in which the positive institutions of society are more diversified. And the contract of marriage itself is subject to be dissolved by the laws of different states of the Union, under various circumstances and conditions. The policy of some states had made absolute divorces extremely difficult to be obtained, others had granted them with more facility. But could it be said that these laws, or any alteration of these laws, impaired the obligation of the contract of marriage? Was it not a constituent part of this contract, that it should be subject to be dissolved under the circumstances and according to the conditions prescribed in the laws of the state in force at the time when the marriage took place? In most of the states, the policy of the English statute of frauds and registry acts had been adopted, and certain contracts and conveyances were required to be

1.—5 Marsh., Life of Washington, 75, 85, 89, 259; 3 Ramsay's Univ. Hist. 46, 77; 2 Ramsay's Hist. of South Carolina, 440, 483; Journ. Fed. Convention, 79, 227, 359; Virginia Debates, 339; 3 Dall. 390; 1 Tuck. Bl. 312; Appendix, part I.; The Federalist, No. 44; 1 State Papers, 252; Secret Debates, 70; 5 Hall's Law Journ. 506, 530, 552; 6 Hall's Law Journ. 474; 5 Binn. Rep. 362, 364; 13 Mass. Rep. 16; 3 Johns. Rep. 74; 16 Johns. Rep. 233; 7 Johns. Ch. Rep. 376.

2.—16 Johns. Rep. 234, note (a).

3.—Paley's Mor. Phil. 92, 106.

in writing, and others to be registered. Might not the states require it as an essential condition to the validity of all contracts and all conveyances, that they should be in writing, and should be registered; and could this condition, annexed by the law to the contract of the parties, be said to impair its obligation? In short, it was insisted that the argument on the other side, when pushed to its legitimate consequences, would go to restrain state legislation upon almost every subject of property and internal police, and to fasten upon the states, against their sovereign will, immutable codes of civil jurisprudence, the inconvenience and mischiefs of which could not be corrected by any means 237*] *within the constitutional power of Congress. On most of the subjects of ordinary civil legislation, Congress had no power at all; and on this particular subject of bankruptcy, there was little hope of its being exercised. So that if the court should pronounce the state bankrupt codes invalid, and Congress should refuse to supply their place by the establishment of uniform laws throughout the Union, the country would present the extraordinary spectacle of a great commercial nation, without laws on the subject of bankruptcy.

Mr. Webster, in reply:

The question arising in this case is not more important nor so important even, in its bearing on individual cases of private right, as in its character of a public political question. The constitution was intended to accomplish a great political object. Its design was not so much to prevent injustice or injury in one case, or in successive single cases, as it was to make general salutary provisions, which, in their operation, should give security to all contracts, stability to credit, uniformity among all the states, in those things which materially concerned the foreign commerce of the country, and their own credit, trade, and intercourse among themselves. The real question is, therefore, a much broader one than has been argued. It is this, whether the constitution has not, for general political purposes, ordained that bankrupt laws should be established only by national authority. We contend that such was the intention of the constitution; an intention, as we think, plainly manifested by a consideration of its several provisions.

The act of New York, under which this question arises, provides, that a debtor may be discharged from all his debts, upon assigning his property to trustees for the use of his creditors. When applied to the discharge of debts, contracted before the date of the law, this court has decided that the act is invalid.[1] The act itself makes no distinction between past and future debts, but provides for the discharge of both in the same manner. In the 238*] case, then, of a debt *already existing, it is admitted that the act does impair the obligation of contracts. We wish the full extent of this decision to be well considered. It is not, merely, that the legislature of the state cannot interfere, by law, in the particular case of A or B, to injure or impair rights which have become vested under contracts; but it is, that they have no power, by general law, to regulate the manner in which all debtors may be discharged from subsisting contracts; in other words, they cannot pass general bankrupt laws, to be applied in presenti. Now, it is not contended that such laws are unjust, and ought not to be passed by any legislature. It is not said they are unwise or impolitic. On the contrary, we know the general experience is, that when bankrupt laws are established, they make no distinction between present and future debts. While all agree that special acts, made for individual cases, are unjust, all admit that a general law, made for all cases, may be both just and politic. The question, then, which meets us in the threshold, is this: If the constitution meant to leave the states the power of establishing systems of bankruptcy to act upon future debts, what great or important object, of a political nature, was answered, by denying the power of making such systems applicable to existing debts?

The argument used in Sturges v. Crowninshield, was, at least, a plausible and consistent argument. It maintained, that the prohibition of the constitution was leveled only against interferences in individual cases, and did not apply to general laws, whether those laws were retrospective or prospective in their operation. But the court rejected that conclusion. It decided that the constitution was intended to apply to general laws, or systems of bankruptcy; that an act, providing that all debtors might be discharged from all creditors, upon certain conditions, was of no more validity than an act, providing that a particular debtor, A, should be discharged on the same conditions from his particular creditor, B.

It being thus decided that general laws are thus within the prohibition of the constitution, it is for the plaintiff in error now to show, on what ground, consistent with the general objects of the constitution, he can establish a distinction, *which can give effect to those [*239 general laws in their application to future debts, while it denies them effect in their application to subsisting debts. The words are, that "no state shall pass any law impairing the obligation of contracts." The general operation of all such laws is, to impair that obligation; that is, to discharge the obligation without fulfilling it. This is admitted; and the only ground taken for the distinction to stand on is, that when the law was in existence, at the time of the making the contract, the parties must be supposed to have reference to it, or, as it is usually expressed, the law is made a part of the contract. Before considering what foundation there is for this argument, it may be well to inquire, what is that obligation of contracts of which the constitution speaks, and whence is it derived?

The definition given by the courts in Sturges v. Crowninshield, is sufficient for our present purpose. "A contract," say the court, "is an agreement to do some particular thing; the law binds the party to perform this agreement, and this is the obligation of the contract."

It may, indeed, probably, be correct to suppose the constitution used the words in somewhat of a more popular sense. We speak, for example, familiarly of a usurious contract, and yet we say, speaking technically, that a usurious agreement is no contract.

By the obligation of a contract, we should

1.—Sturges v. Crowninshield, 4 Wheat. Rep. 122.

understand the constitution to mean, the duty of performing a legal agreement. If the contract be lawful, the party is bound to perform it. But bound by what? What is it that binds him? And this leads to what we regard as a principal fallacy in the argument on the other side. That argument supposes, and insists, that the whole obligation of a contract has its origin in the municipal law. This position we controvert. We do not say that it is that obligation which springs from conscience merely; but we deny that it is only such as springs from the particular law of the place where the contract is made. It must be a lawful contract, doubtless; that is, permitted and allowed; because society has a right to prohibit all such contracts, as well as all such actions, as it deems to be mischievous or injurious. But if the contract be such as the law of society tol-
240*] erates; *in other words, if it be lawful, then we say, the duty of performing it springs from universal law. And this is the concurrent sense of all the writers of authority.

The duty of performing promises is thus shown to rest on universal law; and if, departing from this well-established principle, we now follow the teachers who instruct us that the obligation of a contract has its origin in the law of a particular state, and is, in all cases, what that law makes it, and no more, and no less, we shall probably find ourselves involved in inexplicable difficulties. A man promises, for a valuable consideration, to pay money in New York; is the obligation of that contract created by the laws of that state? or does it subsist independent of those laws? We contend that the obligation of a contract—that is, the duty of performing it—is not created by the law of the particular place where it is made, and dependent on that law for its existence; but that it may subsist, and does subsist, without that law, and independent of it. The obligation is in the contract itself, in the assent of the parties, and in the sanction of universal law. This is the doctrine of Grotius, Vattel, Burlemaqui, Pothier, and Rutherforth. The contract, doubtless, is necessarily to be enforced by the municipal law of the place where performance is demanded. The municipal law acts on the contract after it is made, to compel its execution, or give damages for its violation. But this is a very different thing from the same law being the origin or fountain of the contract. Let us illustrate this matter by an example. Two persons contract together in New York for the delivery, by one to the other, of a domestic animal or utensil of husbandry, or a weapon of war. This is a lawful contract, and while the parties remain in New York, it is to be enforced by the laws of that state. But if they remove with the article to Pennsylvania or Maryland, there a new law comes to act upon the contract, and to apply other remedies if it be broken. Thus far the remedies are furnished by the laws of society. But suppose the same parties to go together to a savage wilderness, or a desert island, beyond the reach of the laws of any society; the obligation of the contract still subsists, and is as perfect as ever, and is now to be enforced by an-
241*] other law—that is, the *law of nature—and the party to whom the promise was made, has a right to take by force the animal, the utensil, or the weapon, that was promised to him. The right is as perfect here as it was in Pennsylvania, or even in New York; but this could not be so if the obligation were created by the law of New York, or were dependent on that law for its existence, because the laws of that state can have no operation beyond its territory. Let us reverse this example. Suppose a contract to be made between two persons cast ashore on an uninhabited territory or in a place over which no law of society extends. There are such places, and contracts have been made there by individuals casually there, and these contracts have been enforced in courts of law in civilized communities. Whence do such contracts derive their obligation, if not from universal law?

If these considerations show us that the obligation of a lawful contract does not derive its force from the particular law of the place where made, but may exist where that law does not exist, and be enforced where that law has no validity, then it follows, we contend, that any statute which diminishes or lessens its obligation, does impair it, whether it precedes or succeeds the contract in date. The contract having an independent origin, whenever the law comes to exist together with it, and interferes with it, it lessens, we say, and impairs its own original and independent obligation. In the case before the court, the contract did not owe its existence to the particular law of New York; it did not depend on that law, but could be enforced without the territory of that state, as well as within it. Nevertheless, though legal, though thus independently existing, though thus binding the party everywhere, and capable of being enforced everywhere, yet, the statute of New York says, that it shall be discharged without payment. This, we say, impairs the obligation of that contract. It is admitted to have been legal in its inception, legal in its full extent, and capable of being enforced by other tribunals according to its terms. An act, then, purporting to discharge it without payment, is, as we contend, an act impairing its obligation.

*But here we meet the opposite ar- [*242
gument, stated on different occasions in different terms, but usually summed up in this, that the law itself is a part of the contract, and, therefore, cannot impair it. What does this mean? Let us seek for clear ideas. It does not mean that the law gives any particular construction to the terms of the contract, or that it makes the promise, or the consideration, or the time if performance, other than they are expressed in the instrument itself. It can only mean that it is to be taken as a part of the contract, or understanding of the parties, that the contract itself shall be enforced by such laws and regulations, respecting remedy, and for the enforcement of contracts, as are in being in the state where it is made at the time of entering into it. This is meant, or nothing very clearly intelligible is meant, by saying the law is part of the contract.

There is no authority in adjudged cases, for the plaintiff in error, but the state decisions which have been cited, and, as has already been stated, they all rest on this reason, that the law is part of the contract.

Against this we contend,

1st. That if the proposition were true, the consequence would not follow.

2d. That the proposition itself cannot be maintained.

1. If it were true that the law is to be considered as part of the contract, the consequence contended for would not follow; because, if this statute be part of the contract, so is every other legal or constitutional provision existing at the time which affects the contract, or which is capable of affecting it; and especially this very article of the constitution of the United States is part of the contract. The plaintiff in error argues in a complete circle. He supposes the parties to have had reference to it because it was a binding law, and yet he proves it to be a binding law only upon the ground that such reference was made to it. We come before the court alleging the law to be void as unconstitutional; they stop the inquiry by opposing to us the law itself. Is this logical? Is it not precisely objectio ejus, cujus dissolutio petitur? If one bring a bill to set aside a judgment, is that judgment itself a good plea in bar to the bill? We propose to 243*] *inquire if this law is of force to control our contract, or whether, by the constitution of the United States, such force be not denied to it. The plaintiff in error stops us by saying that it does control the contract, and so arrives shortly at the end of the debate. Is it not obvious, that supposing the act of New York to be a part of the contract, the question still remains as undecided as ever. What is that act? Is it a law, or is it a nullity? A thing of force, or a thing of no force? Suppose the parties to have contemplated this act, what did they contemplate? its words only, or its legal effect? its words, or the force which the constitution of the United States allowed to it? If the parties contemplated any law, they contemplated all the law that bore on their contract, the aggregate of all the statute and constitutional provisions. To suppose that they had in view one statute, without regarding others, or that they contemplated a statute without considering that paramount constitutional provisions might control or qualify that statute, or abrogate it altogether, is unreasonable and inadmissible. "This contract," says one of the authorities relied on, "is to be construed as if the law were specially recited in it." Let it be so for the sake of argument. But it is also to be construed as if the prohibitory clause of the constitution were recited in it, and this brings us back again to the precise point from which we departed.

The constitution always accompanies the law, and the latter can have no force which the former does not allow to it. If the reasoning were thrown into the form of special pleading, it would stand thus: the plaintiff declares on his debt; the defendant pleads his discharge under the law; the plaintiff alleges the law unconstitutional; but the defendant says, you knew of its existence; to which the answer is obvious and irresistible, I knew its existence of the statute book of New York, but I knew, at the same time, it was null and void under the constitution of the United States.

The language of another leading decision is, "a law in force at the time of making the contract does not violate that contract;" but the very question is, whether there be any such law "in force;" for if the states have no authority *to pass such laws, then no such law [*244 can be in force. The constitution is a part of the contract as much as the law, and was as much in the contemplation of the parties. So that the proposition, if it be admitted, that the law is part of the contract, leaves us just where it found us—that is to say, under the necessity of comparing the law with the constitution, and of deciding by such comparison whether it be valid or invalid. If the law be unconstitutional, it is void, and no party can be supposed to have had reference to a void law. If it be constitutional, no reference to it need be supposed.

2. But the proposition itself cannot be maintained. The law is no part of the contract. What part is it? the promise? the consideration? the condition? Clearly, it is neither of these. It is no term of the contract. It acts upon the contract only when it is broken, or to discharge the party from its obligation after it is broken. The municipal law is the force of society employed to compel the performance of contracts. In every judgment in a suit on contract, the damages are given, and the imprisonment of the person or sale of goods awarded, not in performance of the contract, or as part of the contract, but as an indemnity for the breach of the contract. Even interest, which is a strong case, where it is not expressed in the contract itself, can only be given as damages. It is nearly absurd to say that a man's goods are sold on a fieri facias, or that he himself goes to jail, in pursuance of his contract. These are the penalties which the law inflicts for the breach of his contract. Doubtless, parties, when they enter into contracts, may well consider both what their rights and what their liabilities will be by the law, if such contracts be broken; but this contemplation of consequences, which can ensue only when the contract is broken, is no part of the contract itself. The law has nothing to do with the contract till it be broken; how, then, can it be said to form a part of the contract itself?

But there are other cogent and more specific reasons against considering the law as part of the contract. (1) If the law be part of the contract, it cannot be repealed or altered; because, in such case, the repealing or modifying law itself would impair the obligation of the contract. The insolvent law of New York, for example, authorizes the discharge *of [*245 a debtor on the consent of two-thirds of his creditors. A subsequent act requires the consent of three-fourths; but if the existing law be part of the contract, this latter law would be void. In short, whatever is part of the contract cannot be varied but by consent of the parties, therefore the argument runs in absurdum; for it proves that no laws for enforcing the contract or giving remedies upon it, or any way affecting it, can be changed or modified between its creation and its end. If the law in question binds one party on the ground of assent to it, it binds both, and binds them until they agree to terminate its operation. (2) If the party be bound by an implied assent to the law, as thereby making the law a part of the contract, how would it be if the parties had expressly dissented, and agreed that the law

should make no part of the contract? Suppose the promise to have been, that the promisor would pay at all events, and not take advantage of the statute; still, would not the statute operate on the whole, on this particular agreement and all? and does not this show that the law is no part of the contract, but something above it? (3) If the law of the place be part of the contract, one of its terms and conditions, how could it be enforced, as we all know it might be, in another jurisdiction, which should have no regard to the law of the place? Suppose the parties, after the contract, to remove to another state, do they carry the law with them as part of their contract? We all know they do not. Or take a common case; some states have laws abolishing imprisonment for debt; these laws, according to the argument, are all parts of the contract; how, then, can the party, when sued in another state, be imprisoned contrary to the terms of his contract? (4) The argument proves too much, inasmuch as it applies as strongly to prior as to subsequent contracts. It is founded on a supposed assent to the exercise of legislative authority, without considering whether that exercise be legal or illegal. But it is equally fair to found the argument on an implied assent to the potential exercise of that authority. The implied reference to the control of legislative power, is as reasonable and as strong when that power is dormant, as while it is in exercise. In one case, the argument is, "the law existed, you knew 246*] it, and acquiesced." In the other, it *is, "the power to pass the law existed, you knew it, and took your chance." There is as clear an assent in the one instance as in the other. Indeed, it is more reasonable and more sensible, to imply a general assent to all the laws of society, present and to come, from the fact of living in it, than it is to imply a particular assent to a particular existing enactment. The true view of the matter is, that every man is presumed to submit to all power which may be lawfully exercised over him, or his right, and no one should be presumed to submit to illegal acts of power, whether actual or contingent. (5) But a main objection to this argument is, that it would render the whole constitutional provision idle and inoperative; and no explanatory words, if such words had been added in the constitution, could have prevented this consequence. The law, it is said, is part of the contract; it cannot, therefore, impair the contract, because a contract cannot impair itself. Now, if this argument be sound, the case would have been the same, whatever words the constitution had used. If, for example, it had declared that no state should pass any law impairing contracts prospectively or retrospectively; or law impairing contracts, whether existing or future; or whatever terms it had used to prohibit precisely such a law as is now before the court, the prohibition would be totally nugatory if the law is to be taken as part of the contract; and the result would be, that, whatever may be the laws which the states by this clause of the constitution are prohibited from passing, yet, if they in fact do pass such laws, those laws are valid, and bind parties by a supposed assent.

But further, this idea, if well founded, would enable the states to defeat the whole constitutional provision by a general enactment. Suppose a state should declare, by law, that all contracts entered into therein should be subject to such laws as the legislature, at any time, or from time to time, might see fit to pass. This law, according to the argument, would enter into the contract, become a part of it, and authorize the interference of the legislative power with it, for any and all purposes, wholly uncontrolled by the constitution of the United States.

So much for the argument that the law is a part of the *contract. We think it is [*247 shown to be not so; and if it were, the expected consequence would not follow.

The inquiry, then, recurs, whether the law in question be such a law as the legislature of New York has authority to pass. The question is general. We differ from our learned adversaries on general principles. We differ as to the main scope and end of this constitutional provision. They think it entirely remedial: we regard it as preventive. They think it adopted to secure redress for violated private rights: to us it seems intended to guard against great public mischiefs. They argue it, as if it were designed as an indemnity or protection for injured private rights, in individual cases of meum and tuum; we look upon it as a great political provision, favorable to the commerce and credit of the whole country. Certainly we do not deny its application to cases of violated private right. Such cases are clearly and unquestionably within its operation. Still, we think its main scope to be general and political. And this, we think, is proved by reference to the history of the country, and to the great objects which were sought to be obtained by the establishment of the present government. Commerce, credit, and confidence, were the principal things which did not exsist under the old confederation, and which it was a main object of the present constitution to create and establish. A vicious system of legislation, a system of paper money and tender laws, had completely paralyzed industry, threatened to beggar every man of property, and ultimately to ruin the country. The relation between debtor and creditor, always delicate, and always dangerous whenever it divides society, and draws out the respective parties into different ranks and classes, was in such a condition in the year 1787, '88, and '89, as to threaten the overthrow of all government; and a revolution was menaced, much more critical and alarming than that through which the country had recently passed. The object of the new constitution was to arrest these evils; to awaken industry by giving security to property; to establish confidence, credit, and commerce, by salutary laws, to be enforced by the power of the whole community. The revolutionary war was over, the country had peace, but little domestic tranquility, *liberty, but few of its enjoy- [*248 ments, and none of its security. The states had struggled together, but their union was imperfect. They had freedom, but not an established course of justice. The constitution was therefore framed, as it professes, "to form a more perfect union, to establish justice, to secure the blessings of liberty, and to insure domestic tranquility."

It is not pertinent to this occasion, to advert to all the means by which these desirable ends were to be obtained. Some of them, closely connected with the subject now under consideration, are obvious and prominent. The objects were, commerce, credit, and mutual confidence in matters of property; and these required, among other things, a uniform standard of value, or medium of payments. One of the first powers given to Congress, therefore, is that of coining money, and fixing the value of foreign coins; and one of the first restraints imposed on the states, is the total prohibition to coin money. These two provisions are industriously followed up and completed, by denying to the states all power of emitting bills of credit, or of making anything but gold and silver a tender in the payment of debts. The whole control, therefore, over the standard of value, and medium of payments, is vested in the general government. And here the question instantly suggests itself, why should such pains be taken to confide in Congress alone this exclusive power of fixing on a standard value, and of prescribing the medium in which debts shall be paid, if it is, after all, to be left to every state to declare that debts may be discharged, and to prescribe how they may be discharged, without any payment at all? Why say that no man shall be obliged to take in discharge of a debt paper money issued by the authority of a state, and yet say, that by the same authority the debt may be discharged without any payment whatever?

We contend that the constitution has not left its work thus unfinished. We contend that, taking its provisions together, it is apparent it was intended to provide for two things, intimately connected with each other.

1. A uniform medium for the payment of debts.

249*] *2. A uniform manner of discharging debts when they are to be discharged without payment.

The arrangement of the grants and prohibition contained in the constitution are fit to be regarded on this occasion. The grant to Congress, and the prohibition on the states, though they are certainly to be construed together, are not contained in the same clauses. The powers granted to Congress are enumerated one after another in the eighth section; the principal limitations on those powers, in the ninth section; and the prohibitions to the states in the tenth section. Now, in order to understand whether any particular power be exclusively vested in Congress, it is necessary to read the terms of the grant, together with the terms of the prohibition. Take an example from that power of which we have been speaking—the coinage power. Here the grant to Congress is, "to coin money, regulate the value thereof, and of foreign coins." Now, the correlative prohibition on the states, though found in another section, is, undoubtedly, to be taken in immediate connection with the foregoing, as much so as if it had been found in the same clause. The only just reading of these provisions, therefore, is this: "Congress shall have power to coin money, regulate the value thereof, and of foreign coin; but no state shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts."

These provisions respect the medium of payment, or standard of value, and, thus collated, their joint result is clear and decisive. We think the result clear, also, of those provisions which respect the discharge of debts without payment. Collated in like manner, they stand thus: "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States, but no state shall pass any law impairing the obligation of contracts." This collocation cannot be objected to if they refer to the same subject-matter; and that they do refer to the same subject-matter we have the authority of this court for saying, because this court solemnly determined, in Sturges v. Crowninshield, that this prohibition on the states did apply to systems of bankruptcy. It must be now *taken, therefore, [*250 that state bankrupt laws were in the mind of the convention when the prohibition was adopted, and therefore the grant to Congress on the subject of bankrupt laws, and the prohibition to the state on the same subject, are properly to be taken and read together; and being thus read together, is not the intention clear to take away from the states the power of passing bankrupt laws, since, while enacted by them, such laws would not be uniform, and to confer the power exclusively on Congress, by whom uniform laws could be established?

Suppose the order of arrangement in the constitution had been otherwise than it is, and that the prohibitions to the states had preceded the grants of power to Congress, the two powers, when collated, would then have read thus: "No state shall pass any law impairing the obligation of contracts; but Congress may establish uniform laws on the subject of bankruptcies." Could any man have doubted, in that case, that the meaning was that the states should not pass laws discharging debts without payment, but that Congress might establish uniform bankrupt acts? And yet this inversion of the order of the clauses does not alter their sense. We contend that Congress alone possesses the power of establishing bankrupt laws; and although we are aware that in Sturges v. Crowninshield, the court decided that such an exclusive power could not be inferred from the words of the grant in the seventh section, we yet would respectively request the bench to reconsider this point. We think it could not have been intended that both the states and general government should exercise this power; and, therefore, that a grant to one implies the prohibition on the other. But not to press a topic which the court has already had under its consideration, we contend that even without reading the clauses of the constitution in the connection which we have suggested, and which is believed to be the true one, the prohibition in the tenth section, taken by itself, does forbid the enactment of state bankrupt laws as applied to future as well as present debts. We argue this from the words of the prohibition; from the association they are found in, and from the objects intended.

1. The words are general. The states can pass no law *impairing contracts; that [*251 is, any contract. In the nature of things a law may impair a future contract, and therefore such contract is within the protection of the constitution. The words being general, it is

for the other side to show a limitation; and this, it is submitted, they have wholly failed to do, unless they shall have established the doctrine that the law itself is part of the contract. It may be added, that the particular expression of the constitution is worth regarding. The thing prohibited is called a law, not an act. A law, in its general acceptation, is a rule prescribed for future conduct, not a legislative interference for existing rights. The framers of the constitution would hardly have given the appellation of "law" to violent invasions of individual right, or individual property, by acts of legislative power. Although, doubtless, such acts fall within this prohibition, yet they are prohibited also by general principles, and by the constitutions of the states, and therefore, further provision against such acts was not so necessary as against other mischiefs.

2. The most conclusive argument, perhaps, arises from the connection in which the clause stands. The words of the prohibition, so far as it applies to civil rights or rights of property, are, "that no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in the payment of debts, or pass any law impairing the obligation of contracts." The prohibition of attainders, and ex post facto laws, refer entirely to criminal proceedings, and therefore should be considered as standing by themselves; but the other parts of the prohibition are connected by the subject-matter, and ought, therefore, to be construed together. Taking the words thus together, according to their natural connection, how is it possible to give a more limited construction to the term "contracts," in the last branch of the sentence, than to the word "debts," in that immediately preceding? Can a state make anything but gold and silver a tender in payment of future debts? This nobody pretends. But what ground is there for a distinction? No state shall make anything but gold and silver a tender in the payment of debts, nor pass any law impairing the obligation of contracts. Now, by what reasoning is 252*] it made *out that the debts here spoken of are any debts, either existing or future; but that the contracts spoken of are subsisting contracts only? Such a distinction seems to us wholly arbitrary. We see no ground for it. Suppose the article, where it uses the word "debts," had used the word "contracts." The sense would have been the same then as it now is; but the identity of terms would have made the nature of the distinction now contended for somewhat more obvious. Thus altered, the clause would read that no state should make anything but gold and silver a tender in discharge of contracts, nor pass any law impairing the obligation of contracts; yet the first of these expressions would have been held to apply to all contracts, and the last to subsisting contracts only. This shows the consequence of what is now contended for in a strong light. It is certain that the substitution of the word "contracts" for "debts" would not alter the same; and an argument that could not be sustained if such substitution were made, cannot be sustained now. We maintain, therefore, that if tender laws may not be made for future debts, neither can bankrupt laws be made for future contracts. All the arguments used here may be applied with equal force to tender laws for future debts. It may be said, for instance, that when it speaks of debts, the constitution means existing debts and not mere possibilities of future debt; that the object was to preserve vested rights; and that if a man, after a tender law had passed, had contracted a debt, the manner in which that tender law authorized that debt to be discharged became part of the contract, and that the whole debt or whole obligation was thus qualified by the pre-existing law, and was no more than a contract to deliver so much paper money, or of whatever other article which might be made a tender, as the original bargain expressed. Arguments of this sort will not be found wanting in favor of tender laws, if the court yield to similar arguments in favor of bankrupt laws.

These several prohibitions of the constitution stand in the same paragraph; they have the same purpose, and were introduced for the same object; they are expressed in words of similar import, in grammar and in sense; they are subject to the same construction, and we think no reason has *yet been given [*253 for imposing an important restriction on one part of them which does not equally show that the same restriction might be imposed also on the other part.

We have already endeavored to maintain that one great political object, intended by the constitution, would be defeated if this construction were allowed to prevail. As an object of political regulation, it was not important to prevent the states from passing bankrupt laws applicable to present debts, while the power was left to them in regard to future debts; nor was it at all important, in a political point of view, to prohibit tender laws as to future debts, while it was yet left to the states to pass laws for the discharge of such debts, which, after all, are little different in principle from tender laws. Look at the law before the court in this view. It provides that if the debtor will surrender, offer or tender to trustees, for the benefit of his creditors, all his estate and effects, he shall be discharged from all his debts. If it had authorized a tender of anything but money to any one creditor, though it were of value equal to the debt, and thereupon provided for a discharge, it would have been clearly invalid. Yet it is maintained to be good, merely because it is made for all creditors, and seeks a discharge from all debts; although the thing tendered may not be equivalent to a shilling in the pound of those debts. This shows again very clearly how the constitution has failed of its purpose; if having in terms prohibited all tender laws, and taken so much pains to establish a uniform medium of payment, it has yet left the states the power of discharging debts as they may see fit, without any payment at all.

To recapitulate what has been said, we maintain; first, that the constitution by its grants to Congress and its prohibitions on the states, has sought to establish one uniform standard of value, or medium of payment. Second, that by like means it has endeavored to provide for one uniform mode of discharging debts when they are to be discharged without payment. Third, that these objects are connected, and that the first loses much of its importance if the last, also, be not accomplished. Fourth, that read-

ing the grant to Congress and the prohibition on the states together, the inference is strong that the constitution intended to confer 254*] *an exclusive power to pass bankrupt laws on Congress. Fifth, that the prohibition in the tenth section reaches to all contracts existing or future, in the same way as the other prohibition in the same section extends to all debts existing or future. Sixth, and that upon any other construction, one great political object of the constitution will fail of its accomplishment.

The learned judges delivered their opinions as follows:

Mr. Justice Washington. The first and most important point to be decided in this cause turns essentially upon the question, whether the obligation of a contract is impaired by a state bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that state after the passage of the act.

This question has never before been distinctly presented to the consideration of this court and decided, although it has been supposed by the judges of a highly respectable state court, that it was decided in the case of M'Millan v. M'Neill, 4 Wheat. Rep. 209. That was the case of a debt contracted by two citizens of South Carolina, in that state, the discharge of which had a view to no other state. The debtor afterwards removed to the territory of Louisiana, where he was regularly discharged, as an insolvent, from all his debts, under an act of the legislature of that state, passed prior to the time when the debt in question was contracted. To an action brought by the creditor in the District Court of Louisiana, the defendant plead in bar his discharge under the law of that territory, and it was contended by the counsel for the debtor in this court, that the law under which the debtor was discharged having passed before the contract was made, it could not be said to impair its obligation. The cause was argued on one side only, and it would seem from the report of the case that no written opinion was prepared by the court. The Chief Justice stated that the circumstances of the state law under which the debt was attempted to be discharged having been passed before the debt was contracted, made no difference in the application of the principle, which had been asserted by the 255*] *court in the case of Sturges v. Crowninshield. The correctness of this position is believed to be incontrovertible. The principle alluded to was, that a state bankrupt law which impairs the obligation of a contract, is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the act of assembly, under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained in the opinion of the court, delivered in M'Millan v. M'Neill, unaffected by the circumstance that the law of Louisiana preceded a contract made in another state, since that law having no extraterritorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract in reference to its obligation, since, if upon legal principles it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract. But I hold the principle to be well established, that a discharge under the bankrupt laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract; and this I take to be the only point really decided in the case alluded to. Whether the Chief Justice was correctly understood by the reporter when he is supposed to have said "that this case was not distinguishable in principle from the preceding case of Sturges v. Crowninshield," it is not material at this time to inquire, because I understand the meaning of these expressions to go no farther than to intimate that there was on distinction between the cases as to the constitutional objection, since it professed to discharge a debt contracted in another state, which, at the time is was contracted, was not within its operation, nor subject to be discharged by it. The case now to be decided is that of a debt contracted in the state of New York by a citizen of that state, from which he was discharged so far as he constitutionally could be under a bankrupt law of that state, in force at the time when the debt was contracted. It is a case, therefore, that bears no resemblance to the one just noticed.

*I come now to the consideration of [*256 the question, which for the first time has been directly brought before this court for judgment. I approach it with more than ordinary sensibility, not only on account of its importance, which must be acknowledged by all, but of its intrinsic difficulty, which every step I have taken in arriving at a conclusion with which my judgment could in any way be satisfied, has convinced me attends it. I have examined both sides of this great question with the most sedulous care, and the most anxious desire to discover which of them, when adopted, would be most likely to fulfil the intentions of those who framed the constitution of the United States. I am far from asserting that my labors have resulted in entire success. They have lead me to the only conclusion by which I can stand with any degree of confidence; and yet, I should be disingenous were I to declare, from this place, that I embrace it without hesitation, and without a doubt of its correctness. The most that candor will permit me to say upon the subject, is that I see, or think I see, my way more clear on the side which my judgment leads me to adopt than on the other, and it must remain for others to decide whether the guide I have chosen has been a safe one or not.

It has constantly appeared to me throughout the different investigations of this question, to which it has been my duty to attend, that the error of those who controvert the constitutionality of the bankrupt law under consideration in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract, and one which impairs its obligation. A contract is defined by all to be an agreement to do, or not to do, some particular act; and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed,

we seek for their intention with a view to fulfil it. Any law, then, which enlarges, abridges, or in any manner changes this intention when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention. The manner, or the degree, in which this change is effected, can in no respect influence this conclusion; for whether the law affect the validity, the construction, the duration, the 257*] mode of discharge, *or the evidence of the agreement, it impairs the contract, though it may not do so to the same extent in all the supposed cases. Thus, a law which declares that no action shall be brought whereby to charge a person upon his agreement to pay the debt of another, or upon an agreement relating to lands, unless the same be reduced to writing, impairs a contract made by parol whether the law precede or follow the making of such contract; and if the argument that this law also impairs, in the former case, the obligation of the contract, be sound, it must follow that the statute of frauds and all other statutes which in any manner meddle with contracts, impair their obligation, and are consequently within the operation of this section and article of the constitution. It will not do to answer that in the particular case put, and in others of the same nature, there is no contract to impair, since the pre-existing law denies all remedy for its enforcement, or forbids the making of it, since it is impossible to deny that the parties have expressed their will in the form of a contract, notwithstanding the law denies to it any valid obligation.

This leads us to a critical examination of the particular phraseology of that part of the above section which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted, that this term, obligation, when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it. It is this meaning of which we are all in search.

What is it, then, which constitutes the obligation of a contract? The answer is given by the Chief Justice, in the case of Sturges v. Crowninshield, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge.

But the question, which law is referred to in 258*] the above *definition, still remains to be solved. It cannot for a moment be conceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey, or not, as they please. It cannot be supposed, that it was with this law the grave authors of this instrument were dealing.

The universal law of all civilized nations, which declares that men shall perform that to which they have agreed, has been supposed by the counsel who have argued this cause for the defendant in error, to be the law which is alluded to; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation which nations acknowledge to perform their compacts with each other is founded, and I therefore feel no objection to answer the question asked by the same counsel—what law it is which constitutes the obligation of the compact between Virginia and Kentucky?—by admitting that it is this common law of nations which requires them to perform it. I admit further, that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted, that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this constitution? What is the language of this universal law? It is simply that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification, and no restraint, either as to its validity, construction, or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true, that this is exclusively the law to which the constitution refers us, it is very apparent that the sphere of state legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign states of this Union would have consented to; for it will be found, upon examination, that there are few laws which concern the general *police of a state, or the government of [*259 its citizens, in their intercourse with each other, or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies—frauds and perjuries—laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every state, but laws which may affect the validity, construction or duration, or discharge of contracts? Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist, that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed. The former can be satisfied by nothing short of performance; the latter may affect and control the validity, construction, evidence, remedy, performance and discharge of the contract. The former is the common law of all civilized nations, and of each of them; the latter is the peculiar law of each, and is paramount to the former whenever they come in collision with each other.

It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced.

It forms, in my humble opinion, a part of

the contract, and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases, the remedy which the comity of nations affords for enforcing the obligation of contracts wherever formed, is denied. Free from these objections, this law, which accompanies the contract, as forming a part of it, is 260*] *regarded and enforced everywhere, whether it affect the validity, construction, or discharge of the contract. It is upon this principle of universal law, that the discharge of the contract, or of one of the parties to it, by the bankrupt laws of the country where it was made, operates as a discharge everywhere.

If, then, it be true that the law of the country where the contract is made, or to be executed, forms a part of that contract, and of its obligation, it would seem to be somewhat of a solecism to say that it does at the same time impair that obligation.

But, it is contended, that if the municipal law of the state where the contract is so made, form a part of it, so does that clause of the constitution which prohibits the states from passing laws to impair the obligation of contracts; and, consequently, that the law is rendered inoperative by force of its controlling associate. All this I admit, provided it be first proved that the law so incorporated with, and forming a part of the contract, does, in effect, impair its obligation; and before this can be proved, it must be affirmed, and satisfactorily made out, that if, by the terms of the contract, it is agreed that, on the happening of a certain event, as, upon the future insolvency of one of the parties, and his surrender of all his property for the benefit of his creditors, the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say that the soundness of it is beyond the reach of my mind to understand.

Again, it is insisted that if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity, construction, or duration. Both are valid, (if the view which I take of this case be correct) as they may affect contracts afterwards formed; but neither are so, if they bear upon existing contracts; and, in 261*] the former case, in which the repeal *contains no enactment, the constitution would forbid the application of the repealing law to past contracts, and to those only.

To illustrate this argument, let us take four laws, which, either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence or remedy.

Laws against usury are of the first description.

A law which converts a penalty, stipulated for by the parties, as the only atonement for a breach of the contract, into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second.

The statute of frauds, and the statute of limitations, may be cited as examples of the two last.

The validity of these laws can never be questioned by those who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into; and even then they are void only so far as they do so operate, because, in that case, and in that case only, do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do if this be the operation of a bankrupt law upon such contracts, it would seem to follow, that all such laws, whether in the form of new enactments, or of repealing laws, producing the same legal consequences, are made void by the constitution; and yet the counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded that those laws are not repugnant to the constitution, so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws, and the one now under consideration. How has this been attempted by the learned counsel who have argued this cause upon the ground of such a distinction?

They have insisted that the effect of the law first supposed, is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and, consequently, that there is no obligation to be impaired. But this is clearly not so, since it may legitimately avoid all contracts afterwards *entered into, [*262 which reserve to the lender a higher rate of interest than this law permits.

The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts; for it has not, and I think it cannot, for a moment, be maintained, that a law which, in express terms, varies the construction of an existing contract, or which, repealing a former law, is made to produce the same effect, does not impair the obligation of that contract.

The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former, supplying a rule of evidence, and the latter, forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing a rule of evidence.

All this I admit. But how does it happen that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting contracts? For we are informed by the learned judge who delivered the opinion of this court in the case of Sturges v. Crownin-

shield, that, "if, in a state where six years may be pleaded in bar to an action of assumpsit, a law should pass, declaring that contracts already in existence, not barred by the statute, should be construed within it, there could be little doubt of its unconstitutionality."

It is thus most apparent that, whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively or propectively. In all of them the law is pronounced to be void in the first class of cases, and not so in the second.

Let us stop, then, to make a more critical examination of the act of limitations, which, although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise, as it is made to apply retroactively, or prospectively, and see if it can, upon any intelligible principle, be distinguished from a 263*] *bankrupt law, when applied in the same manner. What is the effect of the former? The answer is, to discharge the debtor and all his future acquisitions from his contract; because he is permitted to plead it in bar of any remedy which can be instituted against him, and consequently in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of justice at least, is more favorable to the validity of the latter than of the former; for in the one, the debtor surrenders everything which he possesses towards the discharge of his obligation, and in the other, he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him, for the purpose of protecting his person, and his present, as well as his future acquisitions, against the performance of his contract.

It is said that the former does not discharge him absolutely from his contract, because it leaves a shadow sufficiently substantial to raise a consideration for a new promise to pay. And is not this equally the case with a certificated bankrupt, who afterwards promises to pay a debt from which his certificate had discharged him? In the former case, it is said, the defendant must plead the statute in order to bar the remedy, and to exempt him from his obligation. And so, I answer, he must plead his discharge under the bankrupt law, and his conformity to it, in order to bar the remedy of his creditor, and to secure to himself a like exemption. I have, in short, sought in vain for some other grounds on which to distinguish the two laws from each other, than those which were suggested at the bar. I can imagine no other, and I confidently believe that none exist which will bear the test of a critical examination.

To the decision of this court, made in the case of Sturges v. Crowninshield, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the state legislatures to pass bankrupt laws, by which I understand, those laws which discharge the person and the future *acquisitions of the bankrupt from his [*264 debts. I have always thought that the power to pass such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to believe that this opinion was, and is incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced.

After making this acknowledgment, I refer again to the above decision with some degree of confidence, in support of the opinion to which I am now inclined to come, that a bankrupt law, which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States. It is there stated, "that, until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the constitution of the United States." The question in that case was, whether the law of New York, passed on the third of April, 1811, which liberates, not only the person of the debtor, but discharges him from all liability for any debt contracted previous, as well as subsequent to his discharge, on his surrendering his property for the use of his creditors, was a valid law under the constitution in its application to a debt contracted prior to its passage? The court decided that it was not, upon the single ground that it impaired the obligation of that contract. And if it be true, that the states cannot pass a similar law to operate upon contracts, subsequently entered into, it follows inevitably, either that they cannot pass such laws at all, contrary to express declaration of the court, as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition, that every contract that can be formed, must either precede, or follow, any law by which it may be affected.

I have, throughout the preceding part of this opinion, considered the municipal law of the country where the contract is made, as incorporated with the contract, whether it affects its validity, construction, or discharge. But I think it quite immaterial to stickle for this position, if it be conceded to me, what can scarcely be denied, that this municipal law constitutes *the law of the contract so [*265 formed, and must govern it throughout. I hold the legal consequences to be the same, in which every view the law, as it affects the contract, is considered.

I come now to a more particular examination and construction of the section under which this question arises; and I am free to acknowledge that the collocation of the subjects for which it provides has made an irresistible impression upon my mind, much stronger, I am persuaded, than I can find language to communicate to the minds of others.

It declares, that "no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to Congress "to coin money, and to regulate the value thereof, and of foreign coin,"

lease him from all debts and demands existing against him on a specified day. This demand is one of that description, and the act under which the discharge was obtained, was the act of New York of 1801, a date long prior to that of the cause of action on which this suit was instituted. The discharge is set forth in the plea, and represents Ogden as "an insolvent debtor, being, on the day and year thereinafter mentioned, in prison, in the city and county of New York, on execution issued against him on some civil action," etc. It does not appear that any suit had ever been instituted against him by this party, or on this cause of action, prior to the present. The cause below was decided upon a special verdict, in which the jury find,

1st. That the acceptance of the bills on which the action was instituted, was made by Ogden, in the city of New York, on the days they severally bear date, the said defendant then residing in the city of New York, and continuing to reside there until a day not specified.

2d. That under the laws of the state of New York, in such case provided, and referred to in the discharge (which laws are specially found, etc., meaning the state law of 1801), application was made for, and the defendant obtained, the discharge hereunto annexed.

3d. That, by the laws of New York, actions on bills of exchange, and acceptances thereof, are limited to the term of six years; and,

4th. That at the time the said bills were drawn and accepted, the drawee and drawer of the same, were residents and citizens of the state of Kentucky.

On this state of facts the court below gave judgment against Ogden, the discharged debtor.

We are not in possession of the grounds of the decision below; and it has been argued here, as having been given upon the general nullity of the discharge, on the ground of its unconstitutionality. But, it is obvious that it 272*] might also have *proceeded upon the ground of its nullity as to citizens of other states, who have never, by any act of their own, submitted themselves to the lex fori of the state that gives the discharge—considering the right given by the constitution to go into the courts of the United States upon any contracts, whatever be their lex loci, as modifying and limiting the general power which states are acknowledged to possess over contracts formed under control of their peculiar laws.

This question, however, has not been argued, and must not now be considered as disposed of by this decision.

The abstract question of the general power of the states to pass laws for the relief of insolvent debtors, will be alone considered. And here, in order to ascertain with precision what we are to decide, it is first proper to consider what this court has already decided on this subject. And this brings under review the two cases of Sturges v. Crowninshield, and M'Millan v. M'Neill, adjudged in the year 1819, and contained in the 4th vol. of the reports. If the marginal note to the report, or summary of the effect of the case of M'Millan v. M'Neill, presented a correct view of the report of that decision, it is obvious, that there would remain very little, if anything, for this court to decide. But by comparing the note of the reporter with the facts of the case, it will be found that there is a generality of expression admitted into the former, which the case itself does not justify. The principle recognized and affirmed in M'Millan v. M'Neill, is one of universal law, and so obvious and incontestable that it need be only understood to be assented to. It is nothing more than this, "that insolvent laws have no extraterritorial operation upon the contracts of other states; that the principle is applicable as well to the discharges given under the laws of the states, as of foreign countries; and that the anterior or posterior character of the law under which the discharge is given, with reference to the date of the contract, makes no discrimination in the application of that principle."

The report of the case of Sturges v. Crowninshield needs also some explanation. The court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise, as of a legal adjudication. *The minority thought it better [*273 to yield something than risk the whole. And, although their course of reasoning led them to the general maintenance of the state power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the constitution of the United States, yet, as denying the power to act upon anterior contracts, could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the constitution, they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts, as well from the positive terms of the adjudication, as from inferences deducible from the reasoning of the court.

The case of Sturges v. Crowninshield, then, must, in its authority, be limited to the terms of the certificate, and that certificate affirms two propositions.

1. That a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law.

2. That a law of this description, acting upon prior contracts, is a law impairing the obligation of contracts within the meaning of the constitution.

Whatever inferences or whatever doctrines the opinion of the court in that case may seem to support, the concluding words of that opinion were intended to control and to confine the authority of the adjudication to the limits of the certificate.

I should therefore have supposed that the question of exclusive power in Congress to pass a bankrupt law was not now open; but it has been often glanced at in argument, and I have no objection to express my individual opinion upon it. Not having recorded my views on this point in the case of Crowninshield, I avail myself of this occasion to do so.

So far, then, am I from admitting that the constitution affords any ground for this doctrine, that I never had a doubt, that the leading object of the constitution was to bring in aid of the states a power over this subject which their individual powers never could attain to; so far from limiting, modifying, and

274*] *attenuating legislative power in its known and ordinary exercise in favor of unfortunate debtors, that its sole object was to extend and perfect it, as far as the combined powers of the states, represented by the general government, could extend it. Without that provision, no power would have existed that could extend a discharge beyond the limits of the state in which it was given, but with that provision it might be made co-extensive with the United States. This was conducing to one of the great ends of the constitution, one which it never loses sight of in any of its provisions—that of making an American citizen as free in one state as he was in another. And when we are told that this instrument is to be construed with a view to its federative objects, I reply that this view alone of the subject is in accordance with its federative character.

Another object in perfect accordance with this, may have been that of exercising a salutary control over the power of the states, whenever that power should be exercised without due regard to the fair exercise of distributive justice. The general tendency of the legislation of the states at that time to favor the debtor, was a consideration which entered deeply into many of the provisions of the constitution. And as the power of the states over the law of their respective forums remained untouched by any other provision of the constitution; when vesting in Congress the power to pass a bankrupt law, it was worthy of the wisdom of the convention to add to it the power to make that system uniform and universal. Yet, on this subject, the use of the term "uniform," instead of general, may well raise a doubt whether it meant more than that such a law should not be partial, but have an equal and uniform application in every part of the Union. This is in perfect accordance with the spirit in which various other provisions of the constitution are conceived.

For these two objects there appears to have been much reason for vesting this power in Congress; but for extending to the grant the effect of exclusiveness over the power of the states, appears to me not only without reason, but to be repelled by weighty considerations.

1. There is nothing which, on the face of the constitution, bears the semblance of direct pro- 275*] hibition on the states to *exercise this power; and it would seem strange that, if such a prohibition had been in the contemplation of the convention, when appropriating an entire section to the enumeration of prohibitions on the states, they had forgotten this, if they had intended to enact it.

The antithetical language adopted in that section, as to every other subject to which the power of Congress had been previously extended, affords a strong reason to conclude that some direct and express allusion to the power to pass a bankrupt law would have been here inserted also, if they had not intended that this power should be concurrently, or, at least, subordinately exercised by the states. It cannot be correct reasoning, to rely upon this fact as a ground to infer that the prohibition must be found in some provision not having that antithetical character, since this supposes an intention to insert the prohibition, which intention can only be assumed. Its omission is a just reason for forming no other conclusion than that it was purposely omitted. But,

2. It is insisted, that, though not express, the prohibition is to be inferred from the grant to Congress to establish uniform laws on the subject of bankruptcies throughout the United States; and that this grant, standing in connection with that to establish an uniform rule of naturalization, which is, in its nature, exclusive, must receive a similar construction.

There are many answers to be given to this argument; and the first is, that a mere grant of a state power does not, in itself, necessarily imply an abandonment or relinquishment of the power granted, or we should be involved in the absurdity of denying to the states the power of taxation, and sundry other powers ceded to the general government. But much less can such a consequence follow from vesting in the general government a power which no state possessed, and which, all of them combined, could not exercise to meet the end proposed in the constitution. For, if every state in the Union were to pass a bankrupt law in the same unvarying words, although this would, undoubtedly, be an uniform system of bankruptcy in its literal sense, it would be very far from answering the grant to Congress. There would still need some act of Congress, or some treaty *under sanction of an act of Con- [*276 gress, to give discharges in one state a full operation in the other. Thus, then, the inference which we are called upon to make, will be found not to rest upon any actual cession of state power, but upon the creation of a new power which no state ever pretended to possess; a power which, so far from necessarily diminishing, or impairing the state power over the subject, might find its full exercise in simply recognizing as valid, in every state, all discharges which shall be honestly obtained under the existing laws of any state.

Again; the inference proposed to be deduced from this grant to Congress, will be found much broader than the principle in which the deduction is claimed. For, in this, as in many other instances in the constitution, the grant implies only the right to assume and exercise a power over the subject. Why, then, should the state powers cease before Congress shall have acted upon the subject? or why should that be converted into a present and absolute relinquishment of power, which is, in its nature, merely potential, and dependent on the discretion of Congress whether, and when, to enter on the exercise of a power that may supersede it?

Let any one turn his eye back to the time when this grant was made, and say if the situation of the people admitted of an abandonment of a power so familiar to the jurisprudence of every state; so universally sustained in its reasonable exercise, by the opinion and practice of mankind, and so vitally important to a people overwhelmed in debt, and urged to enterprise by the activity of mind that is generated by revolutions and free governments.

I will with confidence affirm, that the constitution had never been adopted, had it then been imagined that this question would ever have been made, or that the exercise of this power in the states should ever have depended upon the views of the tribunals to which that

constitution was about to give existence. The argument proposed to be drawn from a comparison of this power with that of Congress over naturalization, is not a fair one, for the cases are not parallel; and if they were, it is by no means settled that the states would have 277*] been precluded from this power, *if Congress had not assumed it. But, admitting, argumenti gratia, that they would, still there are considerations bearing upon the one power, which have no application to the other. Our foreign intercourse being exclusively committed to the general government, it is peculiarly their province to determine who are entitled to the privileges of American citizens, and the protection of the American government. And the citizens of any one state being entitled by the constitution to enjoy the rights of citizenship in every other state, that fact creates an interest in this particular in each other's acts, which does not exist with regard to their bankrupt laws; since state acts of naturalization would thus be extraterritorial in their operation, and have an influence on the most vital interests of other states.

On these grounds, state laws of naturalization may be brought under one of the four heads or classes of powers precluded to the states, to wit, that of incompatibility; and on this ground alone, if any, could the states be debarred from exercising this power, had Congress not proceeded to assume it. There is, therefore, nothing in that argument.

The argument deduced from the commercial character of bankrupt laws is still more unfortunate. It is but necessary to follow it out, and the inference, if any deducible from it, will be found to be direct and conclusive in favor of the state rights over this subject. For if, in consideration of the power vested in Congress over foreign commerce, and the commerce between the states, it was proper to vest a power over bankruptcies that should pervade the states, it would seem, that by leaving the regulation of internal commerce in the power of the states, it became equally proper to leave the exercise of this power within their own limits unimpaired.

With regard to the universal understanding of the American people on this subject, there cannot be two opinions. If ever contemporaneous exposition, and the clear understanding of the contracting parties, or of the legislating power (it is no matter in which light it be considered), could be resorted to as the means of expounding an instrument, the continuing and unimpaired existence of this power in the states ought never to have been controverted. Nor 278*] was it controverted *until the repeal of the bankrupt act of 1800, or until a state of things arose in which the means of compelling a resort to the exercise of this power by the United States became a subject of much interest. Previously to that period, the states remained in the peaceable exercise of this power, under circumstances entitled to great consideration. In every state in the Union was the adoption of the constitution resisted by men of the keenest and most comprehensive minds; and if an argument, such as this, so calculated to fasten on the minds of a people, jealous to state rights, and deeply involved in debt, could have been imagined, it never would have escaped them. Yet nowhere does it appear to have been thought of; and, after adopting the constitution, in every part of the Union, we find the very framers of it everywhere among the leading men in public life, and legislating or adjudicating under the most solemn oath to maintain the constitution of the United States, yet nowhere imagining that, in the exercise of this power, they violated their oaths, or transcended their rights. Everywhere, too the principle was practically acquiesced in, that taking away the power to pass a law on a particular subject was equivalent to a repeal of existing laws on that subject. Yet in no instance was it contended that the bankrupt laws of the states were repealed, while those on navigation, commerce, the admiralty jurisdiction, and various others, were at once abandoned without the formality of a repeal. With regard to their bankrupt or insolvent laws, they went on carrying them into effect and abrogating, and re-enacting them, without a doubt of their full and unimpaired power over the subject. Finally, when the bankrupt law of 1800 was enacted, the only power that seemed interested in denying the right to the states, formally pronounced a full and absolute recognition of that right. It is impossible for language to be more full and explicit on the subject, than is the sixth section of this act of Congress. It acknowledges both the validity of existing laws, and the right of passing future laws. The pratical construction given by that act to the constitution is precisely this, that it amounts only to a right to assume the power to legislate on the subject, and, therefore, abrogates or suspends the existing laws, only so far as they may *clash with the provisions [*279 of the act of Congress. This construction was universally acquiesced in, for it was that on which there had previously prevailed but one opinion from the date of the constitution.

Much alarm has been expressed respecting the inharmonious operation of so many systems, all operating at the same time. But I must say that I cannot discover any real ground for these apprehensions. Nothing but a future operation is here contended for, and nothing is easier than to avoid those rocks and quicksands which are visible to all. Most of the dangers are imaginary, for the interests of each community, its respect for the opinion of mankind, and a remnant of moral feeling which will not cease to operate in the worst of times, will always present important barriers against the gross violation of principle. How is the general government itself made up, but of the same materials which separately make up the governments of the states?

It is a very important fact, and calculated to dissipate the fears of those who seriously apprehend danger from this quarter, that the powers assumed and exercised by the states over this subject, did not compose any part of the grounds of complaint by Great Britain, when negotiating with our government on the subject of violations of the treaty of peace. Nor is it immaterial as an historical fact, to show the evils against which the constitution really intended to provide a remedy. Indeed, it is a solecism to suppose that the permanent laws of any government, particularly those which relate to the administration of justice

between individuals, can be radically unequal or even unwise. It is scarcely ever so in despotic governments; much less in those in which the good of the whole is the predominating principle. The danger to be apprehended, is from temporary provisions and desultory legislation; and this seldom has a view to future contracts.

At all events, whatever be the degree of evil to be produced by such laws, the limits of its action are necessarily confined to the territory of those who inflict it. The ultimate object in denying to the states this power, would seem to be, to give the evil a wider range, if it be one, by extending the benefit of discharges over 280*] the whole of the Union. *But it is impossible to suppose, that the framers of the constitution could have regarded the exercise of this power as an evil in the abstract, else they would hardly have engrafted it upon that instrument which was to become the great safeguard of public justice and public morals.

And had they been so jealous of the exercise of this power in the states, it is not credible that they would have left unimpaired those unquestionable powers over the administration of justice which the states do exercise, and which, in their immoral exercise, might leave to the creditor the mere shadow of justice. The debtor's person, no one doubts, may be exempted from execution. But there is high precedent for exempting his lands; and public feeling would fully sustain an exemption of his slaves. What is to prevent the extension of exemption, until nothing is left but the mere mockery of a judgment, without the means of enforcing its satisfaction?

But it is not only in their execution laws, that the creditor has been left to the justice and honor of the states for his security. Every judiciary in the Union owes its existence to some legislative act; what is to prevent a repeal of that act? and then, what becomes of his remedy, if he has not access to the courts of the Union? Or what is to prevent the extension of the right to imparl? of the time to plead? of the interval between the sittings of the state courts? Where is the remedy against all this? and why were not these powers taken also from the states if they could not be trusted with the subordinate and incidental power here denied them? The truth is, the convention saw all this, and saw the impossibility of providing an adequate remedy for such mischiefs, if it was not to be found ultimately in the wisdom and virtue of the state rulers, under the salutary control of that republican form of government which it guarantees to every state. For the foreigner and the citizens of other states, it provides the safeguard of a tribunal which cannot be controlled by state laws in the application of the remedy; and for the protection of all, was interposed that oath which it requires to be administered to all the public functionaries, as well of the states as the United States. It may be called the ruling principle of the 281*] *constitution to interfere, as little as possible between the citizen and his own state government; and hence, with a few safeguards of a very general nature, the executive, legislative and judicial functions of the states are left as they were, as to their own citizens, and as to all internal concerns. It is not pretended that this discharge could operate upon the rights of the citizens of any other state, unless his contract was entered into in the state that gave it, or unless he had voluntarily submitted himself to the lex fori of the state before the discharge; in both which instances he is subjected to its effects by his own voluntary act.

For these considerations, I pronounce the exclusive power of Congress over the belief of insolvents untenable, and the dangers apprehended from the contrary doctrine unreal.

We will next inquire whether the states are precluded from the exercise of this power by that clause in the constitution which declares that no state shall "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

This law of the state of New York is supposed to have violated the obligation of a contract, by releasing Ogden from a debt which he had not satisfied; and the decision turns upon the question, first, in what consists the obligation of a contract? and, second, whether the act of New York will amount to a violation of that obligation, in the sense of the constitution.

The first of these questions has been so often examined and considered in this and other courts of the United States, and so little progress has yet been made in fixing the precise meaning of the words "obligation of a contract," that I should turn in despair from the inquiry, were I not convinced that the difficulties the question presents are mostly factitious and the result of refinement and technicality; or of attempts at definition made in terms defective both in precision and comprehensiveness. Right or wrong, I come to my conclusion on their meaning, as applied to executory contracts, the subject now before us, by a simple and short-handed exposition.

Right and obligation are considered by all ethical writers *as correlative terms: [*282 Whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to yield or bestow. The obligations of every contract will then consist of that right or power over my will or actions, which I by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say the social exercise of these rights, because in a state of nature, they are asserted over a fellow creature, but in a state of society over a fellow citizen. Yet, it is worthy of observation, how closely the analogy is preserved between the assertion of these rights in a state of nature and a state of society, in their application to the class of contracts under consideration.

Two men, A and B, having no previous connection with each other (we may suppose them even of hostile nations), are thrown upon a desert island. The first, having had the good fortune to procure food, bestows a part of it upon the other, and he contracts to return an equivalent in kind. It is obvious here, that B subjects himself to something more than the moral obligation of his contract, and that the law of nature, and the sense of mankind, would justify A in resorting to any means in his power to compel a compliance with this contract. But if it should appear that B, by sickness, by accident, or circumstances beyond human control, however superinduced, could not possibly comply with his contract, the decision would be otherwise, and the exercise of compulsory power over B would be followed with the indignation of mankind. He has car- 283*] ried the power conferred *on him over the will or actions of another beyond their legitimate extent, and done injustice in his turn. "Summum jus est summa injuria."

The progress of parties, from the initiation to the consummation of their rights, is exactly parallel to this in a state of society. With this difference, that in the concoction of their contracts, they are controlled by the laws of the society of which they are members; and for the construction and enforcement of their contracts, they rest upon the functionaries of its government. They can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is what the existing laws give to them. The remedy is no longer retained in their own hands, but surrendered to the community, to a power competent to do justice, and bound to discharge towards them the acknowledged duties of government to society, according to received principles of equal justice. The public duty, in this respect, is the substitute for that right which they possessed in a state of nature, to enforce a fulfillment of contracts; and if, even in a state of nature, limits were prescribed by the reason and nature of things, to the exercise of individual power in enacting the fulfillment of contracts, much more will they be in a state of society. For it is among the duties of society to enforce the rights of humanity; and both the debtor and the society have their interests in the administration of justice, and in the general good; interests which must not be swallowed up and lost sight of while yielding attention to the claim of the creditor. The debtor may plead the visitations of Providence, and the society has an interest in preserving every member of the community from despondency—in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family, and the community. When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor, and in which, pursuing the debtor any longer would destroy the one, without benefitting the other, must always be a question to be determined by the common guardian of the rights of both; and in this originates the power exercised by governments 284*] in favor of insolvents. *It grows out of the administration of justice, and is a necessary appendage to it.

There was a time when a different idea prevailed, and then it was supposed that the rights of the creditor required the sale of the debtor, and his family. A similar notion now prevails on the coast of Africa, and is often exercised there by brute force. It is worthy only of the country in which it now exists, and of that state of society in which it once originated and prevailed.

"Les non cogit ad impossibilia," is a maxim applied by law to the contracts of parties in a hundred ways. And where is the objection, in a moral or political view, to applying it to the exercise of the power to relieve insolvents? It is in analogy with this maxim, that the power to relieve them is exercised; and if it never was imagined, that, in other cases, this maxim violated the obligation of contracts, I see no reason why the fair, ordinary, and reasonable exercise of it in this instance, should be subjected to that imputation.

If it be objected to these views of the subject, that they are as applicable to contracts prior to the law, as to those posterior to it, and, therefore, inconsistent with the decision in the case of Sturges v. Crowninshield, my reply is, that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But if applicable to the case of prior debts, multo fortiori, will it be so to those contracted subsequent to such a law; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded.

I must not be understood here as reasoning upon the assumption that the remedy is grafted into the contract. I hold the doctrine untenable, and infinitely more restrictive on state power than the doctrine contended for by the opposite party. Since, if the remedy enters into the contract, then the states lose all power to alter their laws for the administration of justice. Yet, I freely admit, that the remedy enters into the views of the parties when contracting; that the constitution pledges the states to every creditor for the full, and fair, and candid exercise of state power to the *ends of justice, according to its ordi- [*285 nary administration, uninfluenced by views to lighten, or lessen, or defer the obligation to which each contract fairly and legally subjects the individual who enters into it. Whenever an individual enters into a contract, I think his assent is to be inferred, to abide by those rules, in the administration of justice which belong to the jurisprudence of the country of the contract. And when compelled to pursue his debtor in other states, he is equally bound to acquiesce in the law of the forum to which he subjects himself. The law of the contract remains the same everywhere, and it will be the same in every tribunal; but the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each state severally. It is very true, that inconveniences may occasionally grow out of irregularities in the administration of justice by the states. But the citizen of the same state is referred to his influence over his own institutions for his security, and the citizens of the other states have the institutions and powers of the general government to resort

to. And this is all the security the constitution ever intended to hold out against the undue exercise of the power of the states over their own contracts, and their own jurisprudence.

But, since a knowledge of the laws, policy, and jurisprudence of a state, is necessarily imputed to every one entering into contracts within its jurisdiction, of what surprise can he complain, or what violation of public faith, who still enters into contracts under that knowledge? It is no reply to urge, that, at the same time knowing of the constitution, he had a right to suppose the discharge void and inoperative, since this would be but speculating on a legal opinion, in which, if he proves mistaken, he has still nothing to complain of but his own temerity, and concerning which, all that come after this decision, at least, cannot complain of being misled by their ignorance or misapprehensions. Their knowledge of the existing laws of the state will hence forward be unqualified, and was so, in the view of the law, before this decision was made.

It is now about twelve or fourteen years since 286*] I was called *upon, on my circuit, in the case of Gell, Canonge & Co. v. L. Jacobs, to review all this doctrine. The cause was ably argued by gentlemen whose talents are well known in this capitol, and the opinions which I then formed, I have seen no reason since to distrust.

It appears to me, that a great part of the difficulties of the cause, arise from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings.

By classing bills of attainder, ex post facto laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property. It is true, that some confusion has arisen from an opinion, which seems early, and without due examination, to have found its way into this court; that the phrase "ex post facto" was confined to laws affecting criminal acts alone. The fact, upon examination, will be found otherwise; for neither in its signification or uses is it thus restricted. It applies to civil as well as to criminal acts (1 Shep. Touch., 68, 70, 73), and with this enlarged signification attached to that phrase, the purport of the clause would be, "that the states shall pass no law, attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date; and all contracts thus construed, shall be enforced according to their just and reasonable purport."

But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfillment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts, as over the form and measure of the remedy to enforce them.

As instances of the first, take the contract imputed to the drawer of a bill, or indorser of a note, with its modifications; the deviations of the law from the literal contract of the parties to a penal bond, a mortgage, a policy of insurance, bottomry bond, and various others that might be *enumerated. And for in- [*287
stances of discretion exercised in applying the remedy, take the time for which executors are exempted from suit; the exemption of members of legislatures; of judges; of persons attending courts, or going to elections; the preferences given in the marshaling of assets; sales on credit for a present debt; shutting of courts altogether against gaming debts and usurious contracts, and above all, acts of limitation. I hold it impossible to maintain the constitutionality of an act of limitation, if the modification of the remedy against debtors, implied in the discharge of insolvents, is unconstitutional. I have seen no distinction between the cases that can bear examination.

It is in vain to say that acts of limitation appertain to the remedy only; both descriptions of laws appertain to the remedy, and exactly in the same way; they put a period to the remedy, and upon the same terms, by what has been called, a tender of paper money in the form of a plea, and to the advantage of the insolvent laws, since, if the debtor can pay, he has been made to pay. But the door of justice is shut in the face of the creditor in the other instance, without an inquiry on the subject of the debtor's capacity to pay. And it is equally vain to say that the act of limitation raises a presumption of payment, since it cannot be taken advantage of on the general issue, without provision by statute; and the only legal form of a plea implies an acknowledgment that the debt has not been paid.

Yet so universal is the assent of mankind in favor of limitation acts, that it is the opinion of profound politicians, that no nation could subsist without one.

The right, then, of the creditor, to the aid of the public arm for the recovery of contracts, is not absolute and unlimited, but may be modified by the necessities or policy of societies. And this, together with the contract itself, must be taken by the individual, subject to such restrictions and conditions as are imposed by the laws of the country. The right to pass bankrupt laws is asserted by every civilized nation in the world. And in no writer, I will venture to say, has it ever been suggested, that the power of annulling such contracts, universally exercised under their bankrupt or insolvent systems, involves a violation of the obligation of contracts. *In interna- [*288
tional law, the subject is perfectly understood, and the right generally acquiesced in; and yet the denial of justice is, by the same code, an acknowledged cause of war.

But, it is contended, that if the obligation of a contract has relation at all to the laws which give or modify the remedy, then the obligation of a contract is ambulatory, and uncertain, and will mean a different thing in every state in which it may be necessary to enforce the contract.

There is no question that this effect follows; and yet, after this concession, it will still remain to be shown how any violation of the obligation of the contract can arise from that cause. It is a casualty well known to the creditor when he enters into the contract; and if obliged to prosecute his rights in another state, what more can he claim of that state than that its courts

shall be open to him on the same terms on which they are open to other individuals? It is only by voluntarily subjecting himself to the lex fori of a state that he can be brought within the provisions of its statutes in favor of debtors, since, in no other instance, does any state pretend to a right to discharge the contracts entered into in another state. He who enters into a pecuniary contract, knowing that he may have to pursue his debtor, if he flees from justice, casts himself, in fact, upon the justice of nations.

It has also been urged, with an earnestness that could only proceed from deep conviction, that insolvent laws were tender laws of the worst description, and that it is impossible to maintain the constitutionality of insolvent laws that have a further operation, without asserting the right of the states to pass tender laws, provided such laws are confined to a future operation.

Yet to all this there appears to be a simple and conclusive answer. The prohibition in the constitution to make anything but gold or silver coin a tender in payment of debts is express and universal. The framers of the constitution regarded it as an evil to be repelled without modification; they have, therefore, left nothing to be inferred or deduced from construction on this subject. But the contrary is the fact with regard to insolvent laws; it con- 289*] tains no express *prohibition to pass such laws, and we are called upon here to deduce such a prohibition from a clause, which is anything but explicit, and which already has been judicially declared to embrace a great variety of other subjects. The inquiry, then, is open and indispensable in relation to insolvent laws,' prospective or retrospective, whether they do, in the sense of the constitution, violate the obligation of contracts? There would be much in the argument, if there was no express prohibition against passing tender laws; but with such express prohibition, the cases have no analogy. And, independent of the different provisions in the constitution, there is a distinction existing between tender laws and insolvent laws in their object and policy, which sufficiently points out the principle upon which the constitution acts upon them as several and distinct; a tender law supposes a capacity in the debtor to pay and satisfy the debt in some way, but the discharge of an insolvent is founded in his incapacity ever to pay, which incapacity is judicially determined according to the laws of the state that passes it. The one imports a positive violation of the contract, since all contracts to pay, not expressed otherwise, have relation to payment in the current coin of the country; the other imports an impossibility that the creditor ever can fulfil the contract.

If it be urged, that to assume this impossibility is itself an arbitrary act, that parties have in view something more than present possessions, that they look to future acquisitions, that industry, talents and integrity are as confidently trusted as property itself; and, to release them from this liability, impairs the obligation of contracts; plausible as the argument may seem, I think the answer is obvious and incontrovertible.

Why may not the community set bounds to the will of the contracting parties in this as in every other instance? That will is controlled in the instances of gaming debts, usurious contracts, marriage, brokage bonds, and various others; and why may not the community also declare that, "look to what you will, no contract formed within the territory which we govern shall be valid as against future acquisitions;" we have an interest in the happiness, and services, and families of this community, which shall not be superseded by individual *views? Who can doubt the power of [*290 the state to prohibit her citizens from running in debt altogether? A measure a thousand time wiser than that impulse to speculation and ruin, which has hitherto been communicated to individuals by our public policy. And if to be prohibited altogether, where is the limit which may be set both to the acts and the views of the contracting parties?

When considering the first question in this cause, I took occasion to remark on the evidence of contemporaneous exposition deducible from well-known facts. Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the cotemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them; and in this point of view it is obvious that the consideration bears as strongly upon the second point in the cause as on the first. For, had there been any possible ground to think otherwise, who could suppose that such men, and so many of them, acting under the most solemn oath, and generally acting rather under a feeling of jealousy of the power of the general government than otherwise, would universally have acted upon the conviction, that the power to relieve insolvents by a discharge from the debt had not been taken from the states by the article prohibiting the violation of contracts. The whole history of the times, up to a time subsequent to the repeal of the bankrupt law, indicates a settled knowledge of the contrary.

If it be objected to the views which I have taken of this subject, that they imply a departure from the direct and literal meaning of terms, in order to substitute an artificial or complicated exposition; my reply is, that the error is on the other side; qui hœret in literâ, hœret in cortice. All the notions of society, particularly in their jurisprudence, are more or less artificial; our constitution nowhere speaks the language of men in a state of nature; let anyone attempt a literal exposition of the phrase which immediately precedes the one under *consideration, I mean ex [*291 post facto, and he will soon acknowledge a failure. Or let him reflect on the mysteries that hang around the little slip of paper which lawyers know by the title of a bail-piece. The truth is, that even compared with the principles of natural law, scarcely any contract imposes an obligation conformable to the literal meaning of terms. He who enters into a contract to follow the plough for the year, is not held to its literal performance, since many casualties may intervene which would release him from the obli-

gation without actual performance. There is a very striking illustration of this principle to be found in many instances in the books; I mean those cases in which parties are released from their contracts by a declaration of war, or where laws are passed rendering that unlawful, even incidentally, which was lawful at the time of the contract. Now, in both these instances, it is the government that puts an end to the contract, and yet no one ever imagined that it thereby violates the obligation of a contract.

It is, therefore, far from being true, as a general proposition, "that a government necessarily violates the obligation of a contract, which it puts an end to without performance." It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.

In the effort to get rid of the universal vote of mankind in favor of limitation acts, and laws against gaming, usury, marriage, brokage, buying and selling of offices, and many of the same description, we have heard it argued, that, as to limitation acts, the creditor has nothing to complain of, because time is allowed him, of which, if he does not avail himself, it is his own neglect; and as to all others, there is no contract violated, because there was none ever incurred. But it is obvious that this mode of answering the argument involves a surrender to us of our whole ground. It admits the right of the government to limit and define the power of contracting, and the extent of the creditor's remedy against his debtor; to regard other rights besides his, and to modify his rights so as not to let them override entirely the general interests of society, the interests of the community itself in the talents and services of the debtor, the regard due to his 292*] *happiness, and to the claims of his family upon him and upon the government.

No one questions the duty of the government to protect and enforce the just rights of every individual over all within its control. What we contend for is no more than this, that it is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be exercised under the semblance of right and justice. It is true, that in the exercise of this power, governments themselves may sometimes be the authors of oppression and injustice; but, wherever the constitution could impose limits to such power, it has done so; and if it has not been able to impose effectual and universal restraints, it arises only from the extreme difficulty of regulating the movements of sovereign power; and the absolute necessity, after every effort that can be made to govern effectually, that will still exist to leave some space for the exercise of discretion, and the influence of justice and wisdom.

Mr. Justice **Thompson.** This action is founded on several bills of exchange, bearing date in September, 1806, drawn by J. Jordan, upon Ogden, the plaintiff in error, in favor of Saunders, the defendant in error. The drawer and payee, at the date of the bill, were citizens of, and resident in Kentucky. Ogden was a citizen of, and resident in New York, where the bills were presented, and accepted by him, but were not paid when they came to maturity, and are still unpaid. Ogden sets up, in bar of this action, his discharge under the insolvent law of the state of New York, passed in April, 1801, as one of the revised laws of that state. His discharge was duly obtained on the 19th of April, 1808, he having assigned all his property for the benefit of his creditors, and having, in all respects, complied with the laws of New York for giving relief in cases of insolvency. These proceedings, according to those laws, discharged the insolvent from all debts due at the time of the assignment, or contracted for before that time, though payable afterwards, except in some specified cases, which do not affect the present question. From this brief statement it appears that Ogden, being sued upon his acceptances of *the bills in [*293 question, the contract was made, and to be executed within the state of New York, and was made subsequent to the passage of the law under which he was discharged. Under these circumstances the general question presented for decision is, whether this discharge can be set up in bar of the present suit. It is not pretended, but that if the law under which the discharge was obtained, is valid, and the discharge is to have its effect according to the provisions of that law, it is an effectual bar to any recovery against Ogden. But, it is alleged, that this law is void under the prohibition in the constitution of the United States (art 1, sec. 10), which declares, that "no state shall pass any law impairing the obligation of contracts." So that the inquiry here is, whether the law of New York, under which the discharge was obtained, is repugnant to this clause in the constitution; and upon the most mature consideration, I have arrived at the conclusion that the law is not void, and that the discharge set up by the plaintiff in error is an effectual protection against any liability upon the bills in question. In considering this question, I have assumed, that the point now presented is altogether undecided, and entirely open for discussion. Although several cases have been before this court which may have a bearing upon the question, yet, upon the argument, the particular point now raised has been treated by the counsel as still open for decision, and so considered by the court by permitting its discussion. Although the law under which Ogden was discharged appears, by the record, to have been passed in the year 1801, yet it is proper to notice that this was a mere revision and re-enactment of a law which was in force as early, at least, as from the year 1788, and which has continued in force from that time to the present (except from the 3d of April, 1811, until the 14th of February, 1812), in all its material provisions, which have any bearing upon the present question. To declare a law null and void after such a lapse of time, and thereby prostrate a system which has been in operation for nearly forty years, ought to be called for by some urgent necessity, and founded upon reasons and principles scarcely admitting of doubt. In our complex system of government, we must expect that questions involving *the jurisdictional limits be- [*294 tween the general and state governments, will frequently arise; and they are always ques-

tions of great delicacy, and can never be met without feeling deeply and sensibly impressed with the sentiment, that this is the point upon which the harmony of our system is most exposed to interruption. Whenever such a question is presented for decision, I cannot better express my views of the leading principles which ought to govern this court, than in the language of the court itself in the case of Fletcher v. Peck, 6 Cranch, 128. "The question," says the court, "whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom or never be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But, it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatability with each other." If such be the rule by which the examination of this case is to be governed and tried (and that it is no one can doubt), I am certainly not prepared to say that it is not, at least a doubtful case, or that I feel a clear conviction that the law in question is incompatible with the constitution of the United States.

In the discussion at the bar, this has rightly been considered a question relating to the division of power between the general and state governments. And in the consideration of all such questions, it cannot be too often repeated (although universally admitted), or too deeply impressed on the mind, that all the powers of the general government are derived solely from the constitution; and that whatever power is not conferred by that charter, is reserved to the states respectively, or to the people. The state of New York, when the law in question was passed (for I consider this a mere continuation of the insolvent act of 1788), was 295*] *in the due and rightful exercise of its powers as an independent government; and unless this power has been surrendered by the constitution of the United States, it still remains in the state. And in this view, whether the law in question be called a bankrupt or an insolvent law, is wholly immaterial; it was such a law as a sovereign state had a right to pass; and the simple inquiry is, whether that right has been surrendered. No difficulty arises here out of any inquiry about express or implied powers granted by the constitution. If the states have no authority to pass laws like this, it must be in consequence of the express provision, "that no state shall pass any law impairing the obligation of contracts."

It is admitted, and has so been decided by this court, that a state law, discharging insolvent debtors from their contracts, entered into antecedent to the passing of the law, falls within this clause in the constitution, and is void. In the case now before the court, the contract was made subsequent to the passage of the law; and this, it is believed, forms a solid ground of distinction, whether tested by the letter, or the spirit and policy of the prohibition. It was not denied on the argument, and, I presume, cannot be, but that a law may be void in part and good in part; or, in other words, that it may be void, so far as it has a retrospective application to past contracts, and valid, as applied prospectively to future contracts. The distinction was taken by the court in the third circuit, in the case of Golden v. Prince, 5 Hall's L. J., 502, and which, I believe, was the first case that brought into discussion the validity of a state law analogous to the one now under consideration. It was there held, that the law was unconstitutional in relation to that particular case, because it impaired the obligation of the contract, by discharging the debtor from the payment of his debts, due or contracted for before the passage of the law. But it was admitted, that a law, prospective in its operation, under which a contract afterwards made might be avoided in a way different from that provided by the parties, would be clearly constitutional. And how is this distinction to be sustained, except on the ground that contracts are deemed to be made in reference to the existing law, and to be governed, *regulated, and controlled by its [*296 provisions? As the question before the court was the validity of an insolvent law, which discharged the debtor from all contracts, the distinction must have been made in reference to the operation of the discharge upon contracts made before, and such as were made after the passage of the law, and is, therefore, a case bearing directly upon the question now before the court. That the power given by the constitution to Congress, to establish uniform laws on the subject of bankruptcies throughout the United States, does not withdraw the subject entirely from the states, is settled by the case of Sturges v. Crowinshield, 4 Wheat. Rep. 191. It is there expressly held, that "until the power to pass uniform laws on the subject of bankruptcies is exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the constitution of the United States." And this case also decides, that the right of the states to pass bankrupt laws is not extinguished, but is only suspended by the enactment of a general bankrupt law by Congress, and that a repeal of that law removes disability to the exercise of the power by the states so that the question now before the court, is narrowed down to the single inquiry, whether a state bankrupt law, operating prospectively upon contracts made after its enactment, impairs the obligation of such contract, within the sense and meaning of the constitution of the United States.

This clause in the constitution has given rise to much discussion, and great diversity of opinion has been entertained as to its true interpretation. Its application to some cases may be plain and palpable, to others more doubtful. But, so fas as relates to the particular question now under consideration, the weight of judicial opinions in the state courts is altogether in favor of the constitutionality of the law, so far as my examination has extended. And, indeed, I am not aware of a single contrary opinion. 13 Mass. Rep. 1; 16 Johns. Rep. 233; 7 Johns. Ch. Rep. 299; 5 Binn. Rep. 264; 5 Hall's L. J. 520, 6th ed. 475;

Niles' Reg. 15th of September, 1821, Townsend v. Townsend.

In proceeding to a more particular examina-
297*] tion of the *true import of the clause "no state shall pass any law impairing the obligation of contracts," the inquiries which seem naturally to arise are, what is a contract, what its obligation, and what may be said to impair it? As to what constitutes a contract, no diversity of opinion exists; all the elementary writers on the subject, sanctioned by judicial decisions, consider it briefly and simply an agreement in which a competent party undertakes to do, or not to do, a particular thing; but all know that the agreement does not always, nay, seldom, if ever, upon its face, specify the full extent of the terms and conditions of the contract; many things are necessarily implied, and to be governed by some rule not contained in the agreement; and this rule can be no other than the existing law when the contract is made, or to be executed. Take, for example, the familiar case of an agreement to pay a certain sum of money, with interest. The amount, or rate of such interest, is to be ascertained by some standard out of the agreement, and the law presumes the parties meant the common rate of interest established in the country where the contract was to be performed. This standard is not looked to for the purpose of removing any doubt or ambiguity arising on the contract itself, but to ascertain the extent of its obligation; or, to put a case more analogous, suppose a statute should declare generally, that all contracts for the payment of money should bear interest after the day of payment fixed in the contract, and a note, where such law was in force, should be made payable in a given number of days after date. Such note would surely draw interest from the day it became payable, although the note upon its face made no provision for interest; and the obligation of the contract to pay the interest would be as complete and binding as to pay the principal; but such would not be its operation without looking out of the instrument itself, to the law which created the obligation to pay interest. The same rule applies to contracts of every description; and parties must be understood as making their contracts with reference to existing laws, and impliedly assenting that such contracts are to be construed, governed, and controlled, by such laws. Contracts absolute, and uncondi-
298*] tional, *upon their face, are often considered subject to an implied condition which the law establishes as applicable to such cases. Suppose a state law should declare, that in all conveyances thereafter to be made, of real estate, the land should be held as security for the payment of the consideration money, and liable to be sold, in case default should be made in payment; would such a law be unconstitutional? And yet it would vary the contract from that which was made by the parties, if judged of by the face of the deed alone, and would be making a contract conditional, which the parties had made absolute, and would certainly be impairing such contract, unless it was deemed to have been made subject to the provisions of such law, and with reference thereto, and that the law was impliedly adopted as forming the obligation and terms of the contract. The whole doctrine of the lex loci is founded on this principle.

The language of the court, in the third circuit, in the case of Campanque v. Burnell, 1 Washington C. C. Rep. 341, is very strong on this point. Those laws, say the court, which in any manner affect the contract, whether in its construction, the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself. The contract is a law which the parties impose upon themselves, subject, however, to the paramount law—the law of the country where the contract is made. And when to be enforced by foreign tribunals, such tribunals aim only to give effect to the contracts, according to the laws which give them validity. So, also, in this court, in the case of Renner v. The Bank of Columbia, 9 Wheat. Rep. 586, the language of the court is to the same effect, and shows that we may look out of the contract, to any known law or custom, with reference to which the parties may be presumed to have contracted, in order to ascertain their intention, and the legal, and binding force, and obligation of their contract. The Bank of Columbia v. Oakley, 4 Wheat. Rep. 235, is another case recognizing the same principle. And in the case of Dartmouth College v. Woodward, 4 Wheat. Rep. 695, it is well observed by one of the judges of this court, "that all contracts recognized as valid in any *country, ob- [*299
tain their obligation and construction jure loci contractus." And this doctrine is universally recognized, both in the English and American courts.

If contracts are not made with reference to existing laws, and to be governed and regulated by such laws, the agreement of parties, under the extended construction now claimed for this clause in the constitution, may control state laws on the subject of contracts altogether. A parol agreement for the sale of land is a contract, and if the agreement alone makes the contract, and it derives its obligation solely from such agreement, without reference to the existing law, it would seem to follow, that any law which had declared such contract void, or had denied a remedy for breach thereof, would impair its obligation. A construction involving such consequences is certainly inadmissible. Any contract not sanctioned by existing laws creates no civil obligation; and any contract discharged in the mode and manner provided by the existing law where it was made, cannot, upon any just principles of reasoning, be said to impair such contract.

It will, I believe, be found on examination, that the course of legislation in some of the states between debtor and creditor, which formed the grounds of so much complaint, and which probably gave rise to this prohibition in the constitution, consisted principally, if not entirely, of laws having a restrospective operation upon antecedent debts.

If a contract does not derive its obligation from the positive law of the country where it is made, where is to be found the rule, that such obligation does not attach until the contracting party has attained a certain age? In what code of natural law, or in what system of universal law, out of which it is said, at the bar, spring

the eternal and unalterable principles of right and of justice, will be found a rule, that such obligation does not attach so as to bind a party under the age of twenty-one years? No one will pretend that a law exonerating a party from contracts entered into before arriving at such age would be invalid. And yet, it would impair the obligation of the contract, if such obligation is derived from any other source than the existing law of the place where made. Would it not be within the legitimate powers 300*] of a state legislature to declare prospectively that no one should be made responsible, upon contracts entered into before arriving at the age of twenty-five years? This, I presume, cannot be doubted. But, to apply such a law to past contracts, entered into when twenty-one years was the limit, would clearly be a violation of the obligation of the contract. No such distinction, however, could exist, unless the obligation of the contract grows out of the existing law, and with reference to which the contract must be deemed to have been made.

The true import of the term "obligation," as used in the constitution, may admit of some doubt. That it refers to the civil, or legal, and not moral obligation, is admitted by all. But whether the remedy upon the contract is entirely excluded from the operation of this provision, is a point on which some diversity of opinion has been entertained.

That it is not intended to interfere with or limit state legislation, in relation to the remedy, in the ordinary prosecution of suits, no one can doubt. And, indeed, such a principle is indispensable to facilitate commercial intercourse between the citizens or subjects of different governments, and is sanctioned by all civilized nations; and if, according to the language of these cases, this principle extends to the obligation, as well as the construction of contracts, it would seem to follow, as a necessary conclusion, that it must embrace all the consequences growing out of the laws of the country where the contract is made; for it is the law which creates the obligation, and whenever, therefore, the lex loci provides for the dissolution of the contract in any prescribed mode, the parties are presumed to have acted subject to such contingency. And hence, in the English courts, wherever the operation of a foreign discharge under a bankrupt law has been brought under consideration, they have given to it the same effect that it would have had in the country where the contract was made. And the same rule has been recognized and adopted in the courts of this country almost universally, where the question has arisen. But whether a law might not so change the nature and extent of existing remedies, and thereby so materially impair the right, as to fall within the scope 301*] *of this prohibition, if it extended to remedies upon antecedent contracts, is by no means clear. If the law, whatever it may be, relating to the remedy, has a prospective operation only, no objection can arise to it under this clause in the constitution. It is a question that must rest in the sound discretion of the state legislature. But men, when entering into contracts, can hardly be presumed entirely regardless of the remedy which the law provides in case of a breach of the contract; and the means of obtaining satisfaction for such breach enters essentially into consideration in making the contract. If, at the time of making the contract, it be known that the person only of the debtor, and not his property, or his personal property only, and not his lands, or a certain part of either, is to be resorted to for satisfaction, no ground of complaint can exist, the contract having been made with full knowledge of all these things; but if, at the time the contract is made, not only the person, but all the property, both real and personal, of the debtor, might be resorted to for satisfaction, and a law should be passed, placing beyond the reach of the creditor the whole, or the principal part, of the debtor's property, it would be difficult to sustain the constitutionality of such a law. The statute of limitations is conceded to relate to the remedy. Suppose, when a contract was made, the limitation was six years, and it should be reduced to six months, or any shorter period, and applied to antecedent contracts, would it not be repugnant to the constitution? But if the legislature of a state should choose to adopt, prospectively, six months as the limitation, who could question the authority so to do? And suppose, further, that the unconstitutionality of the law in question is admitted, could the state of New York pass a law limiting the right of recovery against any insolvent who had been duly discharged according to the provisions of the insolvent act, to ten days from the passage of such law? And yet this would be a statute of limitation, and affect the remedy only. The law now in question is nothing more than taking away all remedy; and whether it be the whole, or some material part thereof, would seem to differ in degree only, and not in principle; and if to have a retrospective operation, *might well be [*302 considered as falling within the spirit and policy of the prohibition.

In the case of Sturges v. Crowninshield, the court, in explaining the meaning of the terms "obligation of a contract," say: "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." That is, as I understand it, the law of the contract forms its obligation; and if so, the contract is fulfilled, and its obligation discharged by complying with whatever the existing law required in relation to such contract; and it would seem to me to follow, that if the law, looking to the contingency of the debtor's becoming unable to pay the whole debt, should provide for his discharge on payment of a part, this would enter into the law of the contract, and the obligation to pay would, of course, be subject to such contingency.

It is unnecessary, however, on the present occasion, to attempt to draw, with precision, the line between the right and the remedy, or to determine whether the prohibition in the constitution extends to the former, and not to the latter, or whether, to a certain extent, it embraces both; for the law in question strikes at the very root of the cause of action, and takes away both right and remedy, and the question still remains, does the prohibition extend to a state bankrupt or insolvent law, like the one in question, when applied to contracts entered into subsequent to its passage. Whether this is technically a bankrupt or an insolv-

ent law, is of little importance. Its operation, if valid, is to discharge the debtor absolutely from all future liability on surrendering up his property, and, in that respect, is a bankrupt law, according to the universal understanding in England, where a bankrupt system is in operation. It is not, however, limited to traders, but extends to every class of citizens; and, in this respect, is more analogous to the English insolvent laws, which only authorize the discharge of the debtor from imprisonment.

If this provision in the constitution was unambiguous, and its meaning entirely free from doubt, there would be no door left open for construction, or any proper ground upon 303*] which *the intention of the framers of the constitution could be inquired into this court would be bound to give to it its full operation, whatever might be the views entertained of its expediency. But the diversity of opinion entertained of its construction, will fairly justify an inquiry into the intention, as well as the reason and policy of the provision; all which, in my judgment, will warrant its being confined to laws affecting contracts made antecedent to the passage of such laws. Such would appear to be the plain and natural interpretation of the words, "no state shall pass any law impairing the obligation of contracts."

The law must have a present effect upon some contract in existence, to bring it within the plain meaning of the language employed. There would be no propriety in saying, that a law impaired, or in any manner whatever modified or altered, what did not exist. The most obvious and natural application of the words themselves, is to laws having a retrospective operation upon existing contracts; and this construction is fortified by the associate prohibitions, "no state shall pass any bill of attainder, expost facto law, or law impairing the obligation of contracts." The two first are confessedly restricted to retrospective laws, concerning crimes and penalties affecting the personal security of individuals. And no good reason is perceived why the last should not be restricted to retrospective laws, relating to private rights growing out of the contracts of parties. The one provision is intended to protect the person of the citizen from punishment criminally for any act not unlawful when committed; and the other to protect the rights of property, as secured by contracts sanctioned by existing laws. No one supposes that a state legislature is under any restriction in declaring, prospectively, any acts criminal which its own wisdom and policy may deem expedient. And why not apply the same rule of construction and operation to the other provision relating to the rights of property? Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of our government. No state court would, I presume, sanction and enforce an ex post facto 304*] law; if no *such prohibition was contained in the constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles, upon which every just system of laws is founded. It is an elementary principle adopted and sanctioned by the courts of justice in this country, and in Great Britain, whenever such laws have come under consideration, and yet retrospective laws are clearly within this prohibition. It is, therefore, no objection to the view I have taken of this clause in this constitution, that the provision was unnecessary. The great principle asserted, no doubt, is, as laid down by the court in Sturges v. Crowninshield, the inviolability of contracts; and this principle is fully maintained by confining the prohibition to laws affecting antecedent contracts. It is the same principle, we find, contemporaneously (13th July, 1787, 1 L. U. S. 475) asserted by the old Congress, in an ordinance for the government of the territory of the United States north-west of the river Ohio. By one of the fundamental articles it is provided, that "in the just preservation of rights and property, it is understood and declared that no law ought ever to be made, or have force in the territory, that shall in any maner whatever interfere with or affect private contracts or engagements, bona fide, and without fraud, previously made," thereby pointedly making a distinction between laws affecting contracts antecedently, and subsequently made; and such a distinction seems to me to be founded upon the soundest principles of justice, if there is anything in the argument, that contracts are made with reference to, and derive their obligation from the existing law.

That the prohibition upon the states to pass laws impairing the obligation of contracts is applicable to private rights merely, without reference to bankrupt laws was evidently the understanding of those distinguished commentators on the constitution, who wrote the Federalist. In the 44th number of that work (p. 281), it is said that "bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed *to some of the state constitutions, and [*305 all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional defenses against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights." Had it been supposed that this restriction had for its object the taking from the states the right of passing insolvent laws, even when they went to discharge the contract, it is a little surprising that no intimation of its application to that subject should be found in these commentaries upon the constitution. And it is still more surprising, that if it had been thought susceptible of any such interpretation, that no objection should have been made in any of the states to the constitution on this ground, when the ingenuity of man was on the stretch in many states to defeat its adoption; and particularly in the state of New York, where the law now in question was in full force at the very time the state convention was deliberating upon the adoption of the constitution. But if the prohibition is confined to retrospective laws, as it naturally imports, it is not surprising that it should have passed without objection, as it is the assertion of a principle universally approved.

It was pressed upon the court with great confidence, and, as it struck me at the time with much force, that if this restriction could not reach laws existing at the time the contract was made, state legislatures might evade the prohibition (immediately preceding), to make anything but gold and silver a tender in payment of debts, by making the law prospective in its operation, and applicable to contracts thereafter to be made. But on reflection, I think, no such consequences are involved. When we look at the whole clause in which these restrictions are contained, it will be seen that the subjects embraced therein are evidently to be divided into two classes; the one of a public and national character, the power over which is entirely taken away from the states; and the other relating to private and personal rights, upon which the states may legislate under the restrictions specified. The former are, "no state shall enter into any treaty, alli- [*306 ance, or confederation, grant *letters of marque and reprisal, coin money, emit bills of credit." Thus far there can be no question that they relate to powers of a general and national character. The next in order is, or "make anything but gold and silver a tender in payment of debts;" this is founded upon the same principles of public and national policy as the prohibition to coin money and emit bills of credit, and is so considered in the commentary on this clause in the number of the Federalist I have referred to. It is there said, the power to make anything but gold and silver a tender in payment of debts, is withdrawn from the states, on the same principles with that of issuing a paper currency. All these prohibitions, therefore, relate to powers of a public nature, and are general and universal in their application, and inseparably connected with national policy. The subject-matter is entirely withdrawn from state authority and state legislation. But the succeeding prohibitions are of a different character; they relate to personal security and private rights, viz., or "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." The subject-matter of such laws is not withdrawn from the states; but the legislation thereon must be under the restriction therein imposed. States may legislate on the subject of contracts, but the laws must not impair the obligation of such contracts. A tender of payment necessarily refers to the time when the tender is made, and has no relation to the time when the law authorizing it shall be passed, or when the debt was contracted. The prohibition is, therefore, general and unlimited in its application. It has been urged in argument, that this prohibition to the states to pass laws impairing the obligation of contracts, had in view an object of great national policy, connected with the power to regulate commerce; that the leading purpose was to take from the states the right of passing bankrupt laws. And to illustrate and enforce this position, this clause has been collated with that which gives to Congress the power of passing uniform laws on the subject of bankruptcies; and by transposition of the clause, the constitution is made to read, Congress shall have power to establish uniform laws on the subject of bankrupts throughout the United States; but no state *shall pass any law impair- [*307 ing the obligation of contracts; and this prohibition is made to mean, no state shall pass any bankrupt law.

No just objection can be made to this collocation, if the grant of the power to Congress and the prohibition in question to the states, relate to the same subject-matter, viz., bankrupt laws. But, it appears to me very difficult to maintain this proposition. It is, in the first place, at variance with the decision in Sturges v. Crowninshield, where it is held, that this power is not taken from the states absolutely, but only in a limited and modified sense. And in the next place, it is not reasonable to suppose that a denial of this power to the states would have been couched in such ambiguous terms, if, as has been contended, the giving to Congress the exclusive power to pass bankrupt laws, was the great and leading object of this prohibition, and the preservation of private rights followed only as an incident of minor importance, it is difficult to assign any satisfactory reason why the denial of the power to the states was not expressed in plain and unambiguous terms, viz., no state shall pass any bankrupt law. This would have been a more natural, and, certainly, a less doubtful form of expression; and, besides, if the object was to take from the states altogether the right of passing bankrupt laws, or insolvent laws having the like operation, why did not the denial of the power extend also to naturalization laws? The grant of the power to Congress on this subject, is contained in the same clause, and substantially in the same words, "To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." If the authority of Congress on the subject of naturalization is exclusive, from the nature of the power, why is it not, also, with respect to bankruptcies? And if, in the one case, the denial of the power to the states was necessary, it was equally so in the other. I cannot think, therefore, that the prohibition to pass laws impairing the obligation of contracts, had any reference to a general system of bankrupt or insolvent laws. Such a system, established by the sovereign legislative power of the general, or state governments, cannot, in any just sense, be said to *impair the obligation of con- [*308 tracts. In every government of laws there must be a power somewhere to regulate civil contracts; and where, under our system, is that power vested? It must be either in the general or state governments. There is certainly no such power granted to the general government, and all power not granted is reserved to the state. The whole subject, therefore, of the regulation of contracts must remain with the states and be governed by their laws respectively; and to deny to them the right of prescribing the terms and conditions upon which persons shall be bound by their contracts thereafter made, is imposing upon the states a limitation, for which I find no authority in the constitution; and no contract can impose a civil obligation beyond that prescribed by the existing law when the contract was made; nor can such obligation be impaired by controlling and discharging the contract according to the provisions of such law. Suppose a contract for the

payment of money should contain an express stipulation by the creditor to accept a proportional part, in case the debtor should become insolvent, and to discharge the contract, can there be a doubt that such contract would be enforced? And what is the law in question but such contract, when applied to the undertaking of Ogden by accepting these bills. It is no strained construction of the transaction, to consider the contract and the law inseparable, when judging of the obligation imposed upon the debtor; and, if so, the undertaking was conditional, and the holder of the bills agreed to accept a part in case of the inability of the acceptor, by reason of his insolvency, to pay the whole.

The unconstitutionality of this law is said to arise from its exempting the property of the insolvent, acquired after his discharge, from the payment of his antecedent debts. A discharge of the person of the debtor is admitted to be no violation of the contract. If this objection is well founded, it must be on the ground that the obligation of every contract attaches upon the property of the debtor, and any law exonerating it violates this obligation. I do not mean that the position implies a lien by way of mortgage, or pledge, on any specific property, but that all the property which a debtor has, when called upon for payment, is liable to be 309*] *taken in execution to satisfy the debt, and that a law releasing any portion of it impairs the obligation of the contract. The force and justice of this position, when applied to contracts existing at the time the law is passed, is not now drawn in question. But its correctness, when applied to contracts thereafter made, is denied. The mode, and the manner, and the extent to which property may be taken in satisfaction of debts, must be left to the sound discretion of the legislature, and regulated by its views of policy and expediency, in promoting the general welfare of the community, subject to such regulation. It was the policy of the common law, under the feudal system, to exempt lands altogether from being seized, and applied in satisfaction of debts; not even possession could be taken from the tenant. There can be no natural right growing out of the relation of debtor and creditor, that will give the latter an unlimited claim upon the property of the former. It is a matter entirely for the regulation of civil society; nor is there any fundamental principle of justice growing out of such relation, that calls upon government to enforce the payment of debts to the uttermost farthing which the debtor may possess; and that the modification and extent of such liability, is a subject within the authority of state legislation, seems to be admitted by the uninterrupted exercise of it. I have not deemed it necessary to look into the statute books of all the states on this subject, but think it may be safely affirmed, that in most, if not all the states, some limitation of the right of the creditor, over the property of the debtor, has been established. In New York, various articles of personal property are exempted from execution. In Rhode Island, real estate cannot at all be taken on judicial process for satisfaction of a debt, so long as the body of the debtor is to be found within the state; and Virginia has adopted the English process of elegit, and a moiety only of the debtor's freehold is delivered to the creditor, until, out of the rents and profits thereof, the debt is paid. Do these statute regulations impair the obligation of contracts? I presume this will not be contended for; and yet they would seem to me to fall within the principle urged on the part of the defendant in error.

*It is no satisfactory answer to say [*310 that such laws relate to the remedy. The principle asserted is, that the creditor has a right to his debtor's property by virtue of the obligation of the contract, to the full satisfaction of the debt; and if so, a law, which in any shape exempts any portion of it, must impair the obligation of the contract. Such a limitation and restriction upon the powers of the state governments cannot, in my judgment, be supported, under the prohibition to pass laws impairing the obligation of contracts.

If the letter of the constitution does not imperiously demand a construction which denies to the states the power of passing insolvent laws like the one in question, policy and expediency require a contrary construction. Although there may be some diversity of opinion as to the policy of establishing a general bankrupt system in the United States, yet it is generally admitted that such laws are useful, if not absolutely necessary, in a commercial community. That it was the opinion of the framers of the constitution, that the power to pass bankrupt laws ought somewhere to exist, is clearly inferable from the grant of such power to Congress. A contrary conclusion would involve the greatest absurdity. The specific power, however, granted to Congress, never did, nor never could, exist in the state governments. That power is to establish uniform laws on the subject of bankruptcies throughout the United States, which could only be done by a government having co-extensive jurisdiction. Congress not having as yet deemed it expedient to exercise the power of re-establishing a uniform system of bankruptcy, affords no well-founded argument against the expediency or necessity of such a system in any particular state. A bankrupt law is most necessary in a commercial community; and as different states in this respect do not stand on the same footing, a system which might be adapted to one, might not suit all, which would naturally present difficulties in forming any uniform system; and Congress may, as heretofore, deem it expedient to leave each state to establish such system as shall best suit its own local circumstances and views of policy, knowing, at the same time, that if any great public inconvenience shall grow out of the different state laws, the evils *may be corrected by es-[*311 tablishing a uniform system, according to the provision of the constitution, which will suspend the state laws on the subject. If such should be the views entertained by Congress, and induce them to abstain from the exercise of the power, the importance to the state of New York, as well as other states, of establishing the validity of laws like the one in question, is greatly increased. The long continuance of it there, clearly manifests the views of the state legislature with respect to the policy and expediency of the law. And I cannot but feel strongly impressed, that the length of time which this law has been in undisputed operation, and the repeated sanction

it has received from every department of the government, ought to have great weight when judging of its constitutionality.

The provisions of the 61st section of the bankrupt law of 1800, appear to me to contain a clear expression of the opinion of Congress in favor of the validity of this, and similar laws in other states. It cannot be presumed they were ignorant of the existence of these laws, or their extent and operation. And, indeed, the section expressly assumes the existence of such laws, by declaring that this act shall not repeal or annul the laws of any state now in force, or which may be thereafter enacted for the relief of insolvent debtors, except so far as the same may effect persons within the purview of the bankrupt act; and even with respect to such persons, it provides that, if the creditor shall not prosecute a commission of bankruptcy within a limited time, they shall be entitled to relief under the state laws for the relief of insolvent debtors. And what relief did such laws give? Was it merely from imprisonment only? Certainly not. The state laws here ratified and sanctioned, or, at least, some of them, were such as had the full effect and operation of a bankrupt law, to wit, to discharge the debtor absolutely from all future responsibility. It is true, if these laws were unconstitutional and void, this section of the bankrupt law could give them no validity. But it is not in this light the argument is used. The reference is only to show the sense of Congress with respect to the validity of such laws; and, if it is fair to presume Congress was acquainted with the extent and operation of these laws, this clause is a direct affirmation of their validity. 312*] *For it cannot be presumed that body would have expressly ratified and sanctioned laws which they considered unconstitutional.

In the case of Sturges v. Crowninshield, as I have before remarked, it is said, that by this prohibition (art. 1, sec. 10), in the constitution, the convention appears to have intended to establish a great principle, "that contracts should be inviolable." This was certainly, though a great, yet not a new principle. It is a principle inherent in every sound and just system of laws, independent of express constitutional restraints. And if the assertion of this principle was the object of the clause (as I think it was), is it reasonable to conclude that the framers of the constitution supposed that a bankrupt or insolvent law, like the one in question, would violate this principle? Can it be supposed that the constitution would have reserved the right, and impliedly enjoined the duty upon Congress to pass a bankrupt law, if it had been thought that such law would violate this great principle? If the discharge of a party from the performance of his contracts, when he has by misfortunes, become incapable of fulfilling them, is a violation of the eternal and unalterable principles of justice, growing out of what has been called at the bar the universal law, can it be, that a power, drawing after it such consequences, has been recognized and reserved in our constitution? Certainly not. And is the discharge of a contract any greater violation of those sacred principles in a state legislature, than in that of the United States? No such distinction will be pretended. But a bankrupt or insolvent law involves no such violation of the great principles of justice, and this is not the light in which it always has been, and ought to be, considered. Such law, in its principle and object, has in view the benefit of both debtor and creditor, and is no more than the just exercise of the sovereign legislative power of the government to relieve a debtor from his contracts, when necessity, and unforeseen misfortunes, have rendered him incapable of performing them; and whether this power is to be exercised by the states individually, or by the United States, can make no difference in principle. In a government like ours, where sovereignty, to a modified extent *exists [*313 both in the state, and in the United States. It was, in the formation of the constitution, a mere question of policy and expediency, where this power should be exercised; and there can be no question, but that, so far as respects a bankrupt law, properly speaking, the power ought to be exercised by the general government. It is naturally connected with commerce and should be uniform throughout the United States. A bankrupt system deals with commercial men but this affords no reason why a state should not exercise its sovereign power in relieving the necessities of men who do not fall within the class of traders, and who, from like misfortune, have become incapable of performing their contracts.

Without questioning the constitutional power of Congress to extend a bankrupt law to all classes of debtors, the expediency of such a measure may well be doubted. There is not the same necessity of uniformity of system, as to other classes than traders; their dealings are generally local, and different considerations of policy may influence different states on this subject; and should Congress pass a bankrupt law confined to traders, it would still leave the insolvent law of New York in force as to other classes of debtors, subject to such alteration as that state shall deem expedient.

Upon the whole, therefore, it having been settled by this court that the states have a right to pass bankrupt laws, provided they do not violate the prohibition against impairing the obligation of contracts; and believing, as do, for the reasons I have given, that the insolvent law in question, by which a debtor obtains a discharge from all future responsibility upon contracts entered into after the passage of the law, and before his discharge, does not impair the obligation of his contracts, I am of opinion that the judgment of the court below ought to be reversed.

Mr. Justice Trimble. The question raised upon the record in this case, and which has been discussed at the bar, may be stated thus: Has a state, since the adoption of the constitution of the United States authority to pass a bankrupt *or insolvent law, discharging the bankrupt or insolvent from all contracts made within the state after the passage of the law, upon the bankrupt or insolvent surrendering his effects and obtaining a certificate of discharge from the constituted authorities of the state? [*314

The counsel for the defendant in error has endeavored to maintain the negative of this proposition, on two grounds:

1st. That the power conferred on Congress

by the constitution, "to establish uniform laws on the subject of bankruptcies throughout the United States" is, in its nature, an exclusive power; that consequently no state has authority to pass a bankrupt law, and that the law under consideration is a bankrupt law.

2nd. That it is a law impairing the obligation of contracts, within the meaning of the constitution.

In the case of Sturges v. Crowninshield, 4 Wheat. Rep. 122, this court expressly decided "that since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law."

This being a direct judgment of the court, overruling the first position assumed in argument, that judgment ought to prevail, unless it be very clearly shown to be erroneous.

Not having been a member of the court when that judgment was given, I will content myself with saying the argument has not convinced me it is erroneous; and that, on the contrary, I think the opinion is fully sustained by a sound construction of the constitution.

There being no act of Congress in force to establish a uniform system of bankruptcy, the first ground of argument must fail.

It is argued that the law under consideration is a law impairing the obligation of contracts within the meaning of the constitution. The 10th section of the 1st article of the constitution is in these words: "No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit make anything [*315] *but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

In the case of Sturges v. Crowninshield the defendant in the original suit had been discharged in New York, under an insolvent law of that state which purported to apply to past as well as future contracts; and being sued on a contract made within the state prior to the passage of the law, he pleaded his certificate of discharge in bar of the action. In answer to the third and fourth questions, certified from the Circuit Court to this court for its final decision, drawing in question the constitutionality of the law, and the sufficiency of the plea in bar founded upon it, this court certified its opinion "that the act of New York, pleaded in this case, so far as it attempts to discharge the contract on which this suit was instituted, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States; and that the plea of the defendant is not a good and sufficient bar of the plaintiff's action."

In the case of M'Millan v. M'Neill, 4 Wheat. Rep. 209, the defendant in the court below pleaded a discharge obtained by him in Louisiana, on the 23d of August, 1815, under the insolvent law of that state, passed in 1808, in bar of a suit instituted against him upon a contract made in South Carolina in the year 1813. This court decided that the plea was no bar to the action, and affirmed the judgment given below for the plaintiff.

These cases do not decide the case at bar. In the first, the discharge was pleaded in bar to a contract made prior to the passage of the law; and in the second, the discharge obtained in one state under its laws was pleaded to a contract made in another state. They leave the question open, whether a discharge obtained in a state, under an insolvent law of the state, is a good bar to an action brought on a contract made within a state after the passage of the law.

In presenting this inquiry, it is immaterial whether the law purports to apply to past as well as future contracts, or is wholly prospective in its provisions.

*It is not the terms of the law, but [*316 its effect, that is inhibited by the constitution. A law may be in part constitutional and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution; but it may not, when applied to a case differently circumstanced, produce such prohibited effect. Whether the law under consideration, in its effects and operation upon the contract sued on in this case, be a law impairing the obligation of this contract, is the only necessary inquiry.

In order to come to a just conclusion we must ascertain, if we can, the sense in which the terms, "obligation of contracts," is used in the constitution. In attempting to do this I will premise that, in construing an instrument of so much solemnity and importance, effect should be given, if possible, to every word. No expression should be regarded as a useless expletive; nor should it be supposed, without the most urgent necessity, that the illustrious framers of that instrument had, from ignorance or inattention, used different words which are, in effect, merely tautologous.

I understand it to be admitted in argument, and if not admitted it could not be reasonably contested, that, in the nature of things, there is a difference between a "contract" and the "obligation" of a contract. The terms "contract" and "obligation," although sometimes used loosely as convertible terms, do not properly impart the same idea. The constitution plainly presupposes that a contract and its obligation are different things. Were they the same thing, and the terms "contract" and "obligation" convertible, the constitution, instead of being read as it now is, "that no state shall pass any law impairing the obligation of contracts;" might, with the same meaning, be read, "that no state shall pass any law impairing the obligation of obligations," or "the contract of contracts;" and to give to the constitution the same meaning which either of these readings would import, would be ascribing to its framers a useless and palpably absurd tautology. The illustrious framers of the constitution could not be ignorant that there were, or might be, many contracts without obligation, and many obligations without contracts. "A contract is defined to be an agreement in which a party *undertakes to do, or [*317 not to do, a particular thing." Sturges v. Crowninshield, 4 Wheat. Rep. 197.

This definition is sufficient for all the purposes of the present investigation, and its general accuracy is not contested by either side.

From the very terms of the definition it results incontestably that the contract is the sole act of the parties, and depends wholly on their will. The same words, used by the same parties, with the same objects in view, would be the same contract, whether made upon a desert island, in London, Constantinople or New York. It would be the same contract, whether the law of the place where the contract was made recognized its validity and furnished remedies to enforce its performance, or prohibited the contract and withheld all remedy for its violation.

The language of the constitution plainly supposes that the obligation of a contract is something not wholly depending upon the will of the parties. It incontestably supposes the obligation to be something which attaches to, and lays hold of the contract, and which, by some superior external power, regulates and controls the conduct of the parties in relation to the contract; it evidently supposes that superior external power to rest in the will of the legislature.

What, then, is the obligation of contracts, within the meaning of the constitution? From what source does that obligation arise?

The learned Chief Justice, in delivering the opinion of the court in Sturges v. Crowninshield, after having defined a contract to be "an agreement wherein a party undertakes to do, or not to do, a particular thing," proceeds to define the obligation of the contract in these words: "The law binds him to perform his engagement, and this is, of course, the obligation of the contract."

The Institutes, lib. 3, tit. 4 (Cooper's translation), says, "an obligation is the chain of the law, by which we are necessarily bound to make some payment, according to the law of the land."

Pothier, in his treatise concerning obligations, in speaking of the obligation of contracts, calls it "vinculum legis," the chain of the law. Paley, p. 56, says, "to be obliged, is 318*] *to be urged by a violent motive, resulting from the command of another." From these authorities—and many more might be cited—it may be fairly concluded that the obligation of the contract consists in the power and efficacy of the law which applies to, and enforces performance of the contracts, or the payment of an equivalent for non-performance. The obligation does not inhere, and subsist in the contract itself, proprio vigore, but in the law applicable to the contract. This is the sense, I think in which the constitution uses the term "obligation."

From what law, and how, is this obligation derived, within the meaning of the constitution? Even if it be admitted that the moral law necessarily attaches to the agreement, that would not bring it within the meaning of the constitution. Moral obligations are those arising from the admonitions of conscience, and accountability to the Supreme Being. No human law-giver can impair them. They are entirely foreign from the purposes of the constitution. The constitution evidently contemplates an obligation which might be impaired by a law of the state, if not prohibited by the constitution.

It is argued, that the obligation of contracts is founded in, and derived from, general and universal law; that, by these laws, the obligation of contracts is co-extensive with the duty of performance, and, indeed, the same thing; that the obligation is not derived from, nor depends upon, the civil or municipal laws of the state; and that this general universal duty, or obligation, is what the constitution intends to guard and protect against the unjust encroachments of state legislation. In support of this doctrine, it is said, that no state, perhaps, ever declared by statute or positive law that contracts shall be obligatory; but that all states, assuming the pre-existence of the obligation of contracts, have only superadded, by municipal law, the means of carrying the pre-existing obligation into effect.

This argument struck me, at first, with great force; but, upon reflection, I am convinced it is more specious than solid. If it were admitted that, in an enlarged and very general sense, obligations have their foundation in natural, or what is called, in the argument, universal law; that this *natural obligation [*319 is, in the general, assumed by states as pre-existing, and, upon this assumption, they have not thought it necessary to pass declaratory laws in affirmance of the principles of universal law; yet nothing favorable to the argument can result from these admissions, unless it be further admitted, or proved, that a state has no authority to regulate, alter, or in any wise control, the operation of this universal law within the state, by its own peculiar municipal enactions. This is not admitted, and, I think, cannot be proved.

I admit that men have, by the laws of nature, the right of acquiring, and possessing property, and the right of contracting engagements. I admit that these natural rights have their correspondent natural obligations. I admit, that in a state of nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is co-extensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law. What is this natural obligation? All writers who treat on the subject of obligations, agree that it consists in the right of the one party to demand from the other party what is due; and if it be withheld, in his right, and supposed capacity to enforce performance, or to take an equivalent for non-performance, by his own power. This natural obligation exists among sovereign and independent states and nations, and amongst men, in a state of nature, who have no common superior, and over whom none claim, or can exercise, a controlling legislative authority.

But when men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. Admitting it, then, to be true, that, in general, men derive the right of private property, and of contracting engagements, from the principles of natural, universal law; admitting that these rights are, in the

general, not derived from, or created by society, but are brought into it; and that no express, declaratory, municipal law be necessary for their creation or recognition; yet, it is equally true that these rights, and the obliga-
320*] tions resulting *from them, are subject to be regulated, modified, and sometimes absolutely restrained, by the positive enactions of municipal law. I think it incontestably true that the natural obligation of private contracts between individuals in society ceases, and is converted into a civil obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance exists, as I think all must admit, only in the law of the land, and the obligation resulting from this condition is a civil obligation.

As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take, or enforce the delivery of the thing due to him by the contract, or its equivalent; so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to a contract, and enforces its performance, or gives an equivalent in lieu of performance. From these principles it seems to result as a necessary corollary, that the obligation of a contract made within a sovereign state must be precisely that allowed by the law of the state, and none other. I say allowed, because, if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for, and put in the place of, natural obligation, would be co-extensive with it; but if by positive enactions, the civil obligation is regulated and modified so as that it does not correspond with the natural obligation, it is plain the extent of the obligation must depend wholly upon the municipal law. If the positive law of the state declares the contract shall have no obligation, it can have no obligation, whatever may be the principles of natural law in relation to such a contract. This doctrine has been held and maintained by all states and nations. The power of controlling, modifying, and even of taking away, all obligation from such contracts as, independent of positive enactions to the contrary, would have been obligatory, has been exercised by all independent sovereigns; and it has been universally held, that the courts of one sovereign will, upon principles of comity and common justice, enforce contracts made within the dominions of another sovereign, so
321*] far as they were obligatory by the *law of the country where made; but no instance is recollected, and none is believed to exist, where the courts of one sovereign have held a contract, made within the dominions of another, obligatory against, or beyond the obligation assigned to it by the municipal law of its proper country. As a general proposition of law, it cannot be maintained that the obligation of contracts depends upon, and is derived from, universal law, independent of, and against the civil law of the state in which they are made. In relation to the states of this Union, I am persuaded that the position that the obligation of contracts is derived from universal law, urged by the learned counsel in argument with great force, has been stated by them much too broadly. If true, the states can have no control over contracts. If it be true that the "obligation of contracts," within the meaning of the constitution, is derived solely from general and universal law, independent of the laws of the state, then it must follow that all contracts made in the same or similar terms must, whenever or wherever made, have the same obligation. If this universal natural obligation is that intended by the constitution, as it is the same, not only everywhere, but at all times, it must follow that every description of contract which could be enforced at any time or place upon the principles of universal law must, necessarily, be enforced at all other times, and in every state, upon the same principles, in despite of any positive law of the state to the contrary.

The arguments, based on the notion of the obligation of universal law, if adopted, would deprive the states of all power of legislation upon the subject of contracts, other than merely furnishing the remedies or means of carrying this obligation of universal law into effect. I cannot believe that such consequences were intended to be produced by the constitution.

I conclude that, so far as relates to private contracts between individual and individual, it is the civil obligation of contracts; that obligation which is recognized by, and results from, the law of the state in which the contract is made, which is within the meaning of the constitution. If *so, it follows that the [*322 states have, since the adoption of the constitution, the authority to prescribe and declare, by their laws, prospectively, what shall be the obligation of all contracts made within them. Such a power seems to be almost indispensable to the very existence of the states, and is necessary to the safety and welfare of the people. The whole frame and theory of the constitution seems to favor this construction. The states were in the full enjoyment and exercise of all the powers of legislation on the subject of contracts, before the adoption of the constitution. The people of the states, in that instrument, transfer to, and vest in the Congress, no portion of this power, except in the single instance of the authority given to pass uniform laws on the subject of bankruptcies throughout the United States; to which may be added such as results by necessary implication in carrying the granted power into effect. The whole of this power is left with the states, as the constitution found it, with the single exception that in the exercise of their general authority they shall pass no law "impairing the obligation of contracts."

The construction insisted upon by those who maintain that prospective laws of the sort now under consideration are unconstitutional, would, as I think, transform a special limitation upon the general powers of the states, into a general restriction. It would convert, by construction, the exception into a general rule, against the best settled rules of construction. The people of the states, under every variety of change of circumstances, must remain unalterably, according to this construction, under the dominion of this supposed universal law, and the obligations resulting from it. Upon

no acknowledged principle can a special exception, out of a general authority, be extended by construction so as to annihilate or embarrass the exercise of the general authority. But, to obviate the force of this view of the subject, the learned counsel admit that the legislature of a state has authority to provide by law what contracts shall not be obligatory, and to declare that no remedy shall exist for the enforcement of such as the legislative wisdom deems injurious. They say the obligation of a contract is coeval with its existence; that 323*] the moment an agreement is made, *obligation attaches to it; and they endeavor to maintain a distinction between such laws as declare that certain contracts shall not be obligatory at all, and such as declare they shall not be obligatory, or (what is the same thing in effect) shall be discharged upon the happening of a future event. The former, they say, were no contracts in contemplation of law, were wholly forbidden, and, therefore, never obligatory; the latter were obligatory at their creation, and that obligation is protected by the constitution from being impaired by any future operation of the law.

This course of reasoning is ingenious and perplexing; but I am greatly mistaken if it will not be found, upon examination, to be unsatisfactory and inconclusive. If it were admitted that, generally, the civil obligation of a contract made in a state attaches to it when it is made, and that this obligation, whatever it be, cannot be defeated by any effect or operation of law, which does not attach to it at its creation, the admission would avail nothing. It is as well a maxim of political law as of reason, that the whole must necessarily contain all the parts; and, consequently, a power competent to declare a contract shall have no obligation, must necessarily be competent to declare it shall have only a conditional or qualified obligation.

If, as the argument admits, a contract never had any obligation, because the pre-existing law of the state, declaring it should have none, attached to it at the moment of its creation, why will not a pre-existing law, declaring it shall have only a qualified obligation, attach to it in like manner at the moment of its creation? A law, declaring that a contract shall not be enforced, upon the happening of a future event, is a law declaring the contract shall have only a qualified or conditional obligation. If such law be passed before the contract is made, does not the same attach to it the moment it is made; and is not the obligation of the contract, whatever may be its terms, qualified from the beginning by force and operation of the existing law? If it is not, then it is absolute in despite of the law, and the obligation does not result from the law of the land, but from some other law.

The passing of a law declaring that a contract shall have no obligation, or shall have 324*] obligation generally, but cease to *be obligatory in specified events, is but the exertion of the same power. The difference exists, not in the character of the power, but the degree of its exertion, and the manner of its operation.

In the case at bar, the contract was made in the state, and the law of the state at the time it was made, in effect, provided that the obligation of the contract should not be absolute, but qualified by the condition that the party should be discharged upon his becoming insolvent, and complying with the requisitions of the insolvent law. This qualification attached to the contract, by law, the moment the contract was made, became inseparable from it, and traveled with it through all its stages of existence, until the condition was consummated by the final certificate of discharge.

It is argued that this cannot be so, because the contract would be enforced, and must necessarily be enforced, in other states, where no such insolvent law exists. This argument is founded upon a misapprehension of the nature of the qualification itself. It is in nature of a condition subsequent, annexed by operation of law to the contract at the moment of its creation.

The condition is, that upon the happening of all the events contemplated by the law, and upon their verification, in the manner prescribed by the law itself, by the constituted authorities of the state, the contract shall not thereafter be obligatory. Unless all these take place, unless the discharge is actually obtained within the state, according to its laws, the contingency has not happened, and the contract remains obligatory, both in the state and elsewhere.

It has been often said that the laws of a state in which a contract is made, enter into, and make part of the contract; and some who have advocated the constitutionality of prospective laws of the character now under consideration, have placed the question on that ground. The advocates of the other side, availing themselves of the infirmity of this argument, have answered triumphantly, "admitting this to be so, the constitution is the supreme law of every state, and must, therefore, upon the same principle, enter into every contract, and overrule the local laws." My answer to this *view of both sides of the question [*325 is, that the argument, and the answer to it, are equally destitute of truth.

I have already shown that the contract is nothing but the agreement of the parties; and that if the parties, in making their agreement, use the same words, with the same object in view, where there is no law, or where the law recognizes the agreement, and furnishes remedies for its enforcement, or where the law forbids, or withholds all remedy for the enforcement of the agreement, it is the very same contract in all these predicaments. I have endeavored to show, and I think successfully, that the obligation of contracts, in the sense of the constitution, consists not in the contract itself, but in a superior external force, controlling the conduct of the parties in relation to the contract; and that this superior external force is the law of the state, either tacitly or expressly recognizing the contract, and furnishing means whereby it may be enforced. It is this superior external force, existing potentially, or actually applied, "which binds a man to perform his engagements;" which, according to Justinian, is "the chain of the law, by which we are necessarily bound to make some payment—according to the law of the land;" and which, according to Paley, being "a violent

motive, resulting from the command of another," obliges the party to perform his contract. The law of the state, although it constitutes the obligation of the contract, is no part of the contract itself; nor is the constitution either a part of the contract, or the supreme law of the state, in the sense in which the argument supposes. The constitution is the supreme law of the land upon all subjects upon which it speaks. It is the sovereign will of the whole people. Whatever this sovereign will enjoins, or forbids, must necessarily be supreme, and must counteract the subordinate legislative will of the United States, and of the states.

But on subjects, in relation to which the sovereign will is not declared, or fairly and necessarily implied, the constitution cannot, with any semblance of truth, be said to be the supreme law. It could not, with any semblance of truth, be said that the constitution of the United States is the supreme law of any state in relation to the solemnities requisite for conveying real estate, or the responsibilities or ob- 326*] ligations *consequent upon the use of certain words in such conveyance. The constitution contains no law, no declaration of the sovereign will, upon these subjects; and cannot, in the nature of things, in relation to them, be the supreme law. Even if it were true, then, that the law of a state in which a contract is made, is part of the contract, it would not be true that the constitution would be part of the contract. The constitution nowhere professes to give the law of contracts, or to declare what shall or shall not be the obligation of contracts. It evidently presupposes the existence of contracts by the act of the parties, and the existence of their obligation, not by authority of the constitution, but by authority of law; and the pre-existence of both the contracts and their obligation being thus supposed, the sovereign will is announced, that "no state shall pass any law impairing the obligation of contracts."

If it be once ascertained that a contract existed, and that an obligation, general or qualified, of whatsoever kind, had once attached, or belonged to the contract, by law, then, and not till then, does the supreme law speak, by declaring that obligation shall not be impaired.

It is admitted in argument, that statutes of frauds and perjuries, statutes of usury, and of limitation, are not laws impairing the obligation of contracts. They are laws operating prospectively upon contracts thereafter made. It is said, however, they do not apply, in principle, to this case; because the statutes of frauds and perjuries apply only to the remedies, and because, in that case, and under the statutes of usury, the contracts were void from the beginning, were not recognized by law as contracts, and had no obligation; and that the statutes of limitation create rules of evidence only.

Although these observations are true, they do not furnish the true reason, nor, indeed, any reason, why these laws do not impair the obligation of contracts. The true and only reason is, that they operate on contracts made after the passage of the laws, and not upon existing contracts. And hence the Chief Justice very properly remarks, of both usury laws, and laws of limitation, in delivering the opinion in Sturges v. Crowninshield, that if they should be made to *operate upon contracts al- [*327 ready entered into, they would be unconstitutional and void. If a statute of frauds and perjuries should pass in a state formerly having no such laws, purporting to operate upon existing contracts, as well as upon those made after its passage, could it be doubted, that so far as the law applied to, and operated upon, existing contracts, it would be a law "impairing the obligation of contracts?" Here, then, we have the true reason and principle of the constitution. The great principle intended to be established by the constitution, was the inviolability of the obligation of contracts, as the obligation existed and was recognized by the laws in force at the time the contracts were made. It furnished to the legislatures of the states a simple and obvious rule of justice, which, however theretofore violated, should by no means be thereafter violated; and whilst it leaves them at full liberty to legislate upon the subject of all future contracts, and assign to them either no obligation, or such qualified obligation as, in their opinion, may consist with sound policy, and the good of the people; it prohibits them from retrospecting upon existing obligations, upon any pretext whatever. Whether the law professes to apply to the contract itself, to fix a rule of evidence, a rule of interpretation, or to regulate the remedy, it is equally within the true meaning of the constitution, if it, in effect, impairs the obligation of existing contracts; and, in my opinion, is out of its true meaning, if the law is made to operate on future contracts only. I do not mean to say that every alteration of the existing remedies would impair the obligation of contracts; but I do say, with great confidence, that a law taking away all remedy from existing contracts, would be, manifestly, a law impairing the obligation of contracts. The moral obligation would remain, but the legal, or civil obligation, would be gone, if such a law should be permitted to operate. The natural obligation would be gone, because the laws forbid the party to enforce performance by his own power. On the other hand, a great variety of instances may readily be imagined in which the legislature of a state might alter, modify, or repeal existing remedies, and enact others in their stead without the slightest ground for a supposition *that the new [*328 law impaired the obligation of contracts. If there be intermediate cases of a more doubtful character, it will be time enough to decide them when they arise.

It is argued, that as the clause declaring that "no state shall pass any law impairing the obligation of contracts" is associated in the same section of the constitution with the prohibition to "coin money, emit bills of credit," or "make anything but gold and silver coin a legal tender in payment of debts;" and as these all evidently apply to legislation in reference to future, as well as existing contracts, and operate prospectively, to prohibit the action of the law, without regard to the time of its passage, the same construction should be given to the clause under consideration.

This argument admits of several answers. First, as regards the prohibition to coin money,

and emit bills of credit. The constitution had already conferred on Congress the whole power of coining money, and regulating the current coin. The grant of this power to Congress, and the prohibitions upon the states, evidently take away from the states all power of legislation and action on the subject, and must, of course, apply to the future action of laws, either then made, or to be made. Indeed, the language plainly indicates that it is the act of "coining money," and the act of emitting bills of credit, which is forbidden, without any reference to the time of passing the law, whether before or after the adoption of the constitution. The other prohibition, to "make anything but gold or silver coin a tender in payment of debts," is but a member of the same subject of currency committed to the general government, and prohibited to the states. And the same remark applies to it already made as to the other two. The prohibition is not, that no state shall pass any law, but that even if a law does exist, the "state shall not make anything but gold and silver coin a legal tender." The language plainly imports that the prohibited tender shall not be made a legal tender, whether a law of the state exists or not. The whole subject of tender, except in gold and silver, is withdrawn from the states. These cases cannot, therefore, furnish a sound rule of interpretation for that clause which prohibits the states from passing laws "impairing the obligation of contracts." This 329*] *clause relates to a subject confessedly left wholly with the states, with a single exception; they relate to subjects wholly withdrawn from the states, with the exception that they may pass laws on the subject of tender in gold and silver coin only.

The principle that the association of one clause with another of like kind may aid in its construction is deemed sound; but I think it has been misapplied in the argument. The principle applied to the immediate associates of the words under consideration is, I think, decisive of this question. The immediate associates are the prohibitions to pass bills of attainder, and ex post facto laws. The language and order of the whole clause is, no state shall "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." If the maxim noscitur a sociis, be applied to this case, there would seem to be an end of the question. The two former members of the clause undeniably prohibit retroactive legislation upon the existing state of things at the passage of the prohibited laws. The associated idea is that the latter member of the same clause should have a similar effect upon the subject-matter to which it relates. I suppose this was the understanding of the American people when they adopted the constitution. I am justified in this supposition by the contemporary construction given to the whole of this clause by that just celebrated work styled the Federalist, written at the time for the purpose of recommending the constitution to the favor and acceptance of the people. In No. 44 (p. 281), commenting upon this very clause and all its members, the following observations are made: "Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters."

Did the American people believe, could they believe, these heavy denunciations were leveled against laws which *fairly prescribed [*330 and plainly pointed out to the people, rules for their future conduct; and the rights, duties and obligations, growing out of their future words or actions? They must have understood that these denunciations were just, as regarded bills of attainder and ex post facto laws, because they were exercises of arbitrary power, perverting the justice and order of existing things by the reflex action of these laws. And would they not naturally and necessarily conclude, the denunciations were equally just as regarded laws passed to impair the obligation of existing contracts, for the same reason?

The writer proceeds: "Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments, as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

I cannot understand this language otherwise than as putting bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, all upon the same footing, and deprecating them all for the same cause. The language shows clearly that the whole clause was understood at the time of the adoption of the constitution to have been introduced into the instrument in the very same spirit, and for the very same purpose, namely, for the protection of personal *security and of private rights.[*331 The language repels the idea that the member of the clause immediately under consideration was introduced into the constitution upon any grand principle of national policy, independent of the protection of private rights, so far as such an idea can be repelled by the total omission to suggest any such independent grand principle of national policy, and by placing it upon totally different ground.

It proves that the sages who formed and recommended the constitution to the favor and adoption of the American people, did not consider the protection of private rights, more than

the protection of personal security, as too insignificant for their serious regard, as was urged with great earnestness in argument. In my judgment, the language of the authors of the Federalist proves that they, at least, understood that the protection of personal security and private rights from the despotic and iniquitous operation of retrospective legislation was, itself and alone, the grand principle intended to be established. It was a principle of the utmost importance to a free people about to establish a national government, "to establish justice," and "to secure to themselves and their posterity the blessings of liberty." This principle is, I think, fully and completely sustained by the construction of the constitution which I have endeavored to maintain.

In my judgment, the most natural and obvious import of the words themselves, prohibiting the passing of laws "impairing the obligation of contracts;" the natural association of that member of the clause with the two immediately preceding members of the same clause, forbidding the passing of "bills of attainder" and "ex post facto laws;" the consecutive order of the several members of the clause; the manifest purposes and objects for which the whole clause was introduced into the constitution, and the cotemporary exposition of the whole clause, all warrant the conclusion that a state has authority, since the adoption of the constitution, to pass a law whereby a contract made within the state after the passage of the law, may be discharged upon the party obtaining a certificate of discharge as an insolvent, in the manner prescribed by the law of the state.

332*] *Mr. Chief Justice **Marshall**. It is well known that the court has been divided in opinion on this case. Three judges, Mr. Justice **Duvall**, Mr. Justice **Story** and myself, do not concur in the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent, as well as labor, at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration is whether the act of the state of New York is consistent with or repugnant to the constitution of the United States.

This court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character, as to make it unnecessary now to say more than that if it be right that the power of preserving the constitution from legislative infraction should reside anywhere, it cannot be wrong, it must be right, that those upon whom the delicate and important duty is conferred should perform it according to their best judgment.

Much, too, has been said concerning the principles of construction, which ought to be applied to the constitution of the United States.

On this subject, also, the court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers, is to repeat what has been already said more at large, and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the constitution, on which the case now under consideration is supposed to depend, it may be proper to inquire *how far it is affected by the former de- [*333
cisions of this court.

In Sturges v. Crowninshield, it was determined that an act which discharged the debtor from a contract entered into previous to its passage, was repugnant to the constitution. The reasoning which conducted the court to that conclusion might, perhaps, conduct it farther; and with that reasoning (for myself alone this expression is used), I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for Ogden v. Saunders, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the court in Sturges v. Crowninshield, that the positive authority of a decision is co-extensive only with the facts on which it is made. In Sturges v. Crowninshield the law acted on a contract which was made before its passage; in this case, the contract was entered into after the passage of the law.

In M'Millan v. M'Neill, the contract, though subsequent to the passage of the act, was made in a different state, by persons residing in that state, and, consequently, without any view to the law, the benefit of which was claimed by the debtor.

The Farmers' and Mechanics' Bank of Pennsylvania v. Smith differed from Sturges v. Crowninshield only in this, that the plaintiff and defendant were both residents of the state in which the law was enacted, and in which it was applied. The court was of opinion that this difference was unimportant.

It has, then, been decided that an act which discharges the debtor from pre-existing contracts is void; and that an act which operates on future contracts is inapplicable to a contract made in a different state, at whatever time it may have been entered into.

Neither of these decisions comprehends the question now presented to the court. It is consequently open for discussion.

The provision of the constitution is, that "no state shall pass any law" "impairing the obligation of contracts." The plaintiff in error contends that this provision inhibits the passage of retrospective laws only—of such as act on contracts *in existence at their pas- [*334
sage. The defendant in error maintains that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from state legislation, the obligation of which has become complete.

That there is an essential difference in principle between laws which act on past, and those which act on future contracts; that those of the first description can seldom be justified, while those of the last are proper subjects of

ordinary legislative discretion, must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class, may very well consist with entire legislative freedom respecting those of the other. Yet, when we consider the nature of our Union—that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between states are, in many respects, obliterated—it would not be a matter of surprise if, on the delicate subject of contracts once formed, the interference of state legislation should be greatly abridged, or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words; and, in making that construction, the whole clause, which consists of a single sentence, is to be taken together, and, the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the state legislature is entirely prohibited. The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty without affecting the rights of individuals. These are the powers "to enter into any treaty, alliance, or confederation; grant letters of marque or reprisal, coin money, emit bills of credit."

The second class of prohibited laws comprehends those whose operation consists in their [*335] action on individuals. *These are laws which make anything but gold and silver coin a tender in payment of debts, bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, or which grant any title of nobility.

In all these cases, whether the thing prohibited be the exercise of mere political power, or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A state is as entirely forbidden to pass laws impairing the obligation of contracts, as to make treaties or coin money. The question recurs, what is a law impairing the obligation of contracts?

In solving this question, all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence, and every word of it. Arguments have been drawn from the context, and from the particular terms in which the prohibition is expressed, for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively; and on the other, of limiting it to laws which act on contracts previously formed.

The first impression which the words make on the mind, would probably be that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties; and, if it be not illegal, to bind them to the extent of their stipulations. It requires reflection, it requires some intellectual effort, to efface this impression and to come to the conclusion that the words contract and obligation, as used in the constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the states to punish offenders in criminal cases, the prohibition to pass bills of attainder and ex post facto laws is, in its very terms confined to pre-existing cases. A bill of attainder can be only for crimes already committed; and a law is not ex post facto unless it looks back to an act done before its passage. Language is incapable of expressing in plainer terms that the mind of the convention was directed to retroactive *legislation. The [*336 thing forbidden is retroaction. But that part of the clause which relates to the civil transactions of individuals, is expresed in more general terms; in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a state to make anything but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the time the law may be passed, and debts afterwards created. The prohibition has been considered as total; and yet the difference in principle between making property a tender in payment of debts, contracted after the passage of the act, and discharging those debts without payment, or by the surrender of property, between an absolute right to tender in payment, and a contingent right to tender in payment, or in discharge of the debt, is not clearly discernible. Nor is the difference in language so obvious as to denote plainly a difference of intention in the framers of the instrument. "No state shall make anything but gold and silver coin a tender in payment of debts." Does the word "debts" mean, generally, those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning which would confine the subsequent words to contracts existing at the passage of the law, would go far in confining these words to debts existing at that time. Yet this distinction has never, we believe occurred to any person. How soon it may occur is not for us to determine. We think it would, unquestionably, defeat the object of the clause.

The counsel for the plaintiff insist that the word "impairing," in the present tense, limits the signification of the provision to the operation of the act at the time of its passage; that no law can be accurately said to impair the obligation of contracts, unless the contracts exist at the time. *The law cannot impair [*337 what does not exist. It cannot act on nonentities.

There might be weight in this argument if the prohibited laws were such only as operated of themselves, and immediately on the contract. But insolvent laws are to operate on a future, contingent, unforeseen event. The time to

which the word "impairing" applies, is not the time of the passage of the act, but of its action on the contract. That is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York for the payment of money, and the debtor removes out of that state into Connecticut, and becomes insolvent, it is not pretended that his debt can be discharged by the law of New York. Consequently, that law did not operate on the contract at its formation. When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation. Were its constitutionality, with respect to previous contracts, to be admitted, it would not impair their obligation until an insolvency should take place, and a certificate of discharge be granted. Till these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract, when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

A question of more difficulty has been pressed with great earnestness. It is, what is the original obligation of a contract, made after the passage of such an act as the insolvent law of New York? Is it unconditional to perform the very thing stipulated, or is the condition implied that, in the event of insolvency, the contract shall be satisfied by the surrender of property? The original obligation, whatever that may be, must be preserved by the constitution. Any law which lessens, must impair it.

All admit that the constitution refers to, and preserves, the legal, not the moral obligation 338*] of a contract. Obligations *purely moral, are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on states by the constitution are intended for those objects which would, if not restrained, be the subject of state legislation. What, then, was the original legal obligation of the contract now under the consideration of the court?

The plaintiff insists that the law enters into the contract so completely as to become a constituent part of it. That it is to be construed as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the act of the legislature.

This is, unquestionably, pressing the argument very far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously.

Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract; and a legislative act annulling the condition would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on pre-existing agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property, enters into the contract, and forms a part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort to give it that effect would impair their obligation. The counsel for the plaintiff perceive, and avow this consequence, in effect, when they contend, that to deny the operation of the law on the contract under consideration, is to impair its obligation. Are gentlemen prepared to say, that an insolvent law, once enacted, must, to a considerable extent, be permanent? That the legislature is incapable of varying it so far as respects existing contracts?

So, too, if one of the conditions of an obligation for the payment of money be, that on the insolvency of the obligor, *or on any [*339 event agreed on by the parties, he should be at liberty to discharge it by the tender of all, or part of his property, no question could exist respecting the validity of the contract, or respecting its security from legislative interference. If it should be determined, that a law authorizing the same tender, on the same contingency, enters into, and forms a part of the contract, then a tender law, though expressly forbidden, with an obvious view to its prospective as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts made after its passage to its control. If it be said that such law would be obviously unconstitutional and void, and, therefore, could not be a constituent part of the contract, we answer, that if the insolvent law be unconstitutional, it is equally void, and equally incapable of becoming, by mere implication, a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect, which is far from being so to another. The law now under consideration is, in the opinion of one party, clearly consistent with the constitution, and, in the opinion of the other, as clearly repugnant to it. We do not admit the correctness of that reasoning which would settle this question by introducing into the contract a stipulation not admitted by the parties.

This idea admits of being pressed still farther. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus, one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and be construed into an inanimate, inoperative, unmeaning clause.

Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a *general law, such as has been stated, [*340 and the incorporation of a particular law, such as the insolvent law of New York, into the contract. But will reason sustain this distinc-

tion? They say that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an article reasonable in itself, and the full extent of which is understood.

But the principle contended for does not make the insertion of this new term or condition into the contract, to depend upon its reasonableness. It is inserted because the legislature has so enacted. If the enactment of the legislature becomes a condition of the contract because it is an enactment, then it is a high prerogative, indeed, to decide that one enactment shall enter the contract, while another, proceeding from the same authority, shall be excluded from it.

The counsel for the plaintiff illustrates and supports this position by several legal principles, and by some decisions of this court, which have been relied on as being applicable to it.

The first case put is, interest on a bond payable on demand, which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract.

Let the correctness of this averment be tried by the course of proceeding in such cases.

The failure to pay, according to stipulation, is a breach of the contract, and the means used to enforce it constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned is a single bill. In this case, the party who has broken his contract is liable for damages. The proceeding to obtain those damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed in the same declaration, and as being distinct from each other. The damages must be assessed by a jury; whereas, if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt; and yet, if a suitor were to declare on such a bond as containing this new 341*] term *for the payment of interest, he would not be permitted to give a bond in evidence in which this supposed term was not written. Any law regulating the proceedings of courts on this subject, would be a law regulating the remedy.

The liability of the drawer of a bill of exchange stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the indorser. His contract is not written, but his name is evidence of his promise that the bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing; and, in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A draws on B in favor of C, for value received. The bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawer, and has a right to expect that his promise will be performed. He has, also, a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that his bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, impose *certain duties, and [*342 that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either.

The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience, and partly in the indulgence of the creditor. By the terms of the note, the debtor has to the last hour of the day on which it becomes payable, to comply with it; and it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the act of the parties. The case cited from 9 Wheat. Rep. 581, is a note discounted in bank. In all such cases the bank receives, and the maker of the note pays, interest for the days of grace. This would be illegal and usurious, if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the indorser of his failure, does not arise, until the failure has taken place; and, consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened.

The case of The Bank of Columbia v. Oakley, 4 Wheat. Rep. 235, was one in which the legislature had given a summary remedy to the bank for a broken contract, and had placed that remedy in the hands of the bank itself. The case did not turn on the question whether the law of Maryland was introduced into the contract, but whether a party might not, by his own conduct, renounce his claim to the trial by jury in a particular case. The court likened it

to submissions to arbitration, and to stipulation and forthcoming bonds. The principle settled 343*] *in that case is, that a party may renounce a benefit, and that Oakley had exercised this right.

The cases from Strange and East turn upon a principle which is generaly recognized, but which is entirely distinct from that which they are cited to support. It is, that a man who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is, that laws act upon a contract, not that they enter into it, and become a stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the claim to it is extinguished. The external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power. The interference with those contracts, by introducing conditions into them not agreed to by the parties, would be a very unusual and a very extraordinary exercise of the legislative power, which ought not to be gratuitously attributed to laws that do not profess to claim it If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate.

It is not, we think, true, that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected. In the ordinary course of human transactions, if even suspected, provision is made for it, by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract.

We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mischievous abridgement of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts.

344*] *But, although the argument is not sustainable in this form, it assumes another, in which it is more plausible. Contract, it is said, being the creature of society, derives its obligation from the law; and, although the law may not enter into the agreement so as to form a constituent part of it, still it acts externally upon the contract, and determines how far the principle of coercion shall be applied to it; and this being universally understood, no individual can complain justly of its application to himself, in a case where it was known when the contract was formed.

This argument has been illustrated by references to the statutes of frauds, of usury, and of limitations. The construction of the words in the constitution, respecting contracts, for which the defendants contend, would, it has been said, withdraw all these subjects from state legislation. The acknowledgment, that they remain within it, is urged as an admission that contract is not withdrawn by the constitution, but remains under state control, subject to this restriction only, that no law shall be passed impairing the obligation of contracts in existence at its passage.

The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs, that he shall perform what he has undertaken to perform. That though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.

It is an argument of no inconsiderable weight against it, that we find no trace of such an enactment. So far back as human research carries us, we find that the judicial power as a part of the executive, administering justice by the application of remedies to violated rights, or broken contracts. We find that power applying these remedies on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim *to com- [*345 pensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation.

In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts,

because, upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle, that the injured party may be the weakest. In 346*] society, the *wrong-doer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and, if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury, and to enforce that reparation if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying that the power, if possessed, is rightfully used.

In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract, as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be, that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The 347*] right of coercion is necessarily *surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy. The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained; but beyond these actual restraints the original power remains unimpaired.

This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present and of past ages.

Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire how far law acts externally on it, and may control that obligation. That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied. That it is capable of discharging the debtor under the circumstances, and on the conditions prescribed in the statute which has been pleaded in this case, will not be controverted. But as this is an operation which was not intended by the parties, nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract on the happening of a contingency, because it is the law. If it be not the law, it cannot have this effect. When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a state." In our system, the legislature of a state is the supreme power, in all cases where its action is not restrained by the constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say that, because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the legislature of New York; for the question returns *upon us, [*348 is this act a law? Is it consistent with, or repugnant to, the constitution of the United States? This question is to be solved only by the constitution itself.

In examining it, we readily admit that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the state legislatures, except in those special cases where restraint is imposed by the constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances on which the original validity of a contract shall be made to depend. If the legislative will be that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded or that they shall assume any prescribed form before they become obligatory, all these are regulations which society may rightfully make, and which do not come within the restrictions of the constitution, because they do not impair the obligation of the contract. The obligation must exist before it can be impaired; and a prohibition to impair it, when made, does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been enacted in the several states, and which are acknowledged to flow from the proper exercise of state sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the constitution.

The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation; and cannot impair that which never came into existence.

Acts of limitations approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may, therefore, be supposed to partake of the character of laws which impair 349*] its *obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles.

In the case of Sturges v. Crowninshield, it was observed by the court, that these statutes relate only to the remedies which are furnished in the courts; and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision, that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated, if contracts might be set up at any distance of time, when the evidence of payment might be lost, and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the courts as a rule of justice. The legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts, or on written contracts not under seal, which are considered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceeding in its courts.

The counsel for the plaintiff in error insist that the right to regulate the remedy and to modify the obligation of the contract are the same; that obligation and remedy are identical, that they are synonymous—two words conveying the same idea.

The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the under- 350*] taking *to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a pre-existing obligation.

If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but, where not regulated, it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times, and are derived from different sources.

But, although the identity of obligation and remedy be disputed it may be, and has been urged, that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation—that they live, languish, and die together. The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation, while it leaves the remedy to the state governments.

We do not perceive this absurdity or self-contradiction.

Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent governments over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts, *but they furnish the remedy [*351 to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the obligation is distinct from the remedy, and it would seem to follow that law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its performance. That instrument treats the states with the respect which is due to intelligent beings, understanding their duties, and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the states from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a state be sufficiently insane to shut up or abolish its courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would not. If the debtor should come within the jurisdiction of any court of another state, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation; for passing the line of a state cannot recreate an

obligation which was extinguished. It must be the original obligation derived from the agreement of the parties, and which exists unimpaired though the remedy was withdrawn.

But, we are told that the power of the state over the remedy may be used to the destruction of all beneficial results from the right; and hence it is inferred that the construction which maintains the inviolability of the obligation, must be extended to the power of regulating the remedy.

The difficulty which this view of the subject presents, does not proceed from the identity or connection of right and remedy, but from the existence of distinct governments acting on kindred subjects. The constitution contemplates restraint as to the obligation of contracts, not as to the application of remedy. If this restraint affects a power which the constitution did not mean to touch, it can 352*] *only be when that power is used as an instrument of hostility to invade the inviolability of contract, which is placed beyond its reach. A state may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the constitution. Thus the power over its domestic police, the power to regulate commerce purely internal, may be so exercised as to interfere with regulations of commerce with foreign nations, or between the states. In such cases, the power which is supreme must control that which is not supreme, when they come in conflict. But this principle does not involve any self-contradiction, or deny the existence of the several powers in the respective governments. So, if a state shall not merely modify, or withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

The counsel for the plaintiff in error put a case of more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this: The law affords remedy by giving execution against the person, or the property, or both. The same power which can withdraw the remedy against the person, can withdraw that against the property, or that against both, and thus effectually defeat the obligation. The constitution, we are told, deals not with form, but with substance; and cannot be presumed, if it designed to protect the obligation of contracts from state legislation, to have left it thus obviously exposed to destruction.

The answer is, that if the law goes farther, and annuls the obligation without affording the remedy which satisfies it—if its action on the remedy be such as palpably to impair the obligation of the contract—the very case arises which we suppose to be within the constitution. If it leaves the obligation untouched, but withholds the remedy, or affords one which is merely nominal it is like all other cases of misgovernment and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy. If that high sense of duty 353*] *which men selected for the government of their fellow-citizens must be supposed to feel, furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath taken by every member, to support the constitution of the United States, furnishes no security against intentional attempts to violate its spirit while evading its letter, the question how far the constitution interposes a shield for the protection of an injured individual, who demands from a court of justice that remedy which every government ought to afford, will depend on the law itself which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be, at least, premature. But, however the question might be decided, should it be even determined that such a law would be a successful evasion of the constitution, it does not follow that an act which operates directly on the contract after it is made, is not within the restriction imposed on the states by that instrument. The validity of a law acting directly on the obligation is not proved by showing that the constitution has provided no means for compelling the state to enforce it.

We perceive, then, no reason for the opinion that the prohibition "to pass any law impairing the obligation of contracts" is incompatible with the fair exercise of that discretion, which the state legislatures possess in common with all governments, to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering, countenance, we think, this idea. No state shall "pass any law impairing the obligation of contracts." These words seem to us to import, that the obligation is intrinsic, that it is created by the contract itself; not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of *nature and nations have guided public [*354 opinion on the subjects of obligations and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our constitution took the same view of the subject and the language they have used confirms this opinion.

The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these:

That the words of the clause in the constitution which we are considering, taken in their natural and obvious sense, admit of a prospective, as well as of a retrospective, operation.

That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law.

That contracts derive their obligation from the act of the parties, not from the grant of government; and that the right of government

to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the state, is entirely consistent with their inviolability after they have been formed.

That the obligation of a contract is not identified with the means which government may furnish to enforce it, and that a prohibition to pass any law impairing it, does not imply a prohibition to vary the remedy; nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every 355*] man, touches the interest of all, *and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous of this great community, and was one of the important benefits expected from a reform of the government.

To impose restraints on state legislation as respected this delicate and interesting subject, was thought necessary by all those patriots who could take an enlightened and comprehensive view of our situation; and the principle obtained an early admission into the various schemes of government which were submitted to the convention. In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended so to operate. But if the construction for which the plaintiff's counsel contend, be the true one, the constitution will have imposed a restriction in language indicating perpetuity, which every state in the Union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless. Instead of introducing a great principle, prohibiting all laws of this obnoxious character, the constitution will only suspend their operation for a moment, or except from it pre-existing cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument.

This construction would change the character of the provision, and convert an inhibition to pass retrospective *laws. Had this been [*356 the intention of the convention, is it not reasonable to believe that it would have been so expressed? Had the intention been to confine the restriction to laws which were restrospective in their operation, language could have been found, and would have been used, to convey this idea. The very word would have occurred to the framers of the instrument, and we should have probably found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or, if the intention had been not to embrace all retrospective laws, but those only which related to contracts, still the word would have been introduced, and the state legislatures would have been forbidden "to pass any retrospective law impairing the obligation of contracts," or "to pass any law impairing the obligation of contracts previously made." Words which directly and plainly express the cardinal intent, always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly there is an imperfection in human language, which often exposes the same sentence to different constructions. But it is rare, indeed, for a person of clear and distinct perceptions, intending to convey one principal idea, so to express himself as to leave any doubt respecting that idea. It may be uncertain whether his words comprehended other things not immediately in his mind; but it can seldom be uncertain whether he intends the particular thing to which his mind is specially directed. If the mind of the convention, in framing this prohibition, had been directed, not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospective operation, it is scarcely conceivable that some word would not have been used indicating this idea. In instruments prepared on great consideration, general terms, comprehending a whole subject, are seldom employed to designate a particular—we might say a minute—portion of that subject. The general language of the clause is such as might be suggested by general intent to prohibit state legislation on the subject to which that language is applied—the obligation of *contracts; [*357 not such as would be suggested by a particular intent to prohibit retrospective legislation.

It is also worthy of consideration, that those laws which had effected all that mischief the constitution intended to prevent, were prospective as well as retrospective in their operation. They embraced future contracts as well as those previously formed. There is the less reason for imputing to the convention an intention, not manifested by their language, to confine a restriction intended to guard against the recurrence of those mischiefs, to retrospective legislation. For these reasons, we are of opinion that, on this point, the District Court of Louisiana has decided rightly.

Judgment having been entered in favor of the validity of a certificate of discharge under the state laws in those cases (argued in connection with Ogden v. Saunders), where the contract was made between citizens of the state

under whose law the discharge was obtained, and in whose courts the certificate was pleaded, the cause was further argued by the same counsel, upon the points reserved, as to the effect of such a discharge in respect to a contract made with a citizen of another state, and where the certificate was pleaded in the courts of another state, or of the United States.

To render the judgment which was finally pronounced in the cause intelligible it is necessary to state that in addition to the plea of the certificate of discharge under the insolvent law of the state of New York of 1801, the defendant below, Ogden, pleaded the statute of limitations (of New York) nonassumpsit infra sex annos.

To this plea the plaintiff below Saunders, replied, that previous to the running of the statute, to wit, in April, 1810, the defendant, Ogden, removed from the state of New York to New Orleans in the state of Louisiana, where he continued to reside until the commencement of this suit.

The jury found the facts of the drawing and acceptance of the bills, of the discharge under the insolvent law of New York, and of the defendant's removing to Louisiana at the time stated in the plaintiff's replication, in the form 358*] *of what was probably intended to be a special verdict, submitting the law to the court: "If the law be for the plaintiff, then they find for the plaintiff the amount of the several acceptances, with the interest and costs; but if the law on the said facts be for the defendant, then the jury find for the defendant, with costs."

A judgment was rendered by the court below upon this verdict. And the cause being brought by writ of error before this court, among the errors assigned was the following: "That the judgment of the court is for a greater sum than is found by the jury, the whole amount of the bills set forth in the petition being $2,183, amounting, with interest from the time of the judicial demand, to $2,652.34. Whereas the judgment is for the sum of $4,017.64, damages, etc.

Mr. Justice **Johnson.** I am instructed by the majority of the court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and, therefore, feel it due to myself and the community to maintain my consistency.

The question now to be considered is, whether a discharge of a debtor under a state insolvent law would be valid against a creditor or citizen of another state, who has never voluntarily subjected himself to the state laws, otherwise than by the origin of his contract.

As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge; nor is it to be questioned that a discharge not valid under the constitution in the courts of the United States is equally invalid in the state courts. The question to be considered goes to the invalidity of the discharge altogether, and, therefore, steers clear of that provision in the constitution which purports to give validity in every state to the records, judicial proceedings, and so forth, of each state.

The question now to be considered, was anticipated in *the case of Sturges v. Crown- [*359 inshield, when the court, in the close of the opinion delivered, declared, that it means to confine its views to the case then under consideration, and not to commit itself as to those in which the interests and rights of a citizen of another state are implicated.

The question is one partly international, partly constitutional. My opinion on the subject is briefly this: that the provision in the constitution which gives the power to the general government to establish tribunals of its own in every state, in order that the citizens of other states or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union; to confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens to prevent, in fact, the exercise of that very power over the rights of citizens of other states, which the origin of the contract might be supposed to give to each state; and thus, to obviate that conflictus legum, which has employed the pens of Huberus and various others, and which anyone who studies the subject will plainly perceive, it is infinitely more easy to prevent than to adjust.

These conflicts of power and right necessarily arise only after contracts are entered into. Contracts, then, become the appropriate subjects of judicial cognizance; and if the just claims which they give rise to are violated by arbitrary laws, or if the course of distributive justice be turned aside, or obstructed by legislative interference, it becomes a subject of jealousy, irritation, and national complaint or retaliation.

It is not unimportant to observe, that the constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law, among the subjects of that crown in the several dominions of Scotland, Ireland, and the West Indies. The first case we have on the effect of foreign discharges, that of Ballantine v. Golding, occurred in 1783, and the law could hardly be held settled before the case of Hunter v. Potts, which was decided in 1791.

*Anyone who will take the trouble [*360 to investigate the subject, will, I think, be satisfied, that although the British courts profess to decide upon a principle of universal law, when adjudicating upon the effect of a foreign discharge, neither the passage in Vattel, to which they constantly refer, nor the practice and doctrines of other nations, will sustain them in the principle to the extent in which they assert it. It was all important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine as one of universal obligation, that the assignment of the bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts, wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it per-

fectly clear, that in the United States a different doctrine has been established; and since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance, carries with it a negation of the principle altogether.

It is vain to deny that it is now the established doctrine in England, that the discharge of a bankrupt shall be effectual against contracts of the state that give the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear, that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity, that the states of the European continent in all cases reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens.

Huberus, in his third axiom on this subject, puts the effect of such laws upon the ground of courtesy, and recognizes the reservation that I have mentioned; other writers do the same.

I will now examine the American decisions on this subject; and, first, in direct hostility with the received doctrines of the British courts, it has been solemnly adjudged in this court, and, I believe, in every state court of the Union, that, notwithstanding the laws of [*361] bankruptcy in England, a creditor of the bankrupt may levy an attachment on a debt due the bankrupt in this country, and appropriate the proceeds to his own debt.

In the case of Harrison v. Sterry, 5 Cranch, 298, 302, a case decided in this court in 1809, upon full argument and great deliberation, and in which all the English cases were quoted, it is expressly adjudged, "that in the case of a contract made with foreigners in a foreign country, the bankrupt laws of a foreign country are incapable of operating a legal transfer of property in the United States," and judgment was given in favor of the attaching creditors, against the claim of the foreign assignees.

In that case, also, another important doctrine is established in hostility with the British doctrine. For the United States had interposed a claim against the English assignees, in order to obtain satisfaction from the proceeds of the bankrupt's effects in this country, for a debt contracted in Great Britain. And this court decreed accordingly, expresly restricting the power of the country of the contract to its concoction and exposition.

The language of the court is, "The law of the place where a contract is made, is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the laws of the place where the property lies, and where the court sits which decides the cause.

And, accordingly, the law of the United States was sustained, which gave the debts due the bankrupt here, to satisfy a debt contracted in England, to the prejudice of the law of England, which gave the same debt to the assignees of the bankrupt.

It cannot be necessary to go farther than this case to establish that, so far as relates to the foreign creditor, this country does not recognize the English doctrine, that the bankrupt law of the country of the contract is paramount in disposing of the rights of the bankrupt.

The United States pass a law which asserts the right to appropriate a debt due a [*362] foreign bankrupt to satisfying a debt due itself, and incurred by that bankrupt in his own country. The assignees of that bankrupt question this right and claim the debt as legally vested in them by the law of the country of the contract, and maintain that the debt due the United States, being contracted in Great Britain, was subject to the laws of Great Britain, and, therefore, entitled only to share in common with other creditors in the proceeds of the bankrupt's effects; that the debt so appropriated by the law of the United States to its exclusive benefit was, as to all the bankrupt's contracts, or certainly as to all English contracts, vested in the assignees, on international principles which gave effect to the English bankrupt laws, so vesting that debt, paramount to the laws of other countries.

In giving effect to the law of the United States, this court overrules that doctrine; and, in the act of passing that law this government asserts both the power over the subject and the right to exercise that power without a violation of national comity; or has at least taken its stand against that comity, and asserted a right to protect its own interests, which, in principle, is equally applicable to the interests of its own citizens.

It has had, in fact, regard to the lex loci rei sitæ, as existing in the person and funds of the debtor of the bankrupt, and the rights of self-preservation, and duty of protection to its own citizens, and the actual allegiance of the creditor and debtor, not the metaphysical allegiance of the contract, on which the foreign power is asserted.

It would be in vain to assign the decision of this court in Harrison v. Sterry, or the passing of the law of the United States, to the general preference, which the government may assert in the payment of its own debt, since that preference can only exist to the prejudice of its own citizens, whereas, the precedence there claimed and concluded operated to the prejudice of British creditors.

The case of Baker v. Wheaton, adjudged in the courts of Massachusetts in the time of Chief Justice Parsons, 5 Mass. Rep. 509, is a very strong case upon this subject. That also was argued with great care, and all the British cases reviewed; the court took time to de- [*363] liberate, and the same doctrine was maintained, in the same year and the same month with Harrison v. Sterry, and certainly without any communication between the two courts.

The case was this: One Wheaton gave a promissory note to one Chandler, both being at that time citizens and inhabitants of Rhode Island. Wheaton was discharged under the bankrupt laws of Rhode Island, both still continuing citizens and inhabitants of the same state, and the note remaining the property of Chandler. Subsequent to the discharge, Chandler indorses the note to Baker, and Wheaton is arrested in Massachusetts. He pleads the discharge in bar, and the court, in deciding, ex-

presses itself thus: "When, therefore, the defendant was discharged from that contract, lege loci, the promisee was bound by that discharge, as he was a party to the laws of that state, and assenting to their operation. But if, when the contract was made, the promisee had not been a citizen of Rhode Island, he would not have been bound by the laws of it or any other state, and holding this note at the time of the discharge, he might afterwards maintain an action upon it in the courts of this state." And again (page 311), "if the note had been transferred to the plaintiff, a citizen of this state, whilst it remained due and undischarged by the insolvent laws of Rhode Island, those laws could not affect his rights in the courts of law in this state, because he is not bound by them."

This, it will be observed, regards a contract acknowledged to be of Rhode Island origin.

There is another case reported in the decisions of the same state (10 vol. p. 337), which carries this doctrine still farther, and, I apprehend, to a length which cannot be maintained.

This was the case of Watson v. Bourne, in which Watson, a citizen of Massachusetts, had sued Bourne in a state court, and obtained judgment. Bourne was discharged under the insolvent laws of that state, and being afterwards found in Massachusetts, was arrested on an actioff of debt upon the judgment. He pleads the discharge; plaintiff replies, that he, plaintiff, was a citizen of Massachusetts, and, therefore, not precluded by the discharge. The 364*] origin of the *debt does not appear from the report, and the argument turned wholly on the question, whether, by entering judgment in the court of the state, he had not subjected his rights to the state laws pro tanto.

The court overruled the plea, and recognized the doctrine in Baker v. Wheaton, by declaring, "that a discharge of that nature can only operate where the law is made by an authority common to the creditor and debtor in all respects, where both are citizens or subjects."

I have little doubt that the court was wrong in denying the effect of the discharge as against judgments rendered in the state courts, when the party goes voluntarily and unnecessarily into those courts; but the decision shows, in other respects, how decidedly the British doctrine is repelled in the courts of that state.

The British doctrine is also unequivocally repelled in a very learned opinion delivered by Mr. Justice Nott, in the court of last resort in South Carolina, and in which the whole court, consisting of the common law judges of the state, concurred. This was in the case of The Assignees of Topham v. Chapman et al., in which the rights of the attaching creditor were maintained against those of the assignees of the bankrupt (1 Constitutional Reports, p. 253;) and that the same rule was recognized at an early day in the court of Pennsylvania, appears from the leading case of Phillips v. Hunter, 2 H. Bl. 402, in which a British creditor, who had recovered of a debtor of the bankrupt in Pennsylvania, was compelled by the British courts to refund to the assignees in England, as for money had and received to their use.

I think it, then, fully established, that in the United States a creditor of the foreign bankrupt may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors.

I do not here speak of assignees, or rights created, under the bankrupt's own deed; those stand on a different ground and do not affect this question. I confine myself to assignments, or transfers, resting on the operation of the laws of the country, independent of the bankrupt's deed; to the *rights and liabili- [*365 ties of the debtor, creditor, bankrupt and assignees, as created by law.

What is the actual bearing of this right to attach, so generally recognized by our decisions?

It imports a general abandonment of the British principles; for, according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a state which is not the state of the contract.

So, also, the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction, if the effects so attached should prove adequate to make satisfaction.

The right to attach also imports the right to sue the bankrupt; and who would impute to the bankrupt law of another country the power to restrain the citizens of these states in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated? Yet, universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law in this case in an international view. I will consider it with reference to the provisions of the constitution.

I have said above, that I had no doubt the erection of a distinct tribunal for the resort of citizens of other states was introduced, ex industria, into the constitution, to prevent, among other evils, the assertion of a power over the rights of the citizens of other states, upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it; for, upon that principle it is that a power is asserted over the rights of creditors which involves a mere mockery of justice.

Thus, in the case of Burrows v. Jemino (reported in 2 Strange, and better reported in Moseley, and some other books), the creditor, residing in England, was cited, probably, by a placard on a door-post in Leghorn, to appear there to *answer to his debtor; and his [*366 debt passed upon by the court, perhaps, without his having ever heard of the institution of legal process to destroy it.

The Scotch, if I remember correctly, attach the summons on the flag-staff, or in the market place, at the shore of Leith; and the civil law process by proclamation, or viis et modis, is not much better, as the means of subjecting the rights of foreign creditors to their tribunals.

All this mockery of justice, and the jealousies, recriminations, and, perhaps, retaliations,

which might grow out of it, are avoided, if the power of the states over contracts, after they become the subject exclusively of judicial cognizance, is limited to the controversies of their own citizens.

And it does appear to me almost incontrovertible, that the states cannot proceed one step farther without exercising a power incompatible with the acknowledged powers of other states, or of the United States, and with the rights of the citizens of other states.

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected, are entitled to a hearing. Hence every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt.

But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to prostrate his rights; and on the subject of these rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the state insolvent, or bankrupt laws, cannot be carried into effect; they have a law of their own on the subject;[1] and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the state in which the court of the United States that grants it is held. Where is the reciprocity? Where the reason upon which the state courts can 367*] *thus exercise a power over the suitors of that court, when that court possesses no such power over the suitors of the state courts?

In fact, the constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the state tribunals, the constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the states unquestionably possess over their own contracts, and their own citizens.

Follow out the contrary doctrine in its consequences, and see the absurdity it will produce.

The constitution has constituted courts professedly independent of state power in their judicial course; and yet the judgments of those courts are to be vacated, and their prisoners set at large, under the power of the state courts, or of the state laws, without the possibility of protecting themselves from its exercise.

I cannot acquiesce in an incompatibility so obvious.

No one has ever imagined that a prisoner in confinement under process from the courts of the United States, could avail himself of the insolvent laws of the state in which the court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign, that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves.

In the courts of the United States no higher power is asserted than that of discharging the individual in confinement under its own process. This affects not to interfere with the rights of creditors in the state courts against the same individual. Perfect reciprocity would seem to indicate *that no greater power [*368 should be exercised under state authority over the rights of suitors who belong to the United States jurisdiction. Even although the principle asserted in the British courts, of supreme and exclusive power over their own contracts, had obtained in the courts of the United States, I must think that power has undergone a radical modification by the judicial powers granted to the United States.

I therefore consider the discharge under a state law as incompetent to discharge a debt due a citizen of another state; and, it follows that the plea of a discharge here set up is insufficient to bar the rights of the plaintiff.

It becomes necessary, therefore, to consider the other error assigned in behalf of the defendant; and, first, as to the plea of the act of limitations.

The statute pleaded here is not the act of Louisiana, but that of New York; and the question is not raised by the facts or averments, whether he could avail himself of that law if the full time had run out before his departure from New York, as was supposed in argument. The plea is obviously founded on the idea that the statute of the state of the contract was generally pleadable in any other state, a doctrine that will not bear argument.

The remaining error assigned has regard to the sum for which the judgment is entered, it being for a greater amount than the nominal amount of the bills of exchange on which the suit was brought, and which are found by the verdict.

There has been a defect of explanation on this subject; but, from the best information afforded us, we consider the amount for which judgment is entered as made up of principal, interest and damages, and the latter as being legally incident to the finding of the bills of exchange, and their non-payment, and assessed by the court under a local practice consonant with that by which the amount of written contracts is determined, by reference to the prothonotary, in many other of our courts. We, therefore, see no error in it. The judgment below will therefore be affirmed.

And the purport of this adjudication, as I understand it, is, that as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior *contracts; that as against [*369 creditors, citizens of other states, it is invalid as to all contracts.

The propositions which I have endeavored

1.—Act of Congress of January 6th, 1800, ch. 4 (Vol. III. p. 301).

to maintain in the opinion which I have delivered are these:

1st. That the power given to the United States to pass bankrupt laws is not exclusive.

2d. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, multo fortiori, of posterior contracts.

3d. But when, in the exercise of that power, the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such power incompatible with the rights of other states, and with the constitution of the United States.

Mr. Justice **Washington**, Mr. Justice **Thompson** and Mr. Justice **Trimble** dissented.

Mr. Chief Justice **Marshall**, Mr. Justice **Duvall** and Mr. Justice **Story** assented to the judgment, which was entered for the defendant in error.

Judgment affirmed.[1]

370*] [*Constitutional Law.]

MASON v. HAILE.

The states have a right to regulate, or abolish, imprisonment for debt, as a part of the remedy for enforcing the performance of contracts.

Where the condition of a bond for the jail limits in Rhode Island required the party to remain a true prisoner in the custody of the keeper of the prison and within the limits of the prison, "until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restraint, then this obligation to be void, or else to remain in full force and virtue;" held, that a discharge, under the insolvent laws of the state, obtained from the proper court, in pursuance of a resolution of the legislature, and discharging the party from all his debts, etc. "and from all imprisonment, arrest and restraint of his person therefore," was a lawful discharge, and that his going at large under it was no breach of the condition of the bond.

THIS was an action of debt, brought in the Circuit Court of Rhode Island, upon two several bonds given by the defendant Haile, to the plaintiff Mason, and one Bates, whom the plaintiff survives, one of which bonds was executed on the 14th, and the other on the 29th of March, 1814. The condition in both bonds was the same, except as to dates and sums, and is as follows:

"The condition of the above obligation is such, that if the above bounden Nathan Haile, now a prisoner in the state's jail, in Providence, within the county of Providence, at the suit of Mason & Bates, do, and shall from henceforth continue to be a true prisoner, in the custody, guard, and safe-keeping of Andrew Waterman, keeper of said prison, and in the custody, guard, and safe-keeping of his deputy, officers and servants, or some one of them, within the limits of said prison, until he shall be lawfully discharged, without committing any manner of escape or escapes, during the time of restraint, then this obligation to be void, or else to remain in full force and virtue."

*To the declaration upon these bonds, [*371 the defendant pleaded several pleas, the substance of which was, that in June, 1814, after giving the bonds, the defendant presented a petition to the legislature of Rhode Island, praying for relief, and the benefit of an act passed in June, 1756, entitled, "An act for the relief of insolvent debtors," and that, in the meantime, all proceedings against him for debt might be stayed, and he be liberated from jail, on giving bonds to return to jail in case his petition shall not be granted. Upon this petition the legislature, in February, 1815, passed the following resolution: "On the petition of Nathan Haile, praying, for the reasons therein stated, that the benefit of an act entitled, 'An act for the relief of insolvent debtors,' passed in the year 1756, be extended to him, voted, that said petition be continued till the next session of this assembly; and that, in the meantime, all proceedings against him, the said Haile, on account of his debts, be stayed; and that the said Haile be liberated from his present confinement in the jail in the county of Providence, on his giving sufficient bond to the sheriff of said county, conditioned to return to jail in case said petition is not granted." That on the 28th of February, 1815, he gave sufficient bonds, with surety, to the sheriff, conditioned to return to jail, in case the petition should not be granted, and, thereupon, the sheriff did liberate and discharge him from his said confinement, in said jail, and permit him to go at large, out of said Waterman's custody, and the custody of the keeper of said prison, his deputy, officers and servants, and out of the limits of said jail and jail-yard; and he, said Haile, did, upon being so liberated, depart and go at large out of the same accordingly and so continued at large and liberated, until the prayer of said petition was granted by the legislature, at the February session, 1816, and ever since, as lawfully he might. That, in February, 1816, the legislature, upon a due hearing, granted the prayer of the defendant's petition, and passed the following reolution: "On the petition of Nathan Haile, of Foster, praying for the reasons therein stated, that the benefit of an act passed in June, 1756,

1.—In the case of Shaw v. Robbins, the judgment below was reversed. This was an action on several bills of exchange, drawn by the plaintiff on the defendant, payable to the plaintiff's order, and by the defendant duly accepted. At the time of the transaction, the plaintiff was a citizen of Massachusetts, resident in that state, and the defendant a citizen of New York, and there resident. The action was brought in a state court, in Ohio, and the defendant relied on a discharge, obtained in New York, under the provision of the insolvent laws of that state. The highest court of law in Ohio gave judgment for the defendant; and the cause was brought before this court by a writ of error.

Mr. Justice Johnson. This is a contract between a citizen of New York and a citizen of Massachusetts. It only differs from Ogden v. Saunders in this particular, that the action was brought in a state court; not the court of New York, but the court of another state. We think the decision in the case of Ogden v. Saunders applies to this, and must govern its decision. The judgment below, therefore, must be reversed, and the cause remanded for such further proceedings as the law may require.

for the relief of insolvent debtors, may be extended to him; voted, that the prayer of the 372*]petition be, *and the same is hereby granted." That the defendant afterwards, in pursuance of the above resolution, and of the laws of the state, received in due form, from the proper court, a judgment, "that he should be, and thereby was, fully discharged of and from all debts, duties, contracts, and demands, of every name, nature and kind, outstanding against him, debts due to the state aforesaid and to the United States, excepted, and from all imprisonment, arrest and restraint of his person therefor."

To the pleas so pleaded the plaintiff demurred; there was a joinder in demurrer; and, on the argument of the cause, the opinions of the judges of the court below were opposed, upon the question whether the defendant was entitled to judgment, on the ground that the matters set forth on his part in his pleas, were sufficient to bar the action, or whether the plaintiff was entitled to judgment upon the demurrers and joinders. The question was thereupon certified to this court for final decision.

The cause was argued by Mr. Webster and Mr. Bliss for the plaintiff, and by Mr. Whipple and Mr. Wheaton for the defendant.

On the part of the plaintiff, it was argued, that the acts of the legislature of Rhode Island of February, 1815, and of February, 1816, liberating the person of the defendant from imprisonment, and reviving in his favor an absolute insolvent act of the colonial legislature, passed in the year 1756, were (in the strictest sense) laws impairing the obligation of contracts. They interfered with an actually vested right of the creditor, acquired under existing laws, and entitling him to a particular remedy against the person of his debtor. Upon the narrowest construction which had ever been given to the prohibition in the constitution of the United States, they impaired the obligation of the bonds now in question; which, though a part of the judicial proceedings to enforce the execution of the primary contract, were still "contracts," within the letter and spirit of the constitution. The obligation of these contracts was entirely destroyed by these legislative acts, which were not general laws, but private acts, professedly intended for the relief of the party in the particular case. They might 373*] even be considered *void on general principles, independent of the positive prohibition in the constitution, as being retrospective laws interfering with vested rights. The law of 1756 was no longer in force in Rhode Island, and the reference to it in the acts of 1815 and 1816 could only have the effect of reviving it in the particular case, and was tantamount to the enactment of a new law with similar provisions. But the acts now in question were clearly retrospective acts of legislation, impairing the obligation of contracts in existence when the acts were passed; and, consequently, the case fell within the principles determined by the majority of the court in Ogden v. Saunders.[1]

For the defendant, it was insisted, that although the act of 1756 was not in force (as a general and permanent law) when the bonds were given, yet the statutes of 1798 and 1812 provide for relief in cases of insolvency; which is always granted by referring to the act of 1756, and reviving its provisions in favor of the individual. These statutes together with the established usage under them, making part of the unwritten law of the state, form a system or code of insolvent laws, authorizing the debtor to petition in the manner prescribed by the act of 1756, constituting the legislature a court to hear and determine it as a case between debtor and creditor,[2] and requiring an assignment of the debtor's property for the benefit of all his creditors. The local legislature possesses sovereign power over the remedy, in its own courts, for the enforcement of contracts made within its own territory;[3] and the acts under which the prison bonds were given, as well as those under which the discharge was obtained, are a part of the process laws of the state, which it has a right to make, alter, and repeal, at its pleasure. The bonds in question could hardly be considered as contracts within the meaning of the constitutional prohibition, since there is but one voluntary party to them. They are rather a part of the judicial process for enforcing the performance of contracts, and the collection of debts. *The legislative [*374 resolution of February, 1815, is not void on account of its dependence on the act of insolvency of 1816, because the latter, though it professes to discharge both person and property (and, therefore, may be void in part), is not entirely void, it being a present discharge executed, and, therefore, void only for the excess. But, admitting the act of 1816 to be entirely void, that of 1815 has no necessary connection with, or dependence upon it. If the resolution of 1815 would have been a valid discharge from imprisonment in close jail, it must be a valid discharge from the limits, as it does not impair the contract for the liberty of the yard. It does not impair it, because that contract is part of a general system, or code of laws, regulating the remedy in regard to imprisonment for debt; and taken in connection with that system, it is plain that the legislature, when they provided the bond as a security for the creditor, did not mean to deprive themselves of the power of entirely liberating the debtor. The words "lawful discharge" are general, and necessarily include all discharges which were lawful previous to the execution of the bond. And even if the resolution of 1816 is to be considered not as the sentence of a court of justice, but as a special law, future in its operation, it does not impair the obligation of the contract, because the bond, by necessary construction, must be taken to refer to future laws, and is to be governed by the laws of the state, general or special, in force at the time of the discharge. Whatever these laws provide shall be a "lawful discharge," is a "lawful discharge," within the meaning of the laws under which the bonds were taken, since all these laws are made by the same legislative authority, having sovereign control over the subject-matter.

1.—Ante, p. 213.

2.—Olney v. Andrews, 3 Dall. 308; Calder v. Bull, 3 Dall. 386.

3.—Sturges v. Crowninshield, 4 Wheat. Rep. 200, 201.

Mr. Justice Thompson delivered the opinion of the court:

The question in this case arises upon the following certificate of a division of opinion of the judges of the Circuit Court of the United States for the district of Rhode Island: "This cause came on to be heard, and was argued by counsel on both sides, and thereupon the following question occurred, viz.: whether, upon the amended pleas in this case, severally pleaded to the first and second counts of the 375*] *plaintiff's declaration, and to which there are demurrers, and joinders in demurrer, the defendant is entitled to judgment, on the ground that the matters set forth therein, on the part of the defendant, are sufficient to bar the action, or whether the plaintiff is entitled, upon said demurrers and joinders, to judgment. Upon which question the court was divided in opinion."

It is not understood by this court, that any question, as to the sufficiency of the pleas, in point of form, is drawn under examination, but simply, whether, upon the merits, the matter thereby set up is sufficient to bar the action. The action is founded upon two several bonds, given by the defendant to the plaintiff, and one Bates, whom the plaintiff survives, one dated the 14th, and the other the 29th of March, 1814. The condition in both bonds is the same, except as to dates and sums, and is as follows: "The condition of the above obligation is such, that if the above bounden Nathan Haile, now a prisoner in the state's jail, in Providence, within the county of Providence, at the suit of said Mason & Bates, do, and shall from henceforth continue to be a true prisoner, in the custody, guard and safe-keeping of Andrew Waterman, keeper of said prison, and in the custody, guard and safe-keeping of his deputy, officers and servants, or some one of them, within the limits of said prison, until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restraint, then this obligation to be void, or else to remain in full force and virtue."

The defense set up by the pleas, to show there has been no breach of the condition of the bond, is, substantially, that in June, 1814, after giving the bond in question, the defendant presented a petition to the legislature of Rhode Island, praying relief, and the benefit of the insolvent act of 1756; and that, in the meantime, all proceedings against his person and estate, for the collection of debts, might be stayed, and he be liberated from jail, on giving bonds to return in case his petition should not be granted. Upon this petition the legislature, in February, 1816, passed the following resolution: "On the petition of Nathan Haile, praying, for the reasons therein stated, that the benefit of an act, entitled, 'An act for the relief of insolvent debtors,' passed in the year 376*] *1756, be extended to him, voted, that said petition be continued until the next session of this assembly; and that, in the meantime, all proceedings against the said Haile on account of his debts, be stayed; and that the said Haile be liberated from his present imprisonment, in the jail, in the county of Providence, on his giving sufficient bond to the sheriff of the county, conditioned to return to jail in case said petition is not granted." The defendant, after the passing of this resolution, gave the bond required by it, and, on the 28th of the same month, was discharged from imprisonment, and has ever since been at large, out of the custody of the sheriff. In February, 1816, the legislature, upon a due hearing, granted the prayer of the defendant, and passed the following resolution: "On the petition of Nathan Haile, of Foster, praying, for the reasons therein stated, that the benefit of an act, passed in June, 1756, for the relief of insolvent debtors, may be extended to him, voted, that the prayer of the said petition be, and the same is hereby granted." By the granting of the prayer of the petition, the condition of the second bond given to the sheriff was complied with, and the bond became extinguished.

The defendant afterwards proceeded to take the benefit of the insolvent act revived in his favor, according to the statute provisions, and received in due form from the proper court, a judgment, "that he should be, and thereby was fully discharged of and from all debts, contracts and demands, of every name, nature and kind, outstanding against him, debts due to the state aforesaid, or to the United States, excepted, and from all imprisonment, arrest and restraint of his person therefor." The insolvent act of 1756 is not considered in force as a general and permanent law, but the legislature of Rhode Island has been in the constant habit of entertaining petitions like the present, and has by the general law of 1798 (now in force) prescribed the mode by which such petitions are to be regulated, and in case of granting the prayer of the petition, the course is to pass an act or resolution, giving the benefit of the act of 1756 to the petitioner, and thus, in effect, reviving it for his particular benefit. So that the mode pursued to obtain the discharge of the defendant, as set out in the pleas, was according to the established course *of [*377 proceeding in cases of insolvency, and in conformity to the laws of Rhode Island, by which the defendant was discharged from all his contracts, and from imprisonment.

The effect of this discharge upon the original judgment against Haile is not now drawn in question. The only inquiry is, whether he has violated the condition of his bonds of March, 1814, by going at large under the authority and sanction of the resolutions of the legislature, as before stated. His bond required him to remain a true prisoner until he should be lawfully discharged, without committing any manner of escape during the time of restraint. The bond is not that he shall remain a true prisoner until the debt shall be paid. Nor is there anything upon the face of the bond, or if we look out of it, to the known and established laws and usages in that state, calling for such a construction. A lawful discharge, in its general signification, will extend to, and be satisfied by, any discharge obtained under the legislative authority of the state. And it is not unreasonable to consider such prison bonds as given subject to the ordinary and well-known practice in Rhode Island, for the legislature to entertain petitions in the manner pursued by the defendant, to obtain the benefit of the insolvent act of 1756 in the manner in which these petitions are received and proceeded upon, as prescribed

by the act of 1798. And, indeed, this cannot strictly be considered a private contract between the parties, but rather as a statute engagement, imposed by an act of the legislature, and as a part of the process under which the defendant was held as a prisoner. And with the full knowledge of this regulation and practice, it is hardly to be presumed that such discharges were not understood to be lawful discharges. And the same remarks will apply to the term "escape" in the bond, which can mean no more than a departure from the limits without lawful authority. Suppose the legislature, after the execution of this bond, had enlarged the jail limits. It surely would not have been an escape for the defendant to have availed himself of the enlarged limits, and gone beyond his former bounds. And yet, if the limits prescribed at the time the bond was executed are to govern the effect and operation of the bond, it would be an escape. Such bonds may well 378*] be considered *as an enlargement of the prison limits, and a mere modification of the imprisonment, according to the provisions of the laws of Rhode Island.

Can it be doubted but the legislatures of the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present, as well as future imprisonment? We are not aware that such a power in the states has ever been questioned. And if such a general law would be valid under the constitution of the United States, where is the prohibition to be found, that denies to the state of Rhode Island the right of applying the same remedy to individual cases? This is a measure which must be regulated by the views of policy and expediency entertained by the state legislatures. Such laws act merely upon the remedy, and that in part only. They do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy. The doctrine of this court in the case of Sturges v. Crowninshield, 4 Wheat. Rep. 200, applies with full force to the present case. "Imprisonment of the debtor," say the court, "may be a punishment for not performing his contract, or may be allowed as a mean for inducing him to perform it. But a state may refuse to inflict this punishment, or may withhold it altogether, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

In whatever light, therefore, the question is viewed, no breach of the condition of the bond, according to its true sense and interpretation, has been committed. The liberation of the defendant from confinement, on his giving bond to the sheriff to return to jail in case his petition for a discharge should not be granted, was sanctioned by the due exercise of legislative power, and was analogous to extending to him more enlarged jail limits, and would not be considered an escape. And both this and the final discharge, so far, at all events, as it related to the imprisonment of the defendant, affected the remedy in part only, and was in the due and ordinary exercise of the powers vested in the legislature of Rhode Island, and was a law- 379*] ful discharge, and no *escape, and, of course, no breach of the condition of the bond in question.

It must, accordingly, be certified to the Circuit Court, that the matters set forth in the defendant's amended pleas, are sufficient to bar the plaintiff's action.

Mr. Justice Washington dissented. It has never been my habit to deliver dissenting opinions in cases where it has been my misfortune to differ from those which have been pronounced by a majority of this court. Nor should I do so upon the present occasion, did I not believe that the opinion just delivered is at variance with the fundamental principle upon which the cases of Sturges v. Crowninshield and Ogden v. Saunders have been decided. A regard for my own consistency, and that, too, upon a great constitutional question, compels me to record the reasons upon which my dissent is founded.

The great, the intelligible principle, upon which those cases were decided, is, that a retrospective state law, so far as it operates to discharge, or to vary the terms of an existing contract, impairs its obligation, and is, for that reason, a violation of the tenth section of the first article of the constitution of the United States; but that a law which is prospective in its operation, has not this effect, and, consequently, is not forbidden by that instrument. But, if I rightly understand the opinion pronounced in this case, and the facts upon which it is founded, this principle is subverted, and the distinction between retrospective and prospective laws, in their application to contracts, is altogether disregarded. The facts are that the bond upon which this action is brought bears date the 14th of March, 1814, and the condition is, that the defendant, then a prisoner in the state's jail in Providence, at the suit of the plaintiff, shall continue to be a true prisoner, in the custody and safe-keeping of the keeper of the said jail, within the limits of the said prison, until he shall be lawfully discharged. Upon the petition of the defendant to the legislature of Rhode Island, to extend to him the benefit of a certain act passed in the year 1756, an act was passed in February, 1815, which liberated him from his confinement in the jail aforesaid, on his giving a bond to return to the *said jail in case his petition should not [*380 be granted; and, by a subsequent act passed in the following year, he was discharged from his debts, upon a surrender previously made of all his estate, for the benefit of his creditors. The plea admits that the defendant did depart from the limits of the jail, and justifies the alleged escape under the above acts of the legislature. The opinion considers those acts as constitutional, and decides that the defendant was lawfully discharged within the terms of his bond.

The case of Sturges v. Crowninshield arose upon a contract for the payment of money, from which the debtor was discharged under a subsequent state insolvent law, and this discharge was plead in bar of the action upon the contract. This court decided the plea to be insufficient, upon the ground that the law upon which it was founded impaired the obligation of the contract, which was entered into previous to his discharge. The obligation of the contract upon which the present suit was brought, is not to pay money, but to continue a true prisoner within the limits of the jail in which he

was then confined. A subsequent act of the legislature discharges him from his confinement and authorizes him to go at large, of which law he availed himself, and under which he justifies the alleged breach of the condition of his bond.

A contract, we are informed by the above case, is an agreement by one or more persons to do, or not to do, a particular thing; and the law which compels a performance of such contract, constitutes his obligation. The thing to be done in that case was, to pay money; and in this, it is, to continue a true prisoner; and, at the time it was concluded, the existing law of Rhode Island required him to perform this engagement. A discharge from his debts in the former case, by a subsequent law of the state, impaired that obligation; but this obligation, it is said, is not impaired by a subsequent law which discharges him from confinement, as well as from all his debts. If the principle which governs the two cases can be reconciled with each other, the course of reasoning by which it is to be effected is quite too subtle for my mind to comprehend it.

It was stated, in the case alluded to, that im- [*381 prisonment of *the debtor forms no part of the contract, and, consequently, that a law which discharges his person from confinement does not impair its obligation. This I admit, and the principle was strictly applicable to a contract for the payment of money. But can it possibly apply to a case where the restraint of the person is the sole object of the contract, and continuing within the limits of the prison the thing contracted to be done?

I admit the right of a state to put an end to imprisonment for debt altogether, and even to discharge insolvent debtors from their debts, by the enactment of a bankrupt law for that purpose. I am compelled by the case of Sturges v. Crowninshield, to make this latter admission, and I voluntarily make the former. But what I insist upon is, that if the law in either case is made to operate retroactively upon contracts, to do what the law discharges the party from doing, it impairs the obligation of the contract, and is so far invalid.

I will now briefly consider the reasons which are assigned for distinguishing this case from that of Sturges v. Crowninshield.

It is said that the bond in this case is not, in point of law, a contract, since there is but one voluntary party to it, and a contract cannot exist unless there be at least two parties to it. My answer is that the law of Rhode Island which authorized the giving of the bond, made the creditor the other party, as much so as creditors and legatees are made parties to a bond, which the law requires an executor to give. If this answer be not considered as satisfactory, I will add another, which is, that the creditor has adopted it as his contract by putting it in suit.

Again; it is said, that the acts which discharged this defendent from his imprisonment, and even from the debt altogether, are not retrospective in their operation, and are not so considered in the state where they were passed.

How they are considered in that state, is more than this court can judicially know, and, consequently, that circumstance cannot here form the basis of a judicial determination.

All that we do judicially know is, that the act of 1756 *was a temporary law, and [*382 expired nearly half a century ago. It was, then, in the year 1815, as if it had never existed. An act in this year to revive it, either as a general law, or for the purpose of benefiting a particular individual, is the enactment of a new law, which derives all its force from the will of the legislature which enacts it, and not from that of the legislature to which the expired law owed its temporary existence. Is it possible that argument, or authorities, can be required to prove this proposition? Would the argument upon which the contrary proposition is founded have been adopted in the case of Sturges v. Crowninshield, if the discharge had been under an act passed subsequent to the contract, which revived an old expired insolvent or bankrupt law? And am I to understand that contracts for the payment of money, as well as for the restraint of the person of the debtor, may now be discharged in the state of Rhode Island at any time, by an act to revive the act of 1756 in favor of debtors for whose benefit it may be revived? If this be the effect of the present decision (and I confess I cannot perceive how it can be otherwise), the decision in the case of Sturges v. Crowninshield will avail nothing in that state, or in any other of the states in whose code an old deceased insolvent law can be found, which, in the days of its existence, authorized a legislative discharge of a debtor from his debts or from his prison bounds bond.

Lastly; it is said that this law does no more than enlarge the limits of the prison rules, within which the defendant bound himself to continue. And can it be contended that a law which has this effect does not vary (and if it does so, it impairs) the terms of the contract entered into by the defendant? For what object was he restricted to certain limits, if not to coerce him to pay the debt for which the plaintiff had a judgment and execution against him? And is not this object defeated, and the whole value of his prison bounds contract destroyed, by enlarging the limits to those of the state, of the United States, or of the four corners of the globe? I shall add nothing further. I have prepared no written opinion; my object in declaring my dissent from that which has been delivered, being not so much to prove that *opinion to be wrong, as to vindi- [*383 cate my own consistency.

Certificate.—That the matters set forth in the defendant's pleas are sufficient to bar the plaintiff's action.

[Insurance.]

THE COLUMBIAN INSURANCE COMPANY, Plaintiffs in Error,

v.

CATLETT, Defendant in Error.

A policy for $10,000, upon a voyage "at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge, in the United States, upon all lawful goods and merchandise, laden or to be laden on board the

ship, etc. beginning the adventure upon the said goods and merchandise from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, etc. and the United States aforesaid," is an insurance upon every successive cargo taken on board in the course of the voyage out and home, so as to cover the risk of a return cargo, the proceeds of the sale of the outward cargo.

Such a policy covers an insurance of $10,000 during the whole voyage out and home, so long as the assured has that amount of property on board, without regard to the fact of a portion of the original cargo having been safely landed at an intermediate port before the loss.

Where the cargo, in the course of the outward voyage, and before its termination, was permanently separated from the ship by the total wreck of the latter, and the cargo being perishable in its nature, though not injured to one-half its value, it became necessary to sell it, the further prosecution of the voyage with the same ship or cargo became impracticable; held, that this was a technical total loss, on account of the breaking up of the voyage.

Whether a delay at a particular port constitutes a deviation, depends upon the usage of trade with reference to the object of selling the cargo. Where different ports are to be visited for this purpose, the owner has the right to limit the price at which the master may sell, to a reasonable extent; and a delay at a particular port, if bona fide made for 384*] *that purpose, does not constitute a deviation, though occasioned by this restriction.

Freight is not a charge upon the salvage of cargo in the hands of the underwriters, whether the assured is owner of the ship or not.

THIS cause was argued by Mr. Webster and Mr. Taylor for the plaintiffs in error, and by the Attorney-General and Mr. Swann for the defendant in error.

Mr. Justice Story delivered the opinion of the court:

This is a writ of error to the Circuit Court of the District of Columbia, sitting at Alexandria.

The original action was upon a policy of insurance, dated the 16th of February, 1822, whereby the Columbian Insurance Company insured the plaintiff ten thousand dollars, lost or not lost, at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge in the United States, upon all kinds of lawful goods and merchandise, laden or to be laden on board the ship called the Commerce, etc.; beginning the adventure upon the said goods and merchandise from the loading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, etc., and the United States. The goods and merchandise to be valued, as interest may appear. The policy contained the usual risks; and the premium agreed on was three and three-quarters per cent., to return half per cent. for each port not used or attempted, and no loss happens. There are other provisions in the policy, which will be hereafter commented on. The breach alleged in the declaration is a total loss by perils of the seas, with the usual averments of notice and non-payment.

The trial was had upon the general issue, and a verdict found by consent for the plaintiff, for $10,000, subject to the opinion of the court, upon the demurrer to evidence filed in the case. It was farther agreed, that if it should be the opinion of the court, that the plaintiff was not entitled to recover the full amount of the insurance, but is entitled to an average loss, then a reference to ascertain that average, or to modify the amount of the verdict in any *other [*385 respect as to the sum, should be made to an auditor, and judgment should be given for the sum finally reported and confirmed by the court, subject, however, to the exceptions of either party to any opinion of the court on that subject. The reference was accordingly made, and, upon the coming in of the auditor's report, the court pronounced its opinion, and gave judgment for the plaintiff for $7,656.57, with interest from the 14th of October, 1822.

From the demurrer to evidence, it appeared that the ship sailed from Alexandria on her voyage about the 14th of February, 1822; having on board a cargo of 2,297½ barrels of flour of the invoice price of $16,887.32, both ship and cargo being owned by the plaintiff. On

NOTE.—Insurance. Deviation.

The master must proceed to the place of destination without delay, and without stopping at any intermediate port, or deviating from the straightest and shortest course. The smallest deviation from the usual course of the voyage, without a justifiable necessity, discharges the underwriters, although the loss is not the immediate consequence of the deviation. Hildyard, Marine Ins. 243; Cook v. Tounson, Park. Ins. 630; Abbott on Shipping, 5 Am. ed. 441, marg. pag. 361; Andenreid v. Mercantile Ins. Co. 60 N. Y. 482; Martin v. Delaware Ins. Co. 2 Wash. C. C. 254; Townsend v. Guyon, Park Ins. 620; De Castro v. Brett, 56 How. Pr. N.Y. 484.

An intended deviation, not actually carried into effect, will not vitiate a policy, nor exempt the insurers from a loss happening before the vessel arrives at the dividing point. Lawrence v. Ocean Ins. Co. 11 John. 241; Firemen Ins. Co. v. Lawrence, 14 John. 46; Marine Ins. Co. of Alexandria v. Tucker, 3 Cranch, 257; Snow v. Columbia Ins. Co. 48 N. Y. 624.

If a vessel sail to a port within the policy, with intent to go to a port not within the policy, in case the former should be blockaded, it is not a deviation. Maryland Ins. Co. v. Woods, 6 Cranch, 29.

But an actual departure to learn whether a port, not of destination, is blockaded, is a deviation. Ib.

The term deviation in marine insurance is understood to mean, a voluntary departure, without necessity, or any reasonable cause, from the regular and usual course of the specific voyage insured. Park Ins. 619; Hildyard Mar. Ins. 231.

A deviation is not merely the going out of the track or course usually taken, but it is a departure from the express or implied terms of the contract. Within this rule, unjustifiable delay constitutes a deviation. Warden v. La Belle Creole, 1 Pet. Adm. 31; Oliver v. Maryland Ins. Co. 7 Cranch. 487.

"Liberty to touch" at a particular port, reserved in a policy of insurance, does not imply liberty to remain there for the purpose of trading. Trading at such a port, involving delay, may amount to a deviation. Maryland Ins. Co. v. Le-Roy, 7 Cranch, 26; U. S. v. The Paul Shearman, Pet. C. C. 98.

Where liberty is given to touch at Matanzas, a stoppage at Matanzas and discharge of cargo there, which produces no delay and no increase of risk, is not a deviation. Hughes v. Un. Ins. Co. 3 Wheat. 159; 8 Wheat. 294.

It is not a deviation, for a vessel armed as a letter of marque and insured as such, to chase and capture hostile vessels coming in sight in the course of her voyage, but she has no right to cruise at large for prizes. Haven v. Holland, 2 Mas. 230.

It is not a deviation for a vessel to take necessary measures to repel a hostile attack; nor when she has captured a hostile vessel in self-defense, to take possession and man out the prize. Ib.

Deviation to avoid capture is justifiable. Post v. Phœnix Co. 10 John, 79; Reade v. Com. Ins. Co. 8 John. 352; Graham v. Commercial Ins. Co. 11 John. 352; Hildyard Mar. Ins. 256.

It is not a deviation to touch and stay at a port out of the course of the voyage, when doing so is within the usage of the trade. But if the departure was not within the purposes and for the objects authorized by the usage, "it amounts to a deviation," and the insured cannot recover. Bentatoe v. Pratt, Wall. C. C. 58; Bulkley v. Protection Ins. Co. 2

the 21st of March she arrived in safety with her cargo at St. Thomas, having met with no accident; and she continued at that port until the 30th of May following, for the purpose of selling her cargo, and for no other cause. During this period the master, who was also consignee, sold by retail 509½ barrels; being limited, by his instructions, to $8 per barrel, and not being able to procure that price for the residue of the cargo, he sailed on the 31st of May for Cape Haytien with it, and had also on board some doubloons, amounting to $480, part of the proceeds of the former sales. He might have sold his whole cargo at from $7.50 to $7.75 at St. Thomas. The 509½ barrels of flour sold at St. Thomas, according to the invoice price, amounted to $3,512.99, leaving the value of the cargo on board, exclusive of the doubloons, at the time of sailing from that port, according to the invoice, at $12,328.25.

On the 6th of June the ship, with her cargo, arrived off Cape Haytien, and the captain having gone on shore, the ship stretching too far in, took the ground and was wrecked. In consequence of this disaster, 155 barrels of flour were totally lost, 1,633 were got on shore, part without injury, but the greater part damaged, and the whole was sold. The gross amount of the sales at Cape Haytien was $9,391.34, the expenses of salvage, including commissions on sales, $4,124.72; the proportion of the captain's expenses attaching on the cargo, 386*] $285.78. Of the proceeds of the sales *at Cape Haytien, the sum of $4,953.89 was invested in coffee, which was shipped to Baltimore where it produced only $3,517.40. The plaintiff makes a claim for freight of the outward cargo of $2,104.25, as a proper deduction from the proceeds.

As soon as the plaintiff heard of the loss, he sent the following letter to the Insurance company, under date of the 5th July, 1822, "Gentlemen, having received a letter from Captain M'Knight (the master), informing me that the ship Commerce was lost, I abandon the proportion of the cargo that your office was interested in. Respectfully, etc." The captain's protest, and the survey of the ship, were also exhibited to the company on the 14th of August. The abandonment was never finally accepted by the directors, but sundry negotiations took place between them and the plaintiff, which, however, led to no effectual arrangement.

The first question arising in this case, is upon the true construction of the policy itself as to the voyage insured. Is it an insurance upon the original cargo only from the time of its loading until its final discharge, or is it an insurance upon every successive cargo, which is taken on board in the course of the voyage out and home, so as to cover the risk of a return cargo, the proceeds of the sales of the outward cargo? The argument in behalf of the defendant is, that the risk applies upon the terms of the policy only to the original cargo, laden at Alexandria. The terms of the policy are, on a voyage, "at and from Alexandria to St. Thomas and two other ports in the West Indies, and back to her port of discharge in the United States, upon all lawful goods and merchandise laden or to be laden on board the ship, etc.; beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, etc., and the United States aforesaid." It is supposed that those words tie up the adventure to the original cargo shipped at Alexandria, because the risk is to attach on the same at that port, and to continue on the same until safely landed at St. Thomas, etc., and the United States. Perhaps a very strict grammatical construction might lead to such a conclusion. But policies have never been construed *in such a [*387

Paine, 82; Haven v. Holland, 2 Mas. 230; McCull v. Sun Ins. Co. 66 N. Y. 505.

Necessity alone can sanction a deviation in any case; and that deviation must be strictly commensurate with the power compelling it. Winthrop v. Union Ins. Co. 2 Wash. C. C. 7; Maryland Ins. Co. v. LeRoy, 7 Cranch, 26; Robinson v. Marine Ins. Co. 2 John. 89; Suydam v. Marine Ins. Co. 2 John. 138.

The vessel may go to the nearest port for repairs of damage, resulting from an accident; but not for the purpose of procuring hands. Cruder v. Penn. Ins. Co. 2 Wash. C. C. 330.

When vessel goes to nearest port for necessary water, the deviation is justifiable. Hildyard Marine Ins. 250; Wood v. Pleasants, 3 Wash. C. C. 201; Matteaux v. London Assurance, 1 Atk. 145.

To turn aside from her course, or delay, in order to relieve another vessel, is not a deviation which avoids a policy, if the object is to save human life. To do so with the object of saving property merely, is a deviation. Mason v. Ship Blaireau, 2 Cranch, 268; Schooner Boston, 1 Sumn. 328; The Henry Ewbank, 1 Sumn. 400; Bond v. The Cora, 2 Wash. C. C. 80; S. C. 2 Pet. Adm. 361; Sturtevant v. The George Nicholans, 1 Newb. 449; Crocker v. Jackson, Sprague, 141 S. C. 10 Law. Rep. 70.

Particular cases in which the circumstances shown have been held to amount to a deviation discharging the underwriters. Hearne v. Marine Ins. Co. 20 Wall. 488; Neilson v. Col. Ins. Co. 1 John. Cas. 301; Glidden v. Manufacturers' Ins. Co. 1 Sumn. 232; Robertson v. Col. Ins. Co. 8 John. 491; Fernandez v. Great W. Ins. Co. 48 N. Y. 571; Bulkley v. Protection Ins. Co. 2 Paine, 82; Martin v. Delaware Ins. Co. 2 Wash. C. C. 254; West v. Columbian Ins. Co. 5 Cranch, C. C. 309; Hearn v. Equitable Ins. Co. 3 Cliff. 328; Hearn v. New Eng. Mu. Ins. Co. 3 Cliff. 318.

Particular cases in which the circumstances relied on as constituting a deviation have been held no defense to the underwriters. Gilfort v. Hallett, 2 John. Cas. 296; Patrick v. Ludlow, 3 John. Cas. 10; Talcott v. Marine Ins. Co. 2 John. 130; Reade v. Com. Ins. Co. 3 John. 352; Maryland Ins. Co. v. Woods, 6 Cranch, 29; Winthorp v. Union Ins. Co. 2 Wash. C. C. 7; Goyon v. Pleasants, 3 Wash. C. C. 241; Coles v. Marine Ins. Co. 3 Wash. C. C. 159; Gardner v. Columbian Ins. Co. 2 Cranch, C. C. 473; De Peyter v. Sun Mut. Ins. Co. 19 N. Y. 272; Child v. Sun Mut. Ins. Co. 3 Sandf. N. Y. 26.

A clause in a marine policy "the risk to be suspended while the vessel is at B. Island loading," suspends the risk all the time she was there for the purpose of loading, and not merely during the time loading was actually proceeding. Reed v. Insurance Co. 5 Otto, 23.

Where there is an intention of going to more than one port, the order described in the policy must be pursued. The insured, however, is not bound to go to all, but may proceed directly to any one of ports mentioned. Hildyard Marine Ins. 241; Gardner v. Senhouse, 3 Taunt. 16; Rankin v. Reeve, Park Ins. 627; Kane v. Columbian Ins. Co. 2 John. 264.

If a vessel lie by, at an intermediate port to repair a defect, known at the commencement of her voyage, and be there destroyed by fire, it is a deviation, which discharges the underwriters. Andenreid v. Mercantile Mu. Ins. Co. 60 N. Y. 482.

Stress of weather is an excuse for leaving the direct course. Harrington v. Ufield, Park Ins. 638; Hildyard Marine Ins. 252 marg. pag.; Delaney v. Stoddart, 1 Term. Rep. 22.

strict and rigid manner. The instrument itself is somewhat loose in its form, and has always received a liberal construction with reference to the nature of the voyage and the manifest intent of the parties. What is the nature of the present voyage? It is upon the face of the policy plainly an insurance upon all lawful goods, not only for the outward voyage to the West Indies, but for the homeward voyage to the United States. The underwriters must be presumed, equally with the assured, to know the nature and course of such a voyage. It is for the purpose of trade, and the exchange of the outward cargo, by sale or barter, for a return cargo of West India productions. If we could shut our eyes to the knowledge of this fact, belonging, as it does, intimately to the history and commercial policy of the nation itself, as disclosed in its laws, the whole evidence in the case furnishes abundant proofs of its notoriety. The true meaning of the policy is to be sought in an exposition of the words, with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. The object of the clause under consideration may be thus rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively, and at different periods of the voyage, constituting the cargo. It would be pushing the argument to a most unreasonable extent to suppose that the parties deliberately contracted for risks on a homeward voyage, on goods which, according to the known course of the trade, and the very nature of the commodities, were not, and could not be, intended to be brought back to the United States. We are of opinion that the policy was for the whole voyage round, and covered any return cargo taken on board at any of the designated ports in the West Indies. This is not like the cases cited at the bar, where a policy on goods at and from a particular port, beginning the adventure from the loading thereof, has been held not to cover goods taken on board at an antecedent port. Those are all cases of insurance upon a single passage, unaffected by any known course or usage of trade to explain the intentions of the parties.

388*] *The next question is, whether the delay at St. Thomas for seventy days was not so unreasonable as to constitute a deviation. Without question, any unreasonable delay in the ordinary progress of the voyage avoids the policy on this account. But what delay will constitute such a deviation, depends upon the nature of the voyage, and the usage of the trade. It may be a very justifiable delay, to wait in port, and sell by retail, if that be the course of business, when such delay would be inexcusable in a voyage requiring or authorizing no such delay. The parties, in entering into the contract of insurance, are always supposed to be governed in the premium by the ordinary length of the voyage, and the course of the trade. That delay, therefore, which is necessary to accomplish the objects of the voyage according to the course of the trade, if bona fide made, cannot be admitted to avoid the insurance. In the present case, it is proved that the stay at St. Thomas was solely for the purpose of selling the cargo, and for no other cause. But, it is said that a sale might have taken place at St. Thomas of the whole cargo, if the orders of the owner had not contained a direction to the master limiting the sale at St. Thomas to the price of $8, and that this limitation was the sole cause of the delay, and was unreasonable; that the master ought, under the circumstances, to have sold at a lower price, or have immediately elected to go to another port. We are of a different opinion. In almost every voyage undertaken of this nature, where different ports are to be visited for the purposes of trade, and to seek markets, it is almost universal for the owner to prescribe limits of price to the sales. Such limitations have never hitherto been supposed to vary the insurance, or the rights of the party under it. It cannot be that the master, if entitled to go to a single port only, is bound to sell at whatever sacrifice, as soon as he arrives at that port, and within the period at which he may unload, and sell, and reload a return cargo. He must, from the very nature of the case, have a discretion on this subject. If he arrives at a bad market, he must have a right to wait a reasonable time for a rise of the market, to make suitable inquiries, and to try the effect of partial and limited sales. He is not bound to sell the whole *cargo at once, whatever be [*389 the sacrifice, and thus frustrate the projected adventures. In short, he must exercise in this, as in all other cases, a sound discretion for the interest of all concerned; and if it be fairly and reasonably exercised, it ought not to be deemed injurious to rights secured by the policy. It is as much the true interest of the owner to sell in a reasonable time, and with all proper despatch, as it is for the underwriters. To be sure, if the owner should limit the price to an extravagant sum, or the master should delay after all reasonable expectations of a change of market were extinguished, such circumstances might properly be left to a jury to infer a delay amounting to a deviation. And here, again, as on the former point, it may be remarked, that every underwriter is presumed to know the ordinary course of the trade, and to regulate his proceedings accordingly.

But, it is said that there is no sufficient evidence of the usage of trade in the present case. It is to be remembered that this is a case which comes before this court upon a demurrer to evidence. The plaintiff was not bound to have joined in the demurrer without the defendant's having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made, without insisting on this preliminary, the court is at liberty to draw the same inferences in favor of the plaintiff, which the jury might have drawn from the facts stated. The evidence is taken most strongly against the party demurring to the evidence. This is the settled doctrine in this court, as recognized in Pawling v. The United States, 4 Cranch's Rep. 219, and Fowle v. The Common Council of Alexandria, 11 Wheat. Rep. 320. The testimony in the present case does not, in direct terms (as has been justly stated at the bar), establish the general usage of the West India trade. The witnesses do not, generally, speak to a usage, eo nomine. But it cannot be

denied that its scope and object are to establish the usage by an enumeration of facts, and voyages, by persons experienced in the trade, and referring to their own knowledge and general information. It thus conduces, indirectly, to prove the usage; and as it is altogether one 390*] way, it is *certainly such that a jury might infer a usage from it. And if so, this court may infer it. We consider it, then, as a fair deduction from this testimony, that considerable delays in port in the West India trade are not uncommon, for the purpose of taking the advantage of the market, and that sales by retail are within the usage. There are no facts from which this court can infer that the delay in the present case was unreasonable or unusual; and, consequently, we cannot admit that the delay amounted to a deviation. The case of Oliver v. The Maryland Insurance Company, 7 Cranch's Rep. 487, is in no respect inconsistent with this doctrine. One question in that case was, whether the delay at Barcelona, for the purpose of taking in a return cargo, was a deviation. The court below instructed the jury that it was not, if the vessel did not remain longer in that port than the usage and custom of trade at that place rendered necessary to complete her cargo. This court was of opinion that the instruction was, in substance, correct. The only difficulty which arose was from the terms of the instruction, which seemed to limit the right, not to the time necessary to take in the cargo, but to a particular period, regulated by the usage of trade. The Chief Justice there said: "There is some doubt spread over the opinion in this case, in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed this was regulated by usage and custom. The usages and customs of a port, or of a trade, are peculiar to a port or trade. But the necessity of waiting, where a cargo is to be taken on board, until it can be obtained, is common to all ports, and all trades. The length of time frequently employed in selling one cargo and procuring another, may assist in proving, that a particular vessel has, or has not, practiced unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been, and seems so to have been understood, that the plaintiff could not recover, unless the jury should be of opinion that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity 391*] the time *usually employed for that purpose might be evidence." This case, therefore, recognizes the right to wait in port for the purpose of selling one cargo and procuring another; and the reasoning is employed solely to avoid a criticism founded upon some ambiguity of phrase peculiar to that case. On the other hand, the cases cited at the bar abundantly prove that the usage and course of trade are very material to determine whether the delay be unreasonable or not.[1]

The next question is, whether there has been a total loss. And this divides itself into two distinct considerations; first, whether the facts of the case created a right of abandonment as for a technical total loss; and, second, if so, whether there has been a legal abandonment by the assured.

Upon the first point there is not much room for difficulty. The insurance was not for a single passage, but for the round voyage out and home. The cargo, in the course of the outward voyage, and before it was terminated (for the master had still an election to go to another port after his arrival at Cape Haytien), was permanently separated from the ship by the total wreck of the latter. It was a perishable cargo, and much injured by the accident, though it does not appear to be to the amount of one-half its value; and it was liable to still farther deterioration. There was a necessity, then, for an immediate sale at Cape Haytien, and the farther prosecution of the voyage with that ship, or that cargo, became impracticable. It was completely frustrated. Under such circumstances, we are of opinion that, according to the established doctrine of the commercial law, it was a clear case of a technical total loss, on account of the breaking up of the voyage. It is a much stronger case than that of Dorr v. The New England Insurance Company, 4 Mass. Rep. 232, or Hudson v. Harrison, 3 Brod. & Bing. 364, where the court held the losses total.

Was there, then, a due and legal abandonment? The letter of abandonment is admitted to have been sent in due* season, and, [*392 in its terms, it amounts to a cession of the property. Under ordinary circumstances, it would furnish nothing upon which to suspend a doubt. The difficulty arises from two clauses in the particular form of policy used by this company. One is in the following terms: "In case of loss, the same shall be paid in sixty days after proof and adjustment thereof, without any deduction, except the amount of the premium, if then unpaid." The other is, "it is hereby agreed, that the insured shall not abandon to the insurers until sixty days have elapsed after having given notice to them of his intention so to do, and of the loss or event which may entitle the insured thereto." The suit was not brought until after more than one hundred and twenty days had elapsed from the abandonment made by the letter of the 5th of July. No question, therefore, arises on this head. But the argument is, that the notice of abandonment must, by the terms of the policy, precede the actual abandonment sixty days; and that, in the present case, either no notice at all of such intention has been given, or there has been no actual abandonment at the end of that period. The letter of the 5th of July must either operate as a notice of abandonment, or as actual abandonment; if the former, then there has been no act of abandonment following up the notice; if the latter, then it was made too soon, and contrary to the terms of the stipulation. Such is the stress of the argument.

In construing these clauses, it is material to consider the intention of the parties, as expounded by the general principles of law applicable to the contract. By these principles, the assured, upon an abandonment in due season, for a technical total loss, acquires an im-

1.—Salvador v. Hopkins, 3 Burr. 1707; Vallance v. De Mar, 1 Campb. Rep. 503; Ongler v. Jennings, 1 Campb. Rep. 505, n. to Phillips' Insur. 182, 183.

mediate right of recovery against the underwriters. He is not bound to wait until they have signified their acceptance or refusal of the abandonment, if it be valid, nor, if accepted, is he bound to wait for payment, but he may immediately commence an action against them. The object of the first clause is, in the case of an undisputed loss, to obtain a delay of payment for sixty days after the adjustment. But from its very terms, it can only apply to the case where there has been proof of loss, and also an adjustment. If proof of the loss 393*] *has been offered, and no adjustment made, as in case of a disputed loss, the cause has been supposed, in the cases cited at the bar, not to apply.[1] The underwriter is, then, understood to waive the privilege. The true object of the second clause is, to postpone the absolute right of abandonment until sixty days after notice of the loss, so as to enable the underwriters to have time for deliberation upon the acceptance or rejectment of it, when made, and to avail themselves of all intermediate events for their benefit. It is wholly unnecessary to consider whether the assured, after a notice of abandonment, can retract, if the underwriters choose to insist upon accepting it; or whether, if, instead of a mere notice, he tenders an unequivocal abandonment, which is accepted by the underwriters within sixty days, he has, nevertheless, a right to withdraw it, if, within the same period, events turn up in his favor. The present case does not present any facts leading to such a question. The clause is manifestly introduced into the policy for the advantage of the underwriters, and not of the assured. But there is no necessity for giving any very strict interpretation to it to accomplish the fair objects of its provisions. If Mr. Catlett had written a letter to the company, stating to them that he thereby gave notice to them of the loss, and his intention to abandon, and had then added therein, that at the termination of the sixty days they were to deem that letter an absolute abandonment, there could scarcely be a doubt that such a letter would have been sufficient to satisfy the requirements of the clause. It would give to the underwriters the full benefit of it. If he had written, at the same time, two letters, one containing a notice of his intention to abandon, and the other that he made an abandonment, to take effect at the end of the sixty days after the notice, the same legal result would seem to be justified. The clause does not insist upon an abandonment being made in presenti, by an instrument dated at the expiration of the sixty days; but only that it shall not, in point 394*] of law, be obligatory *as an abandonment until that period. This seems to us a fair and rational exposition of the intention of the clause. In what respect does the letter of the 5th of July differ from the legal results above stated? It is written with reference to the known language and stipulations of the policy, and it must now be interpreted as it must have been understood, and, indeed, looking to the subsequent proceedings of the company, we may say, as it was understood by both parties. Neither of them seems to have acted upon the supposition that any other, or more formal act of abandonment, was necessary. The letter gives notice of an intention to abandon, because, in its terms, it includes an actual abandonment. It has a tacit reference to the clause in the policy, and must be deemed as a notice to abandon, and, at the same time, a declaration that it shall operate as an abandonment in the case, as soon as by law it may. In our judgment, it was a continuing act of abandonment, and became absolute at the end of the sixty days. It was an abandonment in presenti, to take effect in futuro. Neither the form of the notice, or the abandonment, is prescribed in the clause. They may be in one or two instruments; that may be in direct terms, or by fair and natural inference. It matters not how they are given or executed; it is sufficient in point of fact, that they have been given or executed. Our opinion accordingly is, that upon the true interpretation of this last clause in the policy, the letter of the 5th of July was a sufficient notice of an intention to abandon, and that, at the expiration of the sixty days, it operated as an actual abandonment.

The abandonment, then, having been duly made, the next question that arises is, how the loss is to be apportioned. The argument on behalf of the company is, that as part of the cargo was landed at St. Thomas, the amount risked by them is to be diminished by their proportion of the cargo so landed. In short, that the loss is now to be made up by them with reference to the value of the whole cargo on board, when the risk first attached, and not with reference to the value on board at the time of the loss, notwithstanding it exceeded the amount insured. We are of a different opinion. We think the true intent and object of the policy was to cover *an insurance of [*395 $10,000 during the whole voyage out and home, so long as the assured had that amount of property on board. This is not a policy for a voyage to St. Thomas only, in which case the argument might justly apply. But it is a policy to two other ports on the outward voyage, and also for the homeward voyage. The language of the policy is, that the underwriters insure $10,000 at and from Alexandria, and two other ports in the West Indies, and back to the United States. The premium is apportioned accordingly, for a half per cent. is to be returned "for each port not used or attempted;" and the contemplation of the parties manifestly is, that the premium should be paid during the round voyage upon the full sum insured, and that the assured should have the full benefit of the insurance, so long as he had $10,000 on board. The intermediate landing of a portion of the cargo in the course of the voyage was wholly immaterial in the understanding of the parties, so long as the value on board was sufficient to cover the insurance. If the clause, usual in policies in the eastern states, as to priority of insurance, had been here incorporated, and there had been a subsequent insurance, this, as the prior policy, must have first attached to the extent of the sum insured during the whole voyage. If there had been a subsequent insurance without any such clause, it might form a case for contribution among the various underwriters; but would in no shape affect the rights of the assured. The loss, therefore, must be apportioned between the parties

1.—Vos v. Robinson, 9 Johns. Rep. 192; Alleyne v. Maryland Insurance Company, 6 Harr. & Johns. Rep. 408.

in the proportion which the sum insured bears to the amount of value on board at the time of the loss, that is, as $10,000 bears to $12,328.25.

The next question is, whether the freight for the outward voyage is to be deducted from the salvage, and allowed the assured, who was owner of the ship as well as the cargo. The amount reported by the auditor is not disputed, and the controversy is, whether it is a charge upon the salvage in the hands of the underwriters. In point of fact, no freight was or could be payable in this case, for the plain reason that the assured was owner of the ship, and there could, therefore, be no lien upon the cargo or its proceeds for the same. But in point of law the case is not supposed to be va-
396*] ried by *this circumstance; for if the freight would be a proper charge on the salvage, if a third person were owner of the ship, in the hands of the assured, there is no reason why it should not be allowed when the assured is owner. We consider the law on this point as conclusively settled. As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo for all the freight which becomes due and payable to him, whether it be a full or pro rata freight. But freight is a charge upon the cargo, against which the underwriters do not, in any event, whether of abandonment with salvage, or of partial loss, undertake to indemnify the owner of the cargo. In order to obtain the salvage, when in the hands of the ship-owner, it may become necessary for the underwriters to pay the amount of the freight, for which they have a lien, as it may to pay any other charge created by the act of the owner of the cargo. But this does not change the nature or extent of the responsibility of the underwriters. As between themselves and the assured, they have a right to deduct the amount so paid from the loss, or to recover it in any other manner, as money paid for the use of the latter. This doctrine was expressly held by the Court of King's Bench, in Baillie v. Modigliani, Marshall, Ins., 728, and was confirmed in the fullest manner in this court in Caze & Richaud v. The Baltimore Insurance Company, 7 Cranch, 358.

It only remains to notice an objection made to the form of the declaration. It is said that there is no averment in the declaration, that any preliminary proofs of loss were offered to the company, nor of any promise to pay in sixty days after such proofs, according to the terms of the policy, nor that any abandonment, or notice, was given to the underwriters. It was, in our judgment, wholly unnecessary to aver the latter facts. The abandonment and notice thereof are but matters of evidence to establish the fact of a total loss, which is expressly averred in the declaration. As to the other part of the objection, it proceeds upon a mistake of the terms of the declaration. There is an express averment, after the allegation of the loss, that the company, on, etc., at, etc., had notice thereof, and by means thereof became liable, etc., and in consideration thereof
397*] promised *that they would pay the plaintiff the sum due, "according to the tenor and effect of the said policy of insurance." This is a sufficient averment of a promise to pay according to the stipulations of the policy, and conforms to the general course of precedents in pleading.

Upon the whole, it is the opinion of this court that the judgment of the court below, so far as it allowed the freight of $2,041.25 to the assured, is erroneous, and ought to be reversed; and that in all other respects, it ought to be affirmed.

Mr. Justice **Johnson.** I concur with the court in all the points decided in this cause, except that which relates to freight. On that it is my impression that they have misapprehended the case, the question, and the doctrine on which it turns. If so, it is not to be wondered at if it should appear that they have decided upon the authority of adjudications which have no bearing upon the case.

The great disadvantage of Catlett's cause, arises from the form in which this question is presented. It is raised in the adjustment of this loss, and comes up so confounded and blended with other matters, that it may well bewilder those who are more conversant with special pleadings than with mercantile statements. To give this question a fair chance with a lawyer, it should have come up on an action instituted by the underwriters to recover of the ship-owner, money which arose from the proceeds of an abandoned cargo, and had been remitted to the owner. The questions on the subject of freight would then have been distinctly presented, to wit, whether the freight had been earned, and whether the owner had not a right to set it off against the proceeds of the abandoned cargo. And who would then entertain a doubt upon the subject? Would the ship-owner have been permitted to pay over the proceeds of the abandoned cargo to the underwriters, and take his remedy against the shipper of the goods? No one can imagine such a doctrine.

It is said that the owner of the cargo shall in no case throw the freight upon the underwriter. But there are other interests always involved in such cases, besides those *of [*398 owner and underwriter of the cargo. The ship-owner has his rights, and is not bound to forego his lien on the cargo for the freight, and to look to an absent, or insolvent owner, or insurer, for indemnity. The master is his agent to receive the freight, as well as agent of the underwriter to remit the salvage, and has a right, nay, is bound, to take care of the interests of his employer.

It is not, therefore, the owner of the cargo who throws the freight upon the underwriter, but the owner of the ship, in the fair exercise of his unquestionable rights. It is clear, then, that the freight may be legally thrown upon the underwriters, by the act of another, even in opposition to the will of the insured. It must, then, be ascertained, whether the underwriter, who has thus had the freight thrown upon him, by having it deducted from the proceeds of the salvage, can recover it back from the insured. And, in order to examine the question distinctly, we will suppose the case of a payment of a loss before the freight has been thus thrown upon the underwriter; that is, before the proceeds of the salvage have been realized and remitted to the ship-owner, and by him applied to his own freight.

And on what principle could a right in the insurer to recover back, in such an action against the insured, be maintained?

It must be recollected that I am here speaking of the case of an abandonment, on a voyage in which freight has been earned. In cases of absolute total loss, no freight can be earned; but in that of a technical total loss, it is well known that freight may be earned. It was not disputed in the argument, that freight, in this case, was earned; and the sufficiency of the abandonment to cast the loss upon the underwriters, is now decided. It is true, the underwriters did not accept the abandonment, and have not, by any express act, accepted the salvage, but they are doing it now when they lay claim to the proceeds of the salvage remitted to Catlett. If they do not mean to be encumbered with the freight, let them withdraw their claim to the remittance, and Catlett then remains in possession of the cargo, subject to his lien for freight.

The case must, then, be considered as one in 399*] which the *freight is earned, and both the abandonment and salvage accepted; but the proceeds of the latter remitted to the shipowner, and by him retained for freight. The question will be, whether, in such a case, the underwriter, who has thus been compelled, in effect, to pay the freight, can recover it, in any form of action, from the insured?

What is the effect of a valid abandonment? The right here contended for is, "the right to pay the freight out of the salvage." It is not true, in a sense applicable to this case, that the insured has no right to throw the freight upon the insurer. The right to abandon positively implies the right to throw the freight upon the underwriter indirectly. It is a right to charge him with a total loss, and if he gets nothing from the wreck, the insured has only asserted his rights against him to their acknowledged extent. It is a right to convert a partial actual loss, into a technical total loss.

There is one technical total loss familiarly known to lawyers and merchants, which occurs without abandonment. I mean, where the goods saved are less in value than the freight. There is a complete analogy between the two cases; and, in the latter case, it is expressly adjudged, and so laid down by the best elementary writers, "that the insured has a right to apply the salvage to pay the freight (2 Marsh., 588), giving credit for the balance only to the underwriter." 2 Marsh. 619. And this is precisely the right which Catlett contends for in the present case.

The right so to apply the salvage results unavoidably from the received and acknowledged consequences of the right of abandonment.

Take the familiar case that occurs every day in time of war. A vessel is captured by an enemy; the insurer on the cargo hears of it, tenders his abandonment, and it is accepted and paid. Who, at that period, would think of making a discount of the freight from the policy? It has not been earned; the insured never was liable for it. But the ship is rescued by her crew, proceeds on her voyage, arrives in safety, and delivers her cargo. Here freight is earned, and must be paid; but by whom? Certainly not by the shipper, for he is divorced from the adventure, and the goods as much *the property of the underwriters as [*400 if they had purchased and shipped them.

I have mentioned the case of an accepted abandonment; but the effect of a valid abandonment is the same as if it had been accepted.

In the case at bar, at what point of time did the transfer of interest take place? Certainly at the instant when the accident happened. The abandonment has the same effect as if the owner and insurer had been on board, and the abandonment made at the moment the misfortune occurred. But freight had not then been earned; the liability for it had not attached on the insured, and, in the eye of the law, as between him and the underwriter, it could no more attach on him than if the cargo had then gone to the bottom. By the abandonment, it is as to him as if it had gone to the bottom. The law places it in that situation, by declaring it a total loss; and the language of the books on this subject is, "that he ought not to be placed in a worse situation than if the cargo had gone to the bottom." Boyfield & Brown, 2 Str. et passim. The insured never incurred the liability for the freight, but the underwriters did; for when the freight was earned, he stood in the place of the insured.

In arguing to show that a liability for the freight never did attach upon the insured as between him and the underwriter, I have considered the transfer by abandonment as taking place at the moment of the accident. But as to the effect of the abandonment the law goes further, and considers the underwriter in the light of the owner from the commencement of the voyage. Marshall, 601-2. Upon this principle it is, that in the case of a ship insured and abandoned, the underwriter is entitled to whatever freight she may afterwards earn. In the language of Mr. Marshall, "the insurer becomes the legal assignee and owner, and from that time he is liable for all her future outgoings, and consequently entitled to all her future earnings."

But if entitled to freight to be earned by the ship, why should not the cargo in his hands remain liable for freight to be afterwards incurred? Liability in the one instance is the correlative of right in the other. It is altogether a mistake to call this charging the underwriter with the freight. The proposition *affirmed is, that the abandonment does [*401 not discharge the cargo from the lien for the freight, to which it was subject in the hands of the insured. Even in the hands of the owner, this liability was not unlimited and unconditional; for if damage is incurred (by perils of the sea, not from internal decay), and the salvage goods will not pay the freight in value, the owner is not bound to receive them. Of his interest in this behalf, he may judge for himself; it is only when he does receive them that he must pay. And this is precisely the alternative which Catlett holds out to the underwriters.

There is a very strong, and, I think, conclusive adjudication on this subject, to be found in the third volume of the Massachusetts Reports. It is the case of Fotheringham v. Prince, p. 563, Vol. III.

Wages are to the ship what freight is to the cargo; a contingent liability attaching only on the fulfillment of the contract. In the case re-

ferred to, a vessel had been insured from St. Ubes to a port of discharge in the United States. She was cast away on Cape Cod, and abandoned, but the salvage was sufficient to pay the wages, and the proceeds were remitted to the underwriters. The wages were thus earned, and the owners were compelled to pay them, and now brought suit against the underwriters, counting as well for money had and received as on the policy. The court decided that the underwriters were bound to refund the money paid for wages by the owner; and the adjudication is in principle precisely what is here contended for in behalf of the plaintiff below. Had the salvage in this case been remitted to the underwriters, and Catlett brought his action for money had and received to recover his freight, it would have been a case on all-fours with the present.

It has been supposed that to decide that point against the underwriters would be to make them liable for two insurances upon receiving one premium; that it would be making them liable for both freight and cargo, upon a premium received only on the cargo.

But, it may be truly said that the inconsistency is on the other side; the argument is directly in point in favor of this claim for freight. 402*] This decision is not only making *Catlett liable on the cargo, where he was his own insurer for the freight only, but is making him lose his freight after he had earned it, and pay it into the pockets of underwriters who had never insured it, and therefore could not acquire it by abandonment.

Suppose another company had insured the freight in this instance, and Catlett had abandoned to them; can it be doubted that if the proceeds of the salvage had been remitted to the insurers on the cargo, the insurers on the freight would have been entitled to recover it of them? If so, Catlett is entitled to it, for he was his own insurer on the freight. Whether we consider him as having insured, or having earned it, his right is incontestable.

But, it is supposed that the cases of Baillie v. Modigliani, and of Caze & Richaud v. The Baltimore Insurance Company, have established a contrary doctrine. It appears to me that it is by placing too much confidence in the general language of indexes and marginal notes, and misapprehending the doctrine on which this case turns, that the mistake arises.

We have nothing but a manuscript report of that case of Baillie v. Modigliani, and obviously one for which the learned judge by whom the decision is made is very little indebted to his reporter. We find in it a mass of correct principles, thrown together without order and without object, and which, I make no doubt, is the skeleton of a very learned and correct opinion; and one which, had we the whole of it, would have furnished a full exposition of the doctrine of this case as well as of that. But, as a decision, the case of Baillie v. Modigliani does not touch the present case. For, in that case, there was no abandonment; the cargo was sold in France, with the benefit of the pro rata freight, and the owners wished to charge the underwriters with the freight so paid, as a loss incident to the capture. The question in the present case did not arise there, and could not arise in any case that does not comprise in it both the ingredients of technical total loss and freight earned. That was a case of partial loss, and what the judge chose to say about the doctrine of the case of a total loss, was mere gratis dicta. It would be but charity, or an act of *justice to his learn- [*403 ing, to suppose that if he ever did utter the words attributed to him, to wit, "in case of a loss, total as between the insurer and insured, with salvage, the owner may either take the part saved, or abandon, but in neither case can he throw the freight upon the underwriters, because they have not engaged to indemnify him against it, and have nothing to do with it," that he had in mind the only sense of those words in which it was possible that he could be correct, which was, "that they could in no case raise a personal charge for freight against the underwriters, where sufficient salvage to pay the freight had never come to their hands."

In any other sense, every merchant on the exchange of London could have told his lordship that he was incorrect. To have obtained from the learned judge a decision applicable to the present cause, the question should have been propounded to him as applicable to a case of technical total loss, with salvage sufficient to cover the freight. The answer would then have been rendered in the language of the books, a language on this subject equally that of lawyers, merchants and insurers, "where freight is earned, the insured, in the case propounded, has a right to apply the salvage to the payment of freight;" which is, in so many words, what Catlett contends for in the present cause.

I have reasoned all along on the assumption that it makes no difference in principle whether the vessel and cargo be owned by the same individual, or by different persons. I consider it unquestionable, and even conceded; and, indeed, where the cargo is insured, and the vessel not, after abandonment, the underwriter is, in the eye of the law, an owner ab origine, of the cargo, and so distinct from the ship-owner. In the case of Caze & Richaud v. The Baltimore Insurance Company, 7 Cranch's Rep. 358, the counsel attempted to draw a distinction, but the court did not listen to it, and in their decision obviously consider it as immaterial to the question before them.

The case of Caze v. Richaud is that which is relied on as most fatal to the claim of freight in the present cause; but to me it appears as plain as an axiom, that the court have themselves made it a different case, and adjudged *it to be no authority against the pres- [*404 ent claim. No one pretends that Catlett could have retained for freight if no freight had been earned. But this is the express decision of the court in the case of Caze & Richaud; and if there was no freight due, of what consequence to the decision was it to say "that it was no lien upon the cargo," or that "the underwriters could not be made to pay the freight?" The proposition was equally true of the most indifferent person. It is of no consequence as to the bearing of that decision upon this case, to inquire whether the court were right or wrong in deciding that no freight was earned. In so deciding, they have made it a different case from this in an indispensable circumstance, the earning of freight; and plainly shown that

they could not have had in contemplation to decide a case in which freight had been earned, which is the present case. I believe, myself, that we were wrong in every line of that decision; that it will not stand the test of commercial law in any one of the three propositions that it lays down.

The case was this: A vessel and cargo belonging to the same owner sailed from Bordeaux for this country. The cargo was insured, the vessel and freight not. On her voyage, there being war between Great Britain and France, she was captured and carried into Halifax, having then crossed the Atlantic and gone three-fourths of the way on her course to her port of destination. The cargo was abandoned, and vessel and cargo both condemned; but on an appeal the condemnation was reversed as to both. It is mentioned in the report that there was no appeal "as to the freight;" but the case is defective in showing whether separate claims were filed for ship and cargo, or the two included in a joint claim by the owner. If joint, the question of freight could not have arisen. But if, as seems probable from the proceeds of the cargo passing into the hands of the underwriters, the claims were several, then a question may be raised whether the plaintiff was not concluded by his acquiescence in a judicial decision of a competent tribunal against the claim to freight. This would have sustained the judgment against him in this court had there been no other obstacle to his recovering.

405*] *As the abandonment was accepted, and the sum insured paid, the proceeds of the cargo got into the hands of the underwriters, and that suit was instituted for money had and received to the use of the ship-owner. Had he preferred this claim against the proceeds of the cargo, while lying in the registry of the British admiralty, there cannot be a doubt that it would have been adjudged to him in the distribution of the money among the several claimants.

The three propositions which the opinion affirms in the case of Caze & Richaud, are,

1. That under no circumstances can the insured throw the freight upon the underwriters, even by abandonment,

2. That no freight, even pro rata, was earned in that cause.

3. That the lien of the owner on the cargo for his freight could not affect the question.

On the first point, no one will pretend to maintain the affirmative as a general proposition. Losses are either total, partial, or technically total. Upon an actual total loss no question of freight can ever arise, for there is no freight earned. In the case of partial loss, it is never admitted in adjustments; and this is the full import of the decision in Baillie v. Modigliani, and in the case of Gibson v. The Philadelphia Insurance Company, and some others. It is a charge payable after the arrival of goods at their port of destination, and therefore never admitted into an adjustment of a partial loss. The cases of technical total loss are of two kinds, as has been before noticed; the one with, the other without abandonment. It is not contended that, even in these, the insured can throw the freight upon the underwriters otherwise than incidentally by abandonment. It has been shown that this is not the principle at all upon which the doctrine insisted on by Catlett rests, and may therefore be safely conceded to the case of Modigliani, and all others in which these dicta are to be found. The principle is, "that the owner cannot, by his abandonment, devest the lien which the ship-owner has in the goods abandoned." That the underwriter takes the cargo cum onere—a rule which is held sacred even against hostile capture. The Der Mohr in 3 and 5 Robinson. The law is, that the master is not bound to part *with his cargo, and fails in his duty [*406 if he does, until his freight is paid. Why should he be so bound any more in the case of the transfer by abandonment than in any other transfer? In that class of technical total losses which arises where the freight incurred exceeds the value of the thing saved, it is expressly decided that the right to apply the salvage to the freight exists; and it is impossible to draw a distinction between that class of cases and the cases of technical total loss produced by abandonment.

The full latitude of the assertion, therefore, that the insured cannot throw the freight upon the insurer, may be conceded without affecting the right of the party to freight in the present case. The rule is rightly laid down, but its application is mistaken.

The same observations dispose of the third position assumed by the court in Caze & Richaud, since it must be obvious that the lien of the ship-owner on the cargo is all-important to the question. The right to apply the salvage to the freight grows out of the right of the master to hold the cargo for the freight, whatever change of interest may be produced in it by the act of the owners of the cargo.

The consideration of the second proposition of the court in Caze & Richaud's case is not material to this cause, any further than it shows that they considered themselves as deciding a case the very reverse of the present.

Yet so convinced am I that the decision there made against a pro rata freight was a hasty decision, that I will conclude with expressing a hope that, if ever the subject should again come before this court, it will pause and examine the doctrine without prejudice from that decision, since it is one which involves principles of great interest to the mercantile world, and on which, I will undertake to say, if ever that case should be reviewed, there will be found a vast deal of learning and authority against the decision, and very little to sustain it.

In the very case which the court profess to decide—the case of Baillie v. Modigliani—the same pro rata charge was paid and acquiesced in by the court and the bar, without a question.

*Upon the whole, I never was clear- [*407 er in any opinion in my life than that the decision now rendered against the allowance of freight in this adjustment is not to be sustained by either principle or authority.

[After the opinion of the court was delivered in this case, the parties ascertained that the auditor's report was incorrect (by the disallowance of the freight) in some other respects, and required a different adjustment; and application was accordingly made for a hearing upon

these points. The following additional opinion was subsequently delivered by the court:]

Mr. Justice Story. In consequence of the former opinion delivered in this cause, the parties have found it necessary to re-adjust the auditor's report in several particulars not suggested at the former argument. Indeed, upon that argument the parties assumed that the report was perfectly correct except as to the item of freight. We have examined the report and are satisfied that the original plaintiff is entitled to recover the sum of $6,626.18, with interest from the 14th of October, 1822, which is the residue of the sum of $10,000 insured by the company, deducting the premium note and the proportion of salvage belonging to the underwriters, which has been received by the original plaintiff; and the judgment of the Circuit Court is to be reformed accordingly.

Judgment.—This cause came on, etc. On consideration whereof, it is ordered and adjudged by the court that there is error in so much of the judgment as allowed to the said Catlett, as freight to be deducted from the salvage, the sum of two thousand and forty-one dollars and twenty-five cents. And it is further ordered and adjudged that upon the reformation of the auditor's report, required by the disallowance of the freight aforesaid and otherwise, there is now due and payable to the said Catlett the sum of $6,626.18, together with interest thereon from the 14th of October, 1822, the said sum being the balance of the sum of 408*] $10,000 insured, after *deducting the amount of the premium due on the policy, viz., $376, and also the proportion of the salvage belonging to the said Columbian Insurance Company, viz., $2,997.82, received by the said Catlett; and that the judgment of the Circuit Court, to the amount of the said sum of $6,626.18, and interest thereon from the 14th of October, 1822, be, and hereby is affirmed; and as to the residue of the said judgment, be, and hereby is reversed; and the cause is to be remanded to the said Circuit Court, with directions to enter judgment for the said Catlett accordingly; the parties in the court below to be at liberty to open the auditor's report so far as respects the item for $480, the proceeds of the doubloons, and the item for $719.37 paid over to Captain M'Knight; and the judgment to be varied by the Circuit Court as these items may be found for either party; execution, however, to be granted immediately for the balance of the judgment, deducting the said sum of $719.37.

[Insurance.]

THE GENERAL INTEREST INSURANCE COMPANY, Plaintiffs in Error,
v.
RUGGLES, Defendant in Error.

Where an insurance was effected after a loss had happened, though unknown to the assured, the master having omitted to communicate information to the owner, and having expressed his intention not to write to the owner, and taken measures to prevent the fact of the loss being known, for the avowed purpose of enabling the owner to effect insurance, in consequence of which information of the loss had not reached the parties at the time the policy was underwritten: Held, that the owner having acted with good faith, was not precluded from a recovery upon the policy on account of the fraudulent misconduct of the master.

*THIS cause was argued by Mr. D. [*409 B. Ogden and Mr. Wheaton for the plaintiffs in error,[1] and by Mr. Webster and Mr. Bliss for the defendant in error.

Mr. Justice Thompson delivered the opinion of the court:

This is an action on a policy of insurance, bearing date the 9th of February, 1824, for $3,000, on the sloop Harriet, lost or not lost, at and from Newport, Rhode Island, to, at, and from all ports and places to which she may proceed in the United States, during the term of six months, beginning on the 12th of January, 1824. And also, $600 property on board said sloop, at and from Newport to Charleston, or Savannah, or both. The sloop, whilst proceeding on her voyage, and within the term of six months, to wit, on the 19th of January, was wrecked on Cape Hatteras, and both vessel and cargo wholly lost. An abandonment was, in due time, made, and a total loss claimed.

The case comes before this court upon a bill of exceptions taken to the directions given by the Circuit Court for the district of Massachusetts, to the jury, upon the law of the case.

The loss, it will be seen, happened on the 19th of January, and the policy was not effected until the 9th of February. And the question upon the trial turned upon the legal effect and operation of the misconduct of the master after the loss occurred. It was proved that the master, immediately after the loss, for the purpose, and with the design, that the owner, not hearing of the loss of the vessel, might effect insurance thereon, did express his intention not to write to the owner, and took measures to prevent the fact of the loss being known; and that, by the conduct of the master in this particular, and in consequence of the measures adopted by him to suppress intelligence of the loss, knowledge thereof had not reached the parties at the time the policy was underwritten

*Upon these facts the court instructed [*410 the jury, that although it was the duty of the master to give information of the loss to his owner as soon as he reasonably could, yet that, in the present case, when there had been an abandonment in due time for a loss really total, if the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good faith, he was not precluded from a recovery. Nor was the policy void by the omission of the master to communicate the information; or by his acts, in suppressing intelligence of the loss, although such omission and acts were willful, and resulted from the fraudulent design to enable the owner to make insurance after the loss; the owner himself not being conusant of such acts and design at the time of procuring the insurance.

And, under this direction, a verdict was found for the plaintiff for a total loss.

The statement of the case admits fraudulent misconduct on the part of the master, by reason whereof the policy was effected before any

1.—Park. Ins. 209, 320; 1 Term Rep. 12; 1 Maule & Selw. 35; 9 Johns. Rep. 32; Phill. Ins. 82, 97.

knowledge of the loss reached the assured, or the underwriters; but that the assured was entirely ignorant of this misconduct in the master; and that, on his part, there was the most perfect good faith in procuring the policy. Here, then, is a loss thrown upon one of two innocent parties; and the question is, by which is it to be borne? The determination of this question must depend, in a great measure, if not entirely, upon the relation in which the master stood to the respective parties when this misconduct occurred. If the loss of the vessel had been occasioned by any misconduct of the master short of barratry, whilst in the prosecution of the voyage, and before the loss happened, or if, at the time this misconduct is alleged against him, he was the exclusive agent of the owner for any purposes connected with procuring the insurance, the owner must bear the loss. But if, after the loss, the agency of the master ceased, and was at an end, or if he, in judgment of law, became the agent of the underwriters, his misconduct cannot be chargeable to the assured.

The researches of counsel have not furnished the court with any adjudged cases either in the English or American courts, which seem to have decided this question. Some have been 411*] *referred to, which have been urged as having a strong bearing upon the point, but which, on examination, will be found distinguishable in some material facts and circumstances.

The precise point, therefore, now before the court, may be considered new, but we apprehend is to be governed by the application of principles understood to be well settled in the law of insurance.

It is important to understand with precision and accuracy, the relation in which the master stood to the owner of the vessel, at the time when he was guilty of the fraud and misconduct imputed to him. It was after the loss occurred, and at a time when there had been a total destruction of the subject insured, over which the master's agency had extended.

The case has been argued on the part of the underwriters, as if the agency growing out of the relation of master and owner of the vessel, existed at this time; and that the assured was responsible for all consequences arising from the misconduct of the master; and that the law would presume, that whatever was known to the master, must be considered as impliedly known to the owner. These propositions may be true, when applied to a state of facts properly admitting of such application; but cannot be true to the extent to which they have been urged in the present case. If the owner is presumed to know whatever is known to the master, there could be no valid policy effected upon a vessel, after she was, in point of fact, lost. Such loss must be known to the master; and if it follows, as a legal conclusion, that it is known to the owner, the policy would be void. Nor upon this doctrine, could there ever be any insurance against barratry or any other misconduct of the master; for his own acts must necessarily be known to himself. And, indeed, the principle pressed thus far, would render it impracticable ever to have any guarantee whatever against the fraud or misconduct of an agent, any more than against that of the principal himself. The knowledge of the agent, therefore, with respect to the fact of loss, cannot affect the insurance; nor could the knowledge of the owner himself, with respect to such loss, affect the insurance in all *cases. [*412 Suppose the owner should himself be the master, or be on board, having left orders with an agent to procure insurance in a given time, unless he should hear from him, or have information of the arrival of the vessel at her port of destination; and the vessel should be lost the day before the policy was underwritten, and at a distance that rendered it impossible that information thereof could reach the agent, would such a policy be void? No one could certainly maintain such a proposition. And it is by no means an unfrequent practice to obtain insurance in this way. It is not, therefore, true as a universal rule, that either the fact of loss, or the knowledge of such fact by the agent or the principal, at the time the policy is procured, will vacate it. But such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance; and then the rule properly applies, which puts the principal in place of the agent, and makes him responsible for his acts. There is, then, the relation of principal and agent in the subject-matter of the contract. But the master, in his character as master, has no authority to procure insurance, nor is he in any sense an agent for such purpose, or in any way connected with it. There may, undoubtedly, be superadded to his powers and duties as master, an agency in other matters, to effect insurance or any other lawful business; but in his appropriate character of master, the law considers him an agent only for the navigation of the vessel, and in such matters as are connected with, and incident to, such employment. And when the books speak of the master's being agent of the owner, they are to be understood in this sense. He is not to be considered as the general agent of the owner for all purposes whatsoever, that may have connection with the voyage. He is a special agent for navigating the vessel, and can neither bind nor prejudice his principal, by any act not coming properly within the scope and object of such employment. Unless the powers of agents are thus limited, no man could be safe in the transaction of any business through the agency of another. The master, in his character as such, had certainly no authority to procure insurance. He could not bind the owner by such a contract; and if he could not, why should his *acts, totally unconnected [*413 with the business of procuring the insurance, render void a contract entered into in good faith in all parties having any concern in the transaction? It is a general rule, applicable to agencies of every description, that the agent cannot bind his principal except in matters coming within the scope of his authority; and this rule applies particularly to the master and owner of a vessel, and is construed with considerable strictness. Thus, in the case of Boucher v. Lawson, Cas. Temp. Hardwicke, p. 85, and Abbott, 119, the action was against the owner of a ship, for goods lost by the carelessness of the master; and judgment was given for the defendant, because it did not appear that the ship was usually employed in carrying goods

for hire. For Lord Hardwicke said, "no man could say that the master, by taking in goods of his own head, could make the owners liable."

It is a little difficult to perceive how in any legal sense the relation of principal and agent could exist, at the time when the misconduct of the master is alleged to have taken place. So far as he was agent for navigating the vessel, it had terminated by the absolute destruction of the subject. The agency would seem to have ceased from necessity. There was nothing upon which it could act. Had there not been a total loss of the vessel, there would have remained a duty and legal obligation, on the part of the master, to use his best exertions to save what he could from the wreck. But when the subject-master of the agency becomes extinct, it is not easy to understand how, in any just sense, the agency can be said to survive. There might be a moral duty resting on the master to communicate information of the loss to his owner. But how could there have been any legal obligation binding upon him to do it. The information could neither benefit nor prejudice the owner. It is a general rule of law, that if an injury arises to a principal, in consequence of the misconduct of his agent, an action may be sustained against him for the damage. Could an action in this case be sustained by the owner against the master for not giving him information of the loss? and if not, it would seem to follow as a necessary consequence, that the owner could not be prejudiced by his acts.

414*] *But suppose the agency of the master not to have terminated, but that, in judgment of law, he was the agent of some one. The question recurs, whose agent was he? The answer cannot admit of a doubt. If agent at all, he was, by operation of law, the agent of the underwriters.

The policy, taking the risk on the vessel and cargo, lost or not lost, although effected after the loss happened, related back; and by the abandonment, the underwriters were substituted in the place of the assured; and the master, although the agent of the owner until the loss occurred, became, upon the abandonment, the agent of the underwriters. The law upon this subject is well settled, where there is only a technical total loss, and any part of the subject insured remains. The interest in the salvage, whatever it may be, becomes transferred to the underwriters, and the agency is, of course, transferred with the subject; and the agent, thereafter, becomes responsible to the underwriters for the faithful discharge of his trust. No action could be sustained against him by the assured for the proceeds, or any misconduct in the management thereof. This is not only the settled rule of law, but a contrary doctrine would involve the greatest absurdity. It would be placing the absolute interest in the property in one party, and making the agent accountable for its management to another. No action could be sustained by the assured, for the plain reason that he would have no interest in the subject of the agency.

And if such would be the effect of an abandonment in case of a technical total loss, there can be no good reason assigned why the rule should not be applied to a loss really total, so far as to transfer whatever agency could remain. So that, whether the agency terminated by the total destruction of the subject, or was transferred by the abandonment to the underwriters, the misconduct of the master could not prejudice the rights of the owner. The connection of principal and agent was dissolved, and they stood towards each other as mere strangers, so far as any legal responsibility could be involved in the conduct of the master. Such we apprehend to be the result of the application of well-settled principles of law to the facts and circumstances presented by the bill of exceptions, in the absence of any authority to govern the case. [*415

We will proceed, then, briefly to notice the cases that have been supposed to have a bearing upon this question favorable to the underwriters.

In Fitzherbert v. Mather, 1 Term Rep. 12, the fraud or concealment relied upon to avoid the policy was, that one Thomas, who, on the 16th of September, and before the loss happened, had written a letter to the agent of the assured, and put it in the post-office, but the mail did not leave the place until the afternoon of the next day, before which time, and on the morning of the 17th, he knew of the loss, but did not withdraw his letter from the post-office, or write another giving information of the loss. Here was, then, a palpable case of gross negligence, if Thomas was to be considered the agent of the assured; and, that he was, appears not only to have been assumed by the whole court, but the conclusion is fully warranted by the facts in the case. The assured, in his letter to Fisher, who procured the insurance, directed him to procure it on receiving the bills of lading; which bills, it appears from the case, were to be sent to him by Thomas. The letter and information from Thomas was therefore made the foundation of the insurance, and the assured adopted Thomas as his agent, by directing Fuller to procure insurance on receiving the bills of lading from him. It was, therefore, a case of concealment, or misrepresentation, by one who stood in the relation of agent of the assured, in the subject-matter of the contract, and whose information lay at the foundation of it.

The case of Stewart v. Dunlop, 4 Brown. Parl. Cas. and Park, 320, decided in the House of Lords, is very imperfectly reported, the reasons of the judgment, and the ground on which the decision rested, not appearing in any report of the case. Enough, however, is shown, from the statement of facts, to put the decision upon the plain ground that the policy was procured by an agent of the assured expressly instructed by him to obtain the insurance; he, the agent, having grounds to suspect a loss of the ship, which grounds were not communicated to the underwriter; and, besides this, there was enough to afford strong suspicion that the assured himself knew of the loss. [*416 The men who arrived at Greenock, knowing of the loss, communicated the information to the friend and intimate acquaintance of the assured, who desired it might be concealed. The same day this friend held a conversation with the clerk of the assured, and asked him if he knew whether there was any insurance upon the vessel, and if there was any account of her; and, after this, the assured directed this clerk to write to get insurance. The case

was open to strong suspicion, that the friend of the assured had communicated to him the information he had received of the loss, which would have been a plain ground for declaring the policy void. But if such a conclusion is not fairly warranted, there was enough communicated to the clerk to lead him to suspect a loss had happened; and he being the agent employed to procure the insurance, his principal was properly chargeable with all the information he had in relation to the loss.

The case of Andrews & Boerum v. The Marine Insurance Company, 9 Johns. Rep. 32, does not seem to have much bearing upon this point. The decision turned upon a question of fact, whether there was such gross negligence, or constructive fraud, as to vacate the policy. There was no question of agency involved in the decision The master of the vessel was part owner, and one of the insured, and there was no point raised as to his legal obligation to use ordinary diligence in giving information of the loss to his co-owners; but the court considered that, under the circumstances of the case, he was not chargeable with such negligence as to vacate the policy. But what would have been the result if the doctrine now contended for had been applied to that case? If what is known to the agent is considered as impliedly known to the principal, with much more propriety should the knowledge of one part owner be imputable to all. And the policy must have been held void, because procured with implied knowledge of the loss.

The case of Gladstone v. King, 1 Maule & Selw. 35, did not turn upon the question now before the court. The claim was for an average loss upon the ship, in consequence of an injury received before the policy was effected. The defense set up was a concealment of this 417*] fact, or negligence in the *master in not mentioning it in a letter written to his owners, after the injury had been received, and before the policy was underwritten. The policy, however, took up the vessel from the commencement of the voyage, and would, of course, cover the injury. The court considered the concealment material, and that the underwriter ought not to be charged with the loss. They did not, however, decide the policy to be void, which would seem to have been the necessary consequence of a material concealment, according to the principles of insurance law. But they exonerated the underwriter by the application of what was avowed to be a new principle; that this antecedent damage should be considered an applied exception out of the policy; and this principle, say the court, although new, is adopted as being consistent with justice and convenience.

It is unnecessary to say whether, to such a case arising here, we should think proper to adopt and apply this new principle. It is enough for the present to say, the principle does not apply to the case now before us. It may, however, be observed, that the decision in that case, so far, at least, as it went to exonerate the insurer from the payment of the average loss, may be supported upon well-settled rules. Information of the injury was withheld by the captain whilst he was acting in his appropriate character of the master, and, as such was the exclusive agent of the owner, and for whose negligence he alone was responsible. And from what fell from Lord Ellenborough upon the trial, it may be presumed this letter was shown to the underwriter, and, if so, it amounted to a representation that the vessel had sustained no injury at the date of the letter. But unless the case is imperfectly reported, it would be difficult to sustain it upon principles heretofore understood to govern analogous cases.

These are all the cases cited on the argument on the part of the underwriters, which are supposed to have a bearing upon the present question. We think, however, they are distinguishable in many material circumstances, and particularly in this, that the fraud or concealment, which was held to vitiate the policies, was traced to some agent, having connection in some way with procuring the insurance; and the *agency was, therefore, concerning the [*418 subject-matter of the contract.

It is, no doubt, true, with respect to policies of insurance, as well as to all other contracts, that the principal is responsible for the acts of his agent; and that any misrepresentation, or material concealment by the agent, is equally fatal to the contract, as if it had been the act of the principal himself. But such responsibility must, of necessity, be limited to cases where the agent acts within the scope of his authority. In the present case, the master was clothed with no authority or agency, in any manner connected with procuring insurance. The misconduct charged against him occurred, not whilst he was acting as master, but at a time when the relation of master and owner may well be considered as dissolved from necessity, by reason of a total destruction of the whole subject matter of the agency; and if not, the master, by the legal operation of the abandonment, became the agent of the underwriters, and was their agent at the time of his alleged misconduct.

It is said, that if this is a new question, the court should adopt such rule as is best calculated to preserve good faith in effecting policies of insurance. But it is by no means clear that this end would be best promoted by adopting the rule contended for on the part of the underwriters. Cases may very easily be supposed, where negligence or misconduct in agents of underwriters, as to matters not immediately connected with effecting a policy, will still have a remote influence, which may have a tendency to prejudice the interest of the assured. Such cases, however, as well as those of the description now under consideration, will most likely be of rare occurrence, and nice and minute distinctions practically operate unfavorably on the business of insurance.

If underwriters feel themselves exposed to fraudulent practices in such cases, the protection is in their own hands, by not assuming any losses that may have happened prior to the date of the policy. It is considered a hazardous undertaking to insure, lost or not lost, and a proportionate premium is demanded, according to the circumstances stated, to show the probability or improbability of the safety of the subject insured.

*Although no adjudged cases directly [*419 applicable to the one before us have been

found, we do not consider this decision as establishing any new principle in the law of insurance, but as grounded on the application of principles already settled, to a new combination of circumstances.

Judgment affirmed.

[Constitutional Law.]

BROWN et al., Plaintiffs in Error,
v.
THE STATE OF MARYLAND, Defendant in Error.

An act of a state legislature, requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale, or package, etc., to take out a license, for which they shall pay $50, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties is repugnant to that provision of the constitution of the United States which declares, that "no state shall, without the consent of Congress, lay any impost, or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several states and with the Indian tribes."

ERROR to the Court of Appeals of Maryland.

This was an indictment in the City Court of Baltimore, against the plaintiffs in error, upon the second section of an act of the legislature of the state of Maryland, passed in 1821, entitled, "An act supplementary to the act laying duties on licenses to retailers of dry goods, and for other purposes." The second section of the act provides, "That all importers of foreign articles, or commodities, of dry goods, wares, or merchandises, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, *bale, or [*420 package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act, to which this is a supprement." The penalties and forfeitures prescribed by the original act which was passed in 1819, were, a forfeiture of the amount of the license tax, and a fine of $100, to be recovered by indictment.

The defendants having demurred to the indictment, a judgment was rendered upon the demurrer against them, in the City Court, which was affirmed in the Court of Appeals, and the case was brought, by writ of error, to this court.

Mr. Meredith, for the plaintiffs in error, contended, that the law in question was an unconstitutional exercise of the taxing power of Maryland. He did not deny the existence of such a power. As a necessary incident to sovereignty, it belonged to the several states before the adoption of the constitution, and it still belongs to them, subject, however, to the restrictions imposed upon its exercise by the paramount authority of that instrument. With regard to these restrictions, he did not mean to contend that the general grant contained in the eighth section of the first article of the constitution vested in the national government anything more than a concurrent power of taxation. He admitted the rule of construction, that a grant of power to Congress does not, of itself, imply a prohibition of its exercise by the states. The powers granted to the general government are never to be considered as exclusive, unless they are made so in express terms,

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NOTE.—Power of Congress to regulate Commerce. Power of State to tax.

A state law which requires the masters of vessels engaged in foreign commerce to pay a certain sum to a state officer, on account of every passenger brought from a foreign country into the state, or before landing any alien passenger in the state, is inoperative, by reason of its conflict with the constitution and laws of the United States. The transportation of passengers is a branch of commerce, and a tax upon it is a tax upon a commercial operation. Smith v. Turner, 7 How. 283.

A city ordinance exacting a license fee from a company keeping an office in the city for a carrying or express business extending beyond the limits of the state, is not repugnant to the provisions of the constitution vesting in Congress the power "to regulate commerce among the several states." Osborne v. Mobile, 16 Wall. 479.

A condition in a charter granted by a state to a railroad company, that the company shall pay to the state from time to time a bonus, or a portion of its earnings, is not invalid as amounting to a tax upon the transportation of passengers, or as infringing the exclusive power of Congress to regulate commerce among the states. A state has power to impose conditions upon its own grants to corporations. Railroad Co. v. Maryland, 21 Wall. 456.

The California statute regulating the arrival of passengers from a foreign port is palpably unconstitutional and void. Its purpose is to extort money from a large class of passengers, or prevent their immigration. It operates directly on the passenger; for, unless the master or owner of a vessel gives an onerous bond for the future protection of the state against the support of the passenger, or pays such sum as the Commissioner of Emigration chooses to exact, he is not permitted to land from the vessel. It extends far beyond the necessity in which the right, if it exists, is founded, of protecting the state from the diseased, poor and criminal classes, and invades the right of Congress to regulate commerce with foreign nations. Chy Lung v. Freeman, 2 Otto, 275; Matter of Ah Fong, 13 Am. L. Reg. 761; 3 Sawy. 144.

A statute of Missouri which requires the payment of a license tax from persons who deal in the sale of goods, wares and merchandise, which are not the growth, produce or manufacture of the state, by going from place to place to sell the same in the state, and requires no such license tax from persons selling, in a similar way goods which are the growth, produce or manufacture of the state, is in conflict with the power vested in Congress to regulate commerce with foreign states and among the several states. Welton v. State, 1 Otto, 275.

That power was vested in Congress to insure uniformity of commercial regulations against discriminating state legislation. It covers property which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a state from any burdens imposed by reason of its foreign origin. Ib.

That the tax is imposed in the form of requiring a license fee makes no difference. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves, and it is not, any the less invalid because enforced through the form of a license. Ib.

A statute which imposes a burdensome and almost impossible condition on the shipmaster as a

or unless, from the nature of the power itself, its concurrent exercise must necessarily produce direct repugnancy or incompatibility. But he argued, that this was by no means the inevitable result from a concurrent exercise of the taxing power, because its peculiar nature rendered it often capable of being exercised by different authorities at the same time, and even upon the same subject, without actual collision or interference.

The restrictions which he had alluded to, 421*] were to be found *in other provisions of the constitution; and they were both express and implied. The former were all comprised in the tenth section of the first article, by which the states are prohibited, unless with the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, and are, also, without such consent, forbidden to impose any duty upon tonnage. The effect of this prohibition, coupled with the general grant of the taxing power before referred to, is to vest in the national government an exclusive right to the commercial imposts of the country. With the exception of these, however, the power to lay and collect taxes is a concurrent power.

But, like all the other concurrent powers of the states, this power of taxation is subject, in its exercise, to that general implied restriction which necessarily results from the supreme and paramount authority of the Union. This is a vital principle of the political system, and its direct operation is to restrain the states from the exercise of any power repugnant to, or incompatible with, the constitution, or the constitutional laws of the national government. By which is to be understood, not merely a repugnancy growing out of a concurrent exercise of the same power by Congress and a state legislature, but that which may arise from the exercise of one power by a state, with reference to a different power, whether exclusive or concurrent, express or implied, residing in the general government.

Having stated and illustrated these as the constitutional limits of the taxing power of the states, he insisted that they had been transgressed by the legislative act under consideration. The second section comprises all the provisions of the law which are material to the question. The true construction of this section is somewhat doubtful; upon any interpretation, however, it prohibits the importer from selling the imported merchandise without having first taken out a license to do so, for which he is required to pay a stipulated tax.

The question, then, is, whether this is such a law as the legislature of Maryland have a right to pass. Under color of a license law, he contended that this statute was a palpable *evasion of the express restriction up- [*422 on the states to "lay duties on imports;" an indirect attempt to do that which the constitution has explicity inhibited. And he said this, because he thought it might be clearly shown that a law laying a tax on the importer for the privilege of selling the merchandise he has himself imported, which is this law, and this case, is equivalent, in all substantial respects, to a duty on imports, since, with a few slight and unimportant differences, it answers all the purposes, and produces all the effects of a concurrent power in the states to impose such a duty.

What are the apparent differences between this and a tax directly on imports? It may be said, in the first place, that the one is a tax for the privilege of bringing the foreign article into the country, and the other a tax for the privilege of selling it after it is so brought in. But these privileges are indissolubly connected; the right to sell is a necessary incident to the right of importing. The grant of a privilege to import would be of no value, unless it im-

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prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each one of them, is a tax on the ship-owner for the right to land such passengers, and, in effect, on the passenger himself, since the ship-master makes him pay it in advance as a part of his fare. Such a statute of a state is a regulation of commerce, and when applied to passengers from foreign countries, is a regulation of commerce with foreign nations. Legislation on the subject which it covers is confided exclusively to Congress by that clause of the constitution which gives to that body the "right to regulate commerce with foreign nations." Henderson v. Mayor of N. Y. 2 Otto, 259.

An act of the legislature of N. Y., passed May 6, 1870, in relation to wharfage, with the provision that "all canal-boats navigating the canals of this state, and vessels known as North River barges, shall pay the same rates as heretofore." It further provided that if any vessel should leave a wharf, etc., without paying the wharfage due, after a demand of it, she should pay double rates. Held, that the act was not contrary to the constitution of the United States. The Ann Ryan, 7 Ben. 20.

The Ind. act of March 8, 1873, requiring every corporation, foreign or domestic, engaged in carrying passengers or merchandise through the state to make returns of gross receipts and a one per cent. tax, cannot be enforced against a foreign corporation, except, perhaps, as to earnings received within the state. It is not competent for a state to require of a foreign corporation the payment of a tax on gross receipts not received in the state, or to impose a tax on the receipts of a foreign corporation for the transportation of merchandise received out of the state and delivered out of the state, and simply carried through the state. That is an interference by the state with that which solely belongs to Congress. It would be a tax upon interstate commerce. Indiana v. Am. Exp. Co. 7 Biss. 227.

The Iowa act of March 23, 1874, to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different roads of the state, is not a regulation of interstate commerce. Chicago R. Co. v. Iowa, 4 Otto, 155.

So much of the N. Y. act of May 22, 1862, amended April 17, 1865, as requires, with certain exceptions, all ships or vessels which enter the port of New York, or load, or unload, or make fast to any wharf therein, to pay a certain percentage per ton, to be computed on the tonnage expressed in the registers of enrollments of such ships or vessels, respectively, violates U. S. Const. art. 1, sec. 10, forbidding a state to levy any duty on tonnage. Inman Steamship Co. v. Tinker, 4 Otto, 238.

The La. act of March 6, 1869, in relation to the survey of hatches of sea-going vessels arriving at New Orleans, and of damaged goods coming on board of her, etc., is in the nature of a regulation of commerce, and void. Foster v. Master, etc., of New Orleans, 4 Otto, 246.

The statute of Missouri which prohibits driving or conveying any Texas, Mexican, or Indian cattle into the state, between March 1 and Nov. 1, in each year, is void as involving an attempt to regulate commerce. Railroad Company v. Husen, 5 Otto, 465.

The Wis. act of March 11, 1874, relating to railroads, express and telegraph companies in the state, is confined to state commerce, or such interstate commerce as affects the people of Wisconsin, and is therefore valid. Pelk v. Chicago R. Co. 4 Otto, 164.

plies a right to sell. Prohibit sale, and importation necessarily ceases. He maintained that, on a fair and just construction of the whole revenue system, the implication was irresistible. That the duties exacted by the general government were paid, not for the privilege to import simply, but for the privilege of importing foreign commodities, and using them in the way of merchandise, might be incontestably proved, by showing that no goods were dutiable, unless imported with the intention, and for the purpose of traffic. With this view, he referred to various provisions of the act of March, 1799, ch. 128, s. 30, 32, 45. 46. 60. and 107, and to the case of The Concord.[1] This is the principle, also, of the English law of customs, from which our system is mainly borrowed.[2] It was likewise worthy of remark, that the legislation of Maryland, upon this subject, before the adoption of the constitution, was in strict accordance with the same principle, and carried it so far as to permit the merchant to try the market by an actual sale, and 423*] paying the duties only on the *portion sold, to export the residue free of duty.[3] There is, then, no difference in this respect between these two modes of taxation.

It may be said that these taxes are payable at different times; in the one case, at the time of importation; in the other, at the time of sale. But if they are both paid substantially for the same privilege, surely this is not a material difference. It is a matter that simply concerns the safety, certainty, and convenience of collection; but it gives no distinctive character to the law. In point of fact, however, the duty imposed by the revenue system is not payable except it is less than fifty dollars, until after the importation.

A third apparent difference may be said to consist in this: that the import duty is a charge upon the goods, the license upon the person; but the one is as much a charge upon the goods as the other, if by that is meant an increase of their actual cost. The import duty is, however, a personal charge upon the importer; it is not the bond that alone makes him personally liable; without having given a bond, he is still answerable for the duties.[4]

These are the only differences in the operation of the two taxes, and they are apparent, but not substantial; they are the disguise thrown about the law to elude detection. The true test, however, is, to consider the effect of this law upon the exclusive grant to the general government, to raise revenue from imposts. The reasons for such a grant are obvious. The objects committed by the constitution to the general government are of immense magnitude, and require corresponding means. Of all species of taxation, that upon imports is most fruitful and least oppressive. It is sound policy, therefore, to cherish and extend this branch of the public revenue; because, whenever it fails, other modes of taxation must necessarily be resorted to of a more odious and oppressive nature. Now, the consequence of the right claimed by this law on the part of Maryland, is to place this branch of the public revenue completely in her power; as entirely so as if she had constitutionally a concurrent right *to tax imports. It is to ena-[*424 ble her, at her pleasure, by means of license laws, to annihilate, as it regards her own territory, the commercial revenues of the country. What is to prevent her from prohibiting altogether the importation of foreign merchandise into any of her ports. It is only to increase the price of the license until the commodity will no longer bear the burden, and the end is accomplished. Importation must in that case necessarily cease, and with it, revenue. It is not pretended that these consequences are produced by this particular law; it is not necessary that this should be the case. We are not to look at the particular exercise of power so much as at the principle upon which the power is asserted. We are not to judge of the constitutionality of this law by the amount of tax which it imposes; it is not the degree of taxation, in the particular instance, that determines the right to tax. That the public revenue is, to a certain degree, affected by the operation of this law, is incontestable. But if, on principle, Maryland has a right to demand fifty dollars as the price of a license to sell imported merchandise, she has a right to demand any sum for the same privilege. If, in other words, she is within the proper sphere of her taxing power, that power is, in its nature, unlimited, and she may carry it to what extent she pleases. A power to tax, this court has emphatically said, is a power to destroy. In this case it is a power to prohibit; a power to deprive the government of the means to accomplish its great objects, and conduct all its important operations; a power to defeat the intention of the exclusive grant of commercial revenue.

If Maryland has a right to enact laws of this description, she has a right to regulate her own foreign commerce, although, by the constitution, it is exclusively vested in Congress. The imposition of import duties is often resorted to, not for the purpose of revenue, but to regulate commercial intercourse with foreign countries. Discriminating duties, protecting duties, prohibitory duties, are so many commercial regulations. These may all be resorted to under the disguise of license laws. If Maryland has a right to pass general license laws, she may pass partial ones; she may select particular commodities, and burthen their sale with a license duty; she may establish a tariff of discriminating *duties for herself, [*425 and affect, if not defeat, the commercial policy of the country. In one word, she may exercise the same right to regulate commerce by means of license laws, which a concurrent power to tax imports would give her, and thus evade, in this respect also, the constitutional prohibition. It may be said that this law looks to no such object; that it is simply a tax for revenue, and that there is no ground to apprehend that it will be used for any other purpose. But the motives for legislative acts are not fit subjects of judicial inquiry. If the power can be exercised for one purpose, it may be for an-

1.—9 Cranch, 388; see also 4 Cranch 347.

2.—Hale on the Customs, Pt. 3, ch. 20, in Hargr. Law Tracts, 211.

3.—Hanson's Laws of Maryland, Act of 1783, ch. 36, s. 34; Act of 1784, ch. 84, s. 5.

4.—1 Mason's Rep. 482.

other; the intention may always be effectually concealed. It is the principle of the law, and its capacity to be exerted for the attainment of other objects than that which it professes to aim at in the particular case, that it is proper and necessary to look to. If the states are authorized to pass laws of this description, the purposes which induced the prohibition are defeated, and it is rendered altogether nugatory.

Mr. Taney and Mr. Johnson, contra, insisted that the law of Maryland did not lay a duty on imports, and was not repugnant to the constitution of the United States.

The act of assembly (they said) does not impose a tax on the importation of foreign goods, nor upon the trade and occupation of an importer. But the tax is imposed upon the trade and occupation of selling foreign goods by wholesale after they have been imported. It is a tax upon the profession or trade of the party, when that trade is carried on within the state. It is laid upon the same principle with the usual taxes on retailers, or innkeepers, of hawkers and peddlers, or upon any other trade exercised within the state. It is true, the importers of foreign goods are, by express words, made subject to the provisions of this law, provided they sell by wholesale; but it is the selling by wholesale which subjects the party to the tax; it is upon that trade that the tax is imposed.

Does the constitution of the United States forbid Maryland to impose such a tax? This is the only question presented by the record.

426*] *The plaintiffs in error insist that the tax in question is virtually a duty on imports, and violates that clause in the constitution which declares that a state shall not lay duties on imports.

We answer, it is not, either directly or indirectly, a duty on imports. A duty on imports is a tribute paid to the sovereignty of the country for permission to introduce foreign goods. To import, and to bring in, mean the same thing.[1] A duty on imports is therefore a duty on the bringing in of foreign goods—on the act of importation. The duty is paid for the permission to introduce them; it is the consideration given for that privilege. The party buys the right to introduce the goods into the United States, and to place them under the protection of the laws of the country. He becomes liable to the whole duty by the very act of importation; and the amount is the same, whether he proposes to sell the goods, or to keep them for his own use, or to give them as a present to another.

After the goods have been brought into a state, the importer has one peculiar relation to them by reason of his being the importer. He is known to the state laws in the character of owner, or as the party entitled to the custody of the goods, and he receives the same degree of protection whether he be the importer or not the importer. The property, when it has passed through the custom-houses, is no longer under the exclusive protection of the United States. It is guarded by the laws of the state, must be transferred and otherwise dealt with, according to the laws of the state. It is therefore imported, or brought in, and the act of importation is completed. If, therefore, a duty on imports means a duty on the act of importation, or the permission to introduce, it is very clear that the law in question is not, directly or indirectly, a duty on imports.

But, it is said that the word "imports," as used in the constitution of the United States, does not mean "importation," but means the goods imported.

If this interpretation be right, then the constitution of the *United States must be [*427 expounded as if it had said, "No state shall, without the consent of Congress, lay any imposts or duties on goods imported." And if such be the true reading of the constitution, then no state can lay a tax upon any article of property which was imported from a foreign country. According to this construction, imported plate, imported furniture, imported property of every kind, would be privileged property, and exempt from taxation by the states. For, if the word "imports," as used in the constitution, means "goods imported," or "imported goods," then the states, without the permission of Congress, cannot tax property within their dominion, and owned by their citizens, provided that property has been introduced from abroad. Such would be the inevitable consequence of expounding the word "imports" as if the words "imported goods" had been used. The uniform practice of the states, the principles of justice, the interests of the community, are all directly opposed to this construction.

But, it is said that if "imports" means importation, and not the goods imported, yet the privilege of selling is inseparably incident to the importation, and is always implied in the privilege to import. This argument, like the one last replied to, will be found to prove too much, and to lead to results that can hardly be acquiesced in.

The right to import foreign goods is derived from the United States. The duties are imposed by the federal government, and are paid to that sovereignty. The permission to import is conferred by that government, and if the right to sell is implied in the permission to import, then the right to sell is derived from the United States, and becomes an absolute and vested right in the importer as soon as he acquires the privilege of introducing the goods; that is, as soon as he pays the duties, or secures them, according to the acts of Congress. And if the right to sell is a vested right, derived from the general government, then this right cannot be limited, restrained, regulated, or in any manner affected by state legislation. The importer, then, having an absolute and unconditional right to sell, may sell in any place, and in any manner he thinks proper. He may offer for sale large quantities of gunpowder in the heart of a city, *and thus endanger the [*428 lives of the citizens; he may offer hides, fish, and articles of that description, in places offensive and inconvenient to the public, and dangerous to the health of the citizens; he may hold an auction at his own warehouse, and refuse to pay any tax to the state; he may sell at retail; he may sell as a hawker and peddler; and the laws of the states which impose taxes on these trades, are unconstitutional and void, so far as the importer is concerned. These

1.—Act of March 2, 1799, ch. 128; 1 Mason's Rep. 499; 4 Wheat. Rep. 246.

taxes have been always imposed by some of the states, and their right to derive a revenue from these sources has never before been questioned.

It may be said, that the right of the importer to sell, is a right to sell by wholesale only, and not by auction, or by retail. If, however, the right exists at all, it cannot be limited to sales by wholesale. It is said to be incident to the permission to import; and if it be annexed to that permission, then it must be an absolute and unconditional right; for where can we find the qualification? If the states are disabled from imposing a tax on the sales of foreign merchandise, when made by the bale or package, why are they not equally unable to impose a tax on the sales of such goods when made by auction, or retail, or in any other manner? The constitution gives no peculiar privilege to any particular mode of sale; and this court, in expounding the instrument, will not introduce into it new limitations, and new divisions of power, not implied by its words.

In fine, the importer, by the payment of the duties, either acquires the right to sell, as well as the right to introduce the goods, or he acquires the right to bring in merely. In the first case, his right to sell would be beyond the reach of state control, and state regulation. In the second case, the goods would be subject to the laws and authority of the state. It can hardly be held that an importer may sell in any place, and in any manner he pleases; and if he may not, it is because the disposition of the goods is subject to the regulations of the state authorities; and if they are so subject, they are, consequently, liable to such burthens as the state may impose on any particular mode of sale or transfer; and, therefore, liable to the tax in question.

The cases cited of goods wrecked on our [*429 shores can hardly be supposed to bear on this argument. To import, implies an act of the will, a voluntary introduction of the goods. Besides, in those cases, the question is, are the goods liable to pay duty? not what rights will the payment of the duty procure? And when the questions are so different, it is not perceived how a decision of the one can in any degree affect the other.

But, it is insisted, on the other side, that if the law in question be not repugnant to that clause in the constitution which forbids a state to lay a duty on imports, yet it is in violation of that clause which gives Congress the power to regulate commerce with foreign nations. It must be observed that this argument admits, argumenti gratia, that the tax in question is not, either directly or indirectly, a duty on imports. But the plaintiffs in error contend, that although it be not a duty on imports, still the tax in question is forbidden by the constitution of the United States. In other words, they maintain that the tenth section in the constitution of the United States, is not the only one which limits the taxing power of the states; and that this power is still further curtailed by the clause which gives Congress the power to regulate commerce.

It has been settled by the decisions of this court that the grant of a power to Congress does not extinguish the right of the states to legislate on the same subject, unless Congress exercises the power granted. And when the power is exercised, the states may yet legislate, if the whole ground of legislation has not been covered by the laws of the United States; provided the state law be not repugnant to that of the federal government. Assuming these principles as settled, it would be a sufficient answer to this argument to say, that no law of Congress gives, or professes to give to the importer, the right to sell. The revenue laws referred to charge duties in certain cases, where sales may be made. The laws are framed on the assumption that certain foreign goods will be permitted to be sold; but these laws do not give that permission generally, nor point out in what mode they may be sold. If, therefore, under this power to regulate commerce, Congress may give the importer a right to sell, yet the right is not given; and until it is given by Congress, *the states may regulate and tax [*430 the sales without violating the constitution of the United States.

But this clause in the constitution does not give to Congress the power contended for. By the constitution of the United States, the power of taxation by the states is restrained, by express words, in certain cases.

It has always been supposed that these limitations of state sovereignty, in matters of revenue, so carefully and particularly set down, excluded all inference and implication, and left with the states all the powers of taxation not expressly denied to them in the restraining section. It is very clear, that the men who framed the constitution, and the people who adopted the constitution, so understood it. The Federalist must be considered as expressing the opinions of the friends of the federal constitution, both in and out of the convention; and in No. 33, and near the conclusion of that number, the commentary on the subject of the taxing power is thus concluded: "The inference from the whole is, that the individual states would, under the proposed constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports." And, throughout No. 32 and No. 33 of The Federalist, the same principle is repeatedly asserted as a clear and indisputable one.

But, if Congress, under the power to regulate commerce, may authorize the importer to sell, then certain important powers of taxation, besides duties on imports and exports, have been surrendered by the states. For if Congress may give by law to the importer the right to sell, Congress may direct how the sale may be made, or may allow the importer to elect any mode he pleases; and, whenever this shall be done by the general government, the power of the states to regulate such sales is at an end, and, consequently, their power of taxation also. If this argument, then, be sustained by the court, the authority of the states to regulate and to tax auctioneers and retailers is not "an independent and uncontrollable authority," as was supposed by the distinguished writers in The Federalist, but is a mere dependent authority, and liable to the control of Congress, so far as foreign *goods are concerned. [*431 Congress, it is said, may give the importer the right to sell. If Congress may do so, then the states cannot tax any mode of sale which Con-

gress may please to permit. Such powers were surely too important and valuable to have been surrendered in this loose and slovenly manner. If they were to have been given up by the states, they would have been given up in express terms, like the duties on imports, and not by vague and uncertain inferences. Besides, if Congress may give the right to sell in any manner, they may also give the right to sell in any place; and the police laws of the different states, made for their safety or health, exist only by the permission of Congress. And again, if Congress may not only prescribe the terms upon which foreign goods may be introduced into the country, but may direct how they shall be sold, and thus exempt the sales from state taxation, why may not Congress, upon the same principle, exempt all foreign goods from taxation by the states? If Congress may exercise exclusive dominion over foreign goods for one purpose, after they have been brought into a state, why may not the same exclusive power be exercised for any other purpose? Reasons of policy might, indeed, make a difference; but we are not now discussing the policy of introducing new provisions into the constitution, but endeavoring to ascertain the meaning of the words used in the instrument.

The last argument urged in behalf of the plaintiff in error, is founded on the supposed policy and objects of the constitution, rather than on the interpretation of any words used in the instrument itself. It is said, that if a state may impose the tax in question, it may increase it to any amount, and by that means the states may prevent importations altogether. And, hence it is inferred, that a power capable of being so much abused, was not intended to have been left with the states.

Nothing can be more fallacious than to urge the possible abuse of power by the states, for the purpose of proving that the power has been taken away. Such an argument goes to the destruction of all state power. Such a principle of construction would put an end to all state authority; for all power may possibly be 432*] abused. The states cannot and *ought not to be deemed more liable than the federal government to abuse the powers confided to them by the people; nor can any supposed and merely possible inconvenience, which might arise from an improper use of state power, furnish a ground for deciding against the existence of the power. We must be continually liable to this inconvenience from the complex character of our government. In the Federalist, No. 32, the rule of construction is thus stated: "It is not a mere possibility of inconvenience in the exercise of powers, but an immediate and constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty." The possibility of inconvenience from the improper use of this power by the states, is not, therefore, any argument against the existence of this power. It cannot, by implication, alienate and extinguish the power for which we are contending.

But, indeed, it is impossible that the power to lay the tax in question can lead to any inconvenience, or can be used to embarrass the regulations, or lessen the revenue of the federal government. If the tax on wholesale dealers should be so heavy as to prevent importations, the people of the state will be the principal sufferers. If it enhances the price of imported goods, the burthen is at least as heavy on the people of the state as it is on the citizens of other states, and this furnishes abundant security that no such tax will ever be vexatiously laid. The people of a state cannot be justly suspected of imposing heavy burdens upon themselves, for the purpose of thwarting or embarrassing the general government. If, indeed, the people of a state could be guilty of such folly, they might, by bounties and other facilities to manufacturers in their own state, effectually prevent the importation of foreign goods. Nobody would deny that the states possess this power; but nobody suspects them of being disposed to abuse it.

There is, indeed, no real danger of serious inconvenience from these conflicting powers. The good sense and good feelings of the people will always apply the remedy; and we may safely confide, that the state governments, and the general government, will never embark in the unprofitable contest of trying which shall do each other the most harm. But *if [*433 such a state of things should ever take place, it would matter very little how the boundaries of power had been marked out by judicial decision. The Union cannot be preserved by the mere strength and power of the federal government. It is dissolved as soon as it shall forfeit the affection and confidence of the states.

The Attorney-General, for the plaintiffs in error, in reply, stated the question to be, whether a state law, which rendered it criminal to import and sell foreign goods, without the permission of the state, which permission was only to be obtained by paying a tax to the state, was repugnant to the constitution, laws, and treaties of the Union. If the state of Maryland had the power to lay such a restraint on the importation and sale of foreign goods, every other state must have the same power; and the consequence would be, that this power of taxation would directly interfere, both with the power of regulating commerce, and with the taxing power of Congress. The quantum of tax imposed by the state could make no difference. The same principle would apply, as in the attempt of the same state to tax the Bank of the United States, where the court held, that a power to tax, was a power to tax limited only by the pleasure of the state; and that it was, therefore, a power to destroy.[1]

In the present case, the power was denied upon two grounds; first, because the power exerted by the law in question is that of regulating commerce with foreign nations, and among the several states, which the court has determined to be exclusively vested in Congress.[2] Second, because it was that of laying an impost, or duty on imports, without the consent of Congress.

In order to determine whether the present law interfered with the exercise of the power of regulating commerce, it was only necessary to see whether it undertook to prescribe the terms on which commerce may be carried on with foreign *nations, and among the [*434 states. If it were a power to prescribe those

1.—M'Culloch v. Maryland, 4 Wheat. Rep. 316.

2.—Gibbons v. Ogden, 9 Wheat. Rep. 1.

terms, it was a power to prescribe the whole terms. After Congress, in the exercise of its exclusive power, has prescribed certain terms, it is incompetent for the states to add other terms. Could there be any doubt that the exclusive power of regulating foreign commerce included that of prescribing to all the citizens of the Union the conditions, and the whole conditions, on which they shall be permitted to bring into the United States, for sale or consumption, the productions of foreign countries? This power does not stop with the permission to bring them in; for if the states may prohibit their sale, or restrain, or burthen it, in any mode, they may, in effect, prohibit their importation. If they may prevent their sale, they may prohibit their barter or exchange, or use and consumption in the country, in any and every mode; and thus effectually defeat the benficial exercise of the permission to import. The states might even confiscate the goods, or order them to be burnt and destroyed after they were landed; and this would no more interfere with the right of importation, according to the opposite argument, than the law now in question. And, it was asked whether the sagacious statesmen who framed the constitution meant to confer upon Congress a power so idle and illusory. They looked to the exercise of this power of regulating commerce as a great source of national wealth and aggrandizement.[1] They looked to it as a great means of developing the agricultural and manufacturing resources of the country, and its general industry; as an instrument by which the nation should be enriched at home, and rendered capable of countervailing the commercial regulations of foreign and rival nations. But if the power of regulating commerce ceases on the landing of the goods, and the whole subject is then delivered over to the discretion of the respective states, with their various partial and discordant views of policy, its exclusive exercise by Congress will be utterly vain and useless. So that the very existence of that commerce, a power of regulating and preserving which is so studious-
435*] ly conferred on Congress, *is at last made to depend upon the caprice and pleasure of the states. What signifies the power of regulation, if the states may destroy the very substance of the thing to be regulated? Uniformity, or permanency of regulation, with a view to any purpose of policy, in regard to the agricultural, manufacturing, or commercial interests of the nation, is, of course, as much out of the question as if there were no Union, or as if it were still infected with all the debility of the former confederation. The same state power, exercised upon short-sighted and narrow views, might be exerted so as to defeat the other branch of the power—that of regulating commerce among the states. The free intercommunication which now prevails between the states, may be effectually checked, by requiring a similar license to import into a particular state the productions of other states. So, also, what the state may do as to imports, it may do as to exports. It may require a license from the exporting merchant, and thus, in effect, lay a duty on exports, although both the states and Congress are expressly forbidden in the constitution from laying such a duty; and the whole power of regulating the commerce, both of exports and imports, is exclusively vested in Congress. By the joint exercise of these two usurped powers, the state may establish a total non-intercourse with other states, and with foreign nations, in direct violation of the laws, and treaties, and constitution of the Union. Or it may make a discrimination among foreign nations, or among the different states, with a view of discouraging their commerce, or of encouraging some branch of its own internal industry, in direct repugnancy to the policy of the Union, as exhibited in its laws and treaties. One of the avowed objects for conferring the power of regulating commerce upon Congress, was that of raising a revenue for the support of the national government. It was foreseen that the prosperity of commerce would best be promoted by uniform regulations contained in the laws and treaties of the Union; and it was also foreseen that an impost was that species of taxation best suited to the genius and habits of the American people.[2] *But if the [*436 power now in question may be exercised by one state, it may be exercised by all; and the principal source from which the revenues of the Union were to be derived, will be dried up, or diverted to local purposes. In short, it was insisted that all the evils for which the constitution was intended to provide an effectual remedy would be entailed upon the country, by confirming the validity of such state laws as the act now in question.

Mr. Chief Justice **Marshall** delivered the opinion of the court:

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted, that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offense; and that judgment is now before this court.

The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported.

1.—The Federalist, No. 11.

2.—The Federalist, No. 12.

It has been truly said, that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality. The plaintiffs in error 437*] *take the burthen upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States:

1. To that which declares that "no state shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." The counsel for the state of Maryland would confine this prohibition to the laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of constructing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty 438*] on imports," then, is not merely *a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition. show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by *the [*439 statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the states were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a pro-

hibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular state. We are told, that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an 440*] argument against its *existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any state would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason be said, that no state would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no state ought to exercise. Conceding, to the full extent which is required, that every state would, in its legislation on this subject, provide judiciously for its own interest, it cannot be conceded that each would respect the interest of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports.

This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the states. When we are inquiring whether a particular act is within this prohibition, the question is not, whether the state may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown that a tax on the article in the hands of the importer is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article as if imposed upon it while entering the port.

The counsel for the state of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will 441*] abridge the power of taxation, *which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must therefore be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure, that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, *perhaps, lost its distinctive char- [*442 acter as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on

the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of the duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the state cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An im-443*] porter may *bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety, as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So, if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a pub-444*] lic magazine it is because he stores *it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the states, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no farther than to prevent the states from doing that which it was the great object of the constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.

*In support of the argument, that [*445 the prohibition ceases the instant that the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country, so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or,

suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the constitution which declares that "no state shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the constitution which empowers "Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their 446*] *own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?

This question was considered in the case of Gibbons v. Ogden, 9 Wheat. Rep. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, *when given in the most [*447 comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted—and we think it cannot be denied—what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract? what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the state is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

*We think, then, that if the power [*448 to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce.

It has been contended, that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the states may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the adminis-
449*] tration of *justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in McCulloch v. The State of Maryland, 4 Wheat. Rep. 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the Court of Appeals of the State of Maryland, in affirming the judgment of the Baltimore City Court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

Mr. Justice Thompson dissented: It is with some reluctance, and very considerable diffidence, that I have brought myself publicly to dissent from the opinion of the court in this case; and did it not involve an important constitutional *question relating to the [*450 relative powers of the general and state governments, I should silently acquiesce in the judgment of the court, although my own opinion might not accord with theirs.

The case comes before this court on a writ of error to the Court of Appeals of the state of Maryland, upon a judgment rendered in that court against the defendants. The proceedings in the court below were upon an indictment against the defendants, merchants in the city of Baltimore, trading under the firm of Alexander Brown & Sons, and to recover against them the penalty alleged to have been incurred, for a violation of an act of the legislature of that state, by selling a package of foreign dry goods without having a license for that purpose, as required by said act; and the only question which has been made and argued is, whether the act referred to is in violation of the constitution of the United States.

The act in question was passed on the 23d of February, 1822, and is entitled, "A supplement to the act laying duties on licenses to retailers of dry goods, and for other purposes." By the second section, under which the penalty has been recovered, it is enacted, "that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc.; and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and, in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement."

By the original act, passed in 1819, retail dealers in foreign merchandise are required to take out a license; and the supplemental act requires that wholesale dealers should likewise take out a license to sell. These acts being in pari materia, are to be taken together, and their effect and operation manifestly is nothing more than to require retail and wholesale dealers in foreign merchandise to take out a license before they should be authorized to sell such merchandise. *The act does not [*451 require a license to import, or demand anything more of the importer than is required of any other dealer in the article imported. The license is for selling, and is general, applying to all persons: that all importers, and other persons selling by wholesale, bale, or package, etc., shall, before they are authorized to sell, take out a license, etc.

I understand it to be admitted that these laws, so far as they relate to retail dealers, are not in violation of the constitution of the Unit-

ed States; and, if so, the question resolves itself into the inquiry, whether a distinction in this respect between a retail and wholesale dealer in foreign merchandise, can exist under any sound construction of the constitution.

The parts of the constitution which have been drawn in question on the discussion at the bar, and with which the law in question is supposed to be in conflict, are, that which gives to Congress the power to regulate commerce with foreign nations, and among the several states, and that which declares that no state shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

It is very obvious, that this law can in no manner whatever affect the commercial intercourse between the states; it applies purely to the internal trade of the state of Maryland. The defendants were merchants trading in the city of Baltimore. The indictment describes them as such, and alleges the sale to have been in that place; and nothing appears to warrant an inference that the package of goods sold was not intended for consumption at that place; and the law has no relation whatever to goods intended for transportation to another state. It is proper here to notice, that although the indictment alleges that the defendants did import and sell, yet the district-attorney, in framing the indictment, very properly considered the offense to consist in the selling, and not in the importation without a license. No one will pretend, that if the indictment had only alleged that the defendants did import a package of foreign dry goods without a license, 452*] it could have been sustained. The *act applies to the importer, and other persons selling by wholesale; and the allegation that the defendants did import, is merely descriptive of the double character in which they were dealing, both as importers and sellers. The indictment would, undoubtedly, have been good, had it merely alleged that the defendants sold the package without a license. So that neither the act, nor the form in which the complaint is presented, makes any discrimination between the importer and any other wholesale dealer in foreign merchandise, but requires both to take out a license to sell; nor does it appear to me that this law in any manner infringes or conflicts with the power of Congress to regulate commerce with foreign nations. It is to be borne in mind, that this was a power possessed by the states respectively before the adoption of the constitution, and is not a power growing out of the establishment of the general government. It is to be viewed, therefore, as the surrender of a power antecedently possessed by the states, and the extent of the surrender must receive a fair and reasonable interpretation with reference to the object for which the surrender was made. This was principally with a view to the revenue, and extended only to the external commerce of the United States, and did not embrace any portion of the internal trade or commerce of the several states. This is not only the plain and obvious interpretation of the terms used in the constitution, commerce with foreign nations; but such has been the construction adopted by this court. In the case of Gibbons v. Ogden, 9 Wheat. Rep. 194, the court, in speaking of the grant of the power of Congress to regulate commerce, say: "It is not intended to comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to, or affect other states; such a power would be inconvenient, and is certainly unnecessary. The enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language on the subject of the sentence must be the exclusively internal *commerce of a [*453 state. The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." And, again, (208) "the acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject (commerce) to a considerable extent."

If such be the division of power between the general and state governments in relation to commerce, where is the line to be drawn between internal and external commerce. It appears to me, that no other sound and practical rule can be adopted, than to consider the external commerce as ending with the importation of the foreign article; and the importation is complete as soon as the goods are introduced into the country, according to the provisions of the revenue laws, with the intention of being sold here for consumption, or for the purpose of internal and domestic trade, and the duties paid or secured. And this is the light in which this question has been considered by this and other courts of the United States. 5 Cranch, 368; 9 Cranch, 104; 1 Mason, 499. This, it will be perceived, does not embrace foreign merchandise intended for exportation, and not for consumption; nor articles intended for commerce between the states; but such as are intended for domestic trade within the state; and it is to such articles only that the law of Maryland extends. I cannot, therefore, think, that this law at all interferes with the power of Congress to regulate commerce; nor does it, according to my understanding of the constitution, violate that provision, which declares that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

*The compensation required by this [*454 law to be paid for a license to sell, cannot be considered an impost or duty, within the sense and meaning of these terms, as used in the constitution. They refer to the foreign duty,

and not to any charge that may grow out of the internal police of the states. It may indirectly fall on the imported articles, and enhance the price in the sale; but even this is not an expense imposed on the importer or other seller, but is borne ultimately by the consumer.

But the broad principle has been assumed on the argument, that the payment of the foreign duty is a purchase of the right and privilege, not only of introducing the goods into the country, but of selling them free from any increased burden imposed by the states; and, unless this principle can be sustained, the law in question is not in violation of the constitution.

The counsel, however, aware that the principle thus broadly laid down, if practically carried out to its full extent, would lead to consequences so obviously untenable, that it would at once show the unsoundness of the principle itself, have limited its application to the first wholesale disposition of the merchandise. Can such a distinction, however, be sustained? There is nothing, certainly, in the letter of the constitution to support it; nor does it fall within reasonable intendment growing out of the nature of the subject-matter of the provision. The prohibition to the states is against laying any impost or duty on imports. It is the merchandise that is exempted from the imposition. The constitution nowhere gives any extraordinary protection to the importer. So that, if the law was confined to the importer only, he could find no exemption from the operation of state laws. Nor is there, according to my judgment, any rational grounds, upon which the constitution may be considered as extending such exemption to wholesale, and not to retail dealers. If the payment of the foreign duty is the purchase of the privilege to sell, as well as to introduce the article into the country, where can be the difference whether this privilege is exercised in the one way or the other? The retail merchant often imports his own goods; and why should he be compelled [*455 to take out a license to sell, when his neighbor, who imports and sells by wholesale, is exempted. But the distinction is altogether fruitless, and does not effect the object supposed to have been intended, viz., to take from the states the power of imposing burdens upon foreign merchandise, that might tend to lessen or entirely prevent the importation, and thereby diminish the revenue of the United States. It is very evident that no such purpose can be accomplished, by limiting the protection to the first sale. It was admitted, that after the first sale, and the article becomes mixed and incorporated in the general mass of the property of the country, and to be applied to domestic use, it loses this pretended privilege. But everyone knows, that whatever charge or burden is imposed upon the retail sale, affects the wholesale indirectly, as much as if laid directly upon the wholesale. The retail dealer takes this charge into calculation in the purchase from the wholesale merchant, and which, of course, equally affects the importation. Suppose the $50 required to be paid by the wholesale dealer was imposed on the retail merchant, would it not equally affect the importation? It would equally increase the burden, and enhance the expense of the article when it comes into the hands of the consumer, and on whom all the charges ultimately fall. And if these charges are so increased by the state governments, in any stages of the internal trade, as to check their sale for consumption, it will necessarily affect the importation. So that nothing short of a total exemption from state charges or taxes, under all circumstances, will answer the supposed object of the constitution. And to push the principle to such lengths, would be a restriction upon state authority, not warranted by the constitution.

It certainly cannot be maintained that the states have no authority to tax imported merchandise. But the same principle of discrimination between the wholesale and retail dealer, as to a license to sell, would seem to me, if well-founded, to extend to taxes of every description. And it would present a singular incongruity, to exempt a wholesale merchant from all taxes upon his stock of goods, and subject to taxation the like stock of his neighbor who was selling by retail.

[*456 It is laid down in No. 32 of the Federalist (and I believe universally admitted), "that the states, with the sole exception of duties on imports and exports, retain authority to tax in the most absolute and unqualified sense; and any attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause in the constitution." Although an impost or duty may be considered a tax in its most enlarged sense, yet every tax cannot be understood to mean an impost or duty in the sense of the constitution. As here used, it evidently refers to the foreign duty imposed by revenue laws. It would be a singular use of the term impost, to apply it to a tax on real estate; and no one, I presume, would contend that all imported articles upon which the duties have been paid are exempt from all state taxation in the hands of the consumer. And yet this would follow, if duty and tax are, in all respects, synonymous; for the constitution declares, that no state shall lay any duty on imports, viz., the article imported. To avoid these consequences, which are certainly inadmissible, the inhibition to the states must be understood as extending only to foreign duties, and not to taxes imposed by the states, after the imports become articles of internal trade, and for domestic use and consumption; they then become subject to state jurisdiction.

This law seems to have been treated as if it imposed a tax or duty upon the importer, or the importation. It certainly admits of no such construction. It is a charge upon the wholesale dealer, whoever he may be, and to operate upon the sale, and not upon the importation. It requires the purchase of a privilege to sell, and must stand on the same footing as a purchase of a privilege to sell in any other manner, as by retail, at auction, or as hawkers and peddlers, or in whatever way state policy may require. Whether such regulations are wise and politic, is not a question for this court. If the broad principle contended for on the part of the plaintiffs in error—that the payment of the foreign duty is a purchase of the privilege of selling—be well founded, no

limit can be set by the states to the exercise of this privilege. The first sale may be made in 457*] defiance of all state *regulation; and all state laws regulating sales of foreign goods at auction, and imposing a duty thereupon, are unconstitutional, so far, at all events, as the sale may be by bale, package, hogshead, barrel or tierce, etc. And, indeed, if the right to sell follows as an incident to the importation, it will take away all state control over infectious and noxious goods, whilst unsold, in the hands of the importer. The principle, when carried out to its full extent, would inevitably lead to such consequences.

It has been urged with great earnestness upon the court, that if the states are permitted to lay such charges and taxes upon imports, they may be so multipled and increased as entirely to stop all importations. If this argument presents any serious objection to the law in question, the answer to it, in my judgment, has already been given: that the limitation, as contended for, of state power, will not effect the objects proposed. Whether this additional burden is imposed upon the wholesale or retail dealer, it will equally affect the importation; and nothing short of a total exemption from all taxation and charges of every description, will take from the states the power of legislating so as in some way may indirectly affect the importation.

But arguments drawn against the existence of a power from its supposed abuse are illogical, and generally lead to unsound conclusions. And this is emphatically so when applied to our system of government. It supposes the interest of the people, under the general and state governments, to be in hostility with each other, instead of considering the two governments as parts only of the same system, and forming but one government for the same people, having for its object the same common interest and welfare of all.

If the supposed abuse of a power is a satisfactory objection to its existence, it will equally apply to many of the powers of the general government; and it is as reasonable to suppose that the people would wish to injure or destroy themselves, through the instrumentality of the one government as the other.

The doctrine of the court in the case of M'Culloch v. The State of Maryland, 4 Wheat. 458*] Rep. 316, has been urged *as having a bearing upon this question unfavorable to the validity of the law. But it appears to me, that that case warrants no such conclusion. It is there admitted, that the power of taxation is an incident of sovereignty, and is co-extensive with that to which it is an incident. And that all subjects, over which the sovereign power of a state extends, are objects of taxation. The Bank of the United States could not be taxed by the states, because it was an instrument employed by the government in the execution of its powers. It was called into existence under the authority of the United States, and of course could not have previously existed as an object of taxation by the states. Not so, however, with respect to imports; they were in existence, and under the absolute jurisdiction and control of the states, before the adoption of the constitution. And it is, therefore, as to them, a question of surrender of power by the states, and to what extent this has been given up to the United States. And it is expressly admitted in that case, that the opinion did not deprive the states of any resources they originally possessed; nor to any tax paid by the real property of the bank in common with the other real property within the state; nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with other property of the same description throughout the state. But the tax was held unconstitutional, because laid on the operations of the bank, and consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution; and this instrument, created by the government of the Union. But these objections do not apply to the law in question. The government of the Union found the states in the full exercise of sovereign power over imports. It was one of the sources of revenue originally possessed by the states. The law does not purport to act directly upon anything which has been surrendered to the general government, viz., the external commerce of the state. It may operate indirectly upon it to some extent; but cannot be made essentially to impede or retard the operations of the government; not more so than might be effected by a tax on the stock held by individuals in the Bank of the United States. And, indeed, the power *of crippling [*459 the operations of the government, in the former case, would not be so practicable as in the latter; for it has the whole range of the property of its citizens for taxation and to provide the means for carrying on its measures. So that it would be beyond the reach of the states materially to affect the operations of the general government, by taxing foreign merchandise, should they be disposed so to do.

I am, accordingly, of opinion, that the judgment of the Court of Appeals of Maryland ought to be affirmed.

Judgment.—This cause came on, etc. On consideration whereof, this court is of opinion that there is error in the judgment rendered by the said Court of Appeals in this, that the judgment of the City Court of Baltimore, condemning the said Alexander Brown, George Brown, John A. Brown, and James Brown, to pay the penalty therein mentioned, ought not to have been so rendered against them, because the act of the legislature of the state of Maryland, entitled, "An act supplementary to the act laying duties on licenses to the retailers of dry goods, and for other purposes," on which the indictment on which the said judgment was rendered is founded, so far as it enacts, "that all importers of foreign articles, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, or other distilled spirituous liquors, etc., selling the same by wholesale, bale, or package, hogshead barrel or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars; and, in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are

prescribed by the original act to which this is a supplement," is repugnant to the constitution of the United States, and void; wherefore the said Court of Appeals, before whom the said judgment of the said City Court of Baltimore was brought by appeal, ought not to have affirmed, but should have reversed the same. Wherefore it is considered by this court, that the said judgment of the said Court of Appeals, affirming the said judgment of the City Court of 460*] Baltimore, *be reversed and annulled, and that the cause be remanded to the said Court of Appeals, with directions to reverse the same.

[Slave Trade Acts. Evidence. Pleading.]

THE UNITED STATES v. GOODING.

Upon an indictment under the slave trade act of the 20th of April, 1818, ch. 373, against the owner of the ship, testimony of the declarations of the master, being a part of the res gestæ, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner, in the conduct of the guilty enterprise, is admissible in evidence against the owner.

Upon such an indictment against the owner, charging him with fitting out the ship with intent to employ her in the illegal voyage, evidence is admissible, that he commanded, authorized, and superintended the fitment, through the instrumentality of his agents, without being personally present.

It is not essential to constitute a fitting out, under the acts of Congress, that every equipment necessary for a slave voyage, or any equipment peculiarly adapted to such a voyage, should be taken on board; it is sufficient if the vessel is actually fitted out with intent to be employed in the illegal voyage.

In such an indictment, it is not necessary to specify the particulars of the fitting out; it is sufficient to allege the offense in the words of the statute.

Nor is it necessary that there should be any principal offender to whom the defendant might be aiding and abetting. These terms in the statute do not refer to the relation of principal and accessory in cases of felony; both the actor, and he who aids and abets the act, are considered as principals.

It is necessary that the indictment should aver, that the vessel was built, fitted out, etc., or caused to sail, or be sent away, within the jurisdiction of the United States.

An averment that the ship was fitted out, etc., "with intent that the said vessel should be employed" in the slave trade, is fatally defective, the words of the statute being, "with intent to employ" the vessel in the slave trade, and exclusively referring to the intent of the party causing the act.

461*] *Objections to the form and sufficiency of the indictment may, in the discretion of the court, be discussed, and decided during the trial before the jury; but generally speaking they ought regularly to be considered only upon a motion to quash the indictment, or in arrest of judgment, or on demurrer.

In criminal proceedings, the onus probandi rests upon the prosecutor, unless a different provision is expressly made by statute.

THIS was a prosecution in the Circuit Court of Maryland, against the defendant, Gooding, under the slave trade act of the 20th of April, 1818, ch. 373. The indictment alleged, (1) that the said Gooding, being a citizen of the United States, after the passing of the act of the Congress of the United States, entitled, "An act in addition to an act to prohibit the introduction of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord 1808, and to repeal certain parts of the same," that is to say, after the 20th of April, 1818, to wit, on the 30th day of September, in the year 1824, at the district of Maryland, did fit out for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States, and within the jurisdiction of this court, a certain vessel called the General Winder, with intent to employ the said vessel, the General Winder, in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to another place, to wit, to the Island of Cuba, in the West Indies, to be sold as slaves, contrary to the true intent and meaning of the act of Congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

2. That the said Gooding, a citizen of the said United States, and residing therein, to wit, at the district aforesaid, after the passing of the act of Congress aforesaid, to wit, on the day and year last aforesaid, within the jurisdiction of this court, at the district aforesaid, did, for himself, as owner, send away from the port of Baltimore, within the jurisdiction of the United States, a certain other vessel, called the General Winder, with intent to employ the said vessel, the General Winder, in procuring negroes from a foreign country, *to wit, from the continent of Africa, [*462 to be transported to another place, to wit, to the Island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of Congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the United States.

3. That the said Gooding, a citizen of the said United States, and residing therein, after the passing of the act of Congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did aid in fitting out, for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, a certain other vessel, called the General Winder, with intent that the said vessel, The General Winder should be employed in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to another place, to wit, to the Island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of Congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

4. That the said Gooding, a citizen of the said United States, and residing therein, after the passing of the act of Congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did abet the taking on board, from one of the coasts of Africa, divers negroes, to

NOTE.—As to slave trade, see note ante, 268.

wit, 290, not being inhabitants, nor held to service by the laws of either of the states or territories of the United States, of a certain other vessel, called the General Winder, for the purpose of selling such negroes as slaves, contrary to the true intent and meaning of the act of Congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

5. That the said Gooding, a citizen of the United States, and residing therein after the passing of the act of Congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of 463*] this court, *did, for himself, as owner, cause to sail from the port of Baltimore, within the jurisdiction of the United States, a certain other vessel, called the General Winder, with intent that the said vessel, the General Winder, should be employed in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to another place, to wit, to the Island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of Congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

6. That the said Gooding, a citizen of the United States, and residing therein, after the passing of the act of Congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did, for himself, as owner, cause to be sent away from the port of Baltimore, within the jurisdiction of the United States, a certain other vessel, called the General Winder, with intent that the said vessel, the General Winder, should be employed in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to a certain other place, to wit, to the Island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of Congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

7. That the said Gooding, a citizen of the United States, and residing therein, after the passing of the act of Congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did, for himself as owner, or for other persons, as factor, fit out, equip, load, or otherwise prepare, a certain other ship or vessel called the General Winder, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, or did cause the same ship or vessel, the General Winder, to be so fitted out, equipped, loaded, or otherwise prepared, with intent that the said ship or vessel, the General Winder, should be employed in procuring negroes, mulattoes, or persons of color, from a foreign kingdom, place or country, to wit, from the continent of Africa, to be transported to another port or place, to 464*] wit, to *the Island of Cuba, in the West Indies, to be there sold, or otherwise disposed of as slaves, or held to labor or service, contrary to the true intent and meaning of the act of Congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government and dignity of the said United States.

At the trial in the Circuit Court, the United States offered evidence that the defendant purchased of one M'Elderry the vessel called the General Winder, in the indictment mentioned, and that said vessel was built in the port of Baltimore, also in the said indictment mentioned. They further offered in evidence, that at the time said purchase was made, the said vessel was not completely finished, and that the same was finished under the superintendence of a certain Captain John Hill, who was appointed by the defendant master of said vessel on her then intended voyage. They also offered in evidence, that the defendant was, at the time when the offense laid in the indictment is charged to have been committed, and at the time of his purchase of the said vessel, and ever since has been a citizen of the United States, and has constantly, from the time of the purchase of the said vessel till the present period, been an actual resident of the said port of Baltimore.

They further offered evidence, that after the said purchase, and after the appointment of the said Captain Hill as master as aforesaid, the said Hill ordered various fitments for the said vessel at the said port of Baltimore, which said fitments were furnished for said vessel, and afterwards, on the order of said Hill, were paid for by the defendant. They also offered in evidence, that some of these fitments were peculiarly adapted for the slave trade, and are never put on board any other vessels than those intended for such trade; a part of such fitments so ordered by Captain Hill and paid for by the defendant, to wit, three dozen of brooms, eighteen scrapers, and two trumpets, were actually put on board the General Winder in the port of Baltimore, the residue of the equipments on board the General Winder at the time of her departure being such as are usual on board vessels carrying on trade between said port and the West Indies. And the rest of such fitments, peculiar to the slave trade as aforesaid, *were shipped at the said port of Balti- [*465 more, on board another vessel called the Pocahontas, chartered by the defendant. That the said vessel called the General Winder, sailed from the port of Baltimore, fitted as aforesaid, and with the said Hill as master, on or about the twenty-first day of August, eighteen hundred and twenty-four, having cleared for the island of St. Thomas in the West Indies. That the other vessel called the Pocahontas also sailed for St. Thomas from the port of Baltimore, with the part of the said fitments put on board her as before mentioned, some time in the month of September following. They also gave evidence that both the said vessels, the General Winder and the Pocahontas, afterwards arrived at St. Thomas, and that at that island the said peculiar fitments shipped as aforesaid in the Pocahontas, were there transhipped from said vessel to the General Winder, the said Hill still being the master of the said last-mentioned vessel. They also further offered in evidence, that the defendant, about six or seven months after the sailing of the General Winder from the said port of Baltimore, declared in the presence of a competent witness, that the

General Winder had made him a good voyage, having arrived with a cargo of slaves, the witness thought he said 290, and that he also declared in the presence of the same witness at another time, that he, the defendant, was the sole owner of the said vessel, called the General Winder. They also offered in evidence by another witness, that the defendant had at another time declared in the presence of this other witness, that the said witness, who was a creditor of the defendant, should be paid one-half his debt on the arrival of the General Winder at Trinidad de Cuba. The United States, further to support the said indictment, offered to give in evidence to the jury, by a certain Captain Peter L. Coit, that he, Captain Coit, was at St. Thomas while the General Winder was at that island, as before stated, in September, 1824, and that he was frequently on board the said vessel at that time at St. Thomas; that the said Captain Hill, the said master of the General Winder, then and there proposed to the said witness, Captain Coit, to engage on board the General Winder, as mate for the voyage [*466] *then in progress, and described the same to be a voyage to the coast of Africa for slaves, and thence back to Trinidad de Cuba. That he offered to the said witness seventy dollars per month, and five dollars per head for every prime slave which should be brought to Cuba. That on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, "Uncle John," meaning (as witness understood), John Gooding, the defendant.

The defendant's counsel objected to the admissibility of this evidence, and the judges divided in opinion upon its admissibility. They also moved the court for its opinion upon the following points:

1. That on the charges contained in the 1st, 2d, 3d. 5th and 6th counts in the indictment, it is incumbent on the United States to prove that the vessel, named or mentioned in the indictment, was fitted out, sent away, caused to sail, or caused to be sent away, with intent to transport negroes from the coast of Africa to the Island of Cuba.

2. That evidence, that the defendant caused the vessel in question to be fitted out by Captain John Hill, or anyone else, will not support the first count in the indictment, in which he is charged with fitting her out himself.

3. That the first count charges a fitting out in the port of Baltimore, which, according to the true legal interpretation of the words in an indictment, means a complete equipment; and that evidence of a partial preparation here, and a further equipment at St. Thomas, will not support the charge contained in this count.

4. That the defendant cannot be convicted on the first count, because no offense is legally charged in the said count, it being necessary to specify the particular equipments in the indictment, in order that the defendant may have notice of the particular charge against him.

5. That the defendant cannot be convicted upon the third and fourth counts, because these counts do not charge any offense to have been committed by any principal, to whom the defendant was or could be aiding or abetting; also, that he cannot be convicted upon the fourth count, unless he was actually or constructively present when the negroes were taken *on board on the coast of Africa; and [*467] if the defendant was in Baltimore at the time the said negroes were taken on board on the coast of Africa, he could not aid or abet within the meaning of the fourth section of the act of Congress of 20th of April, 1818, upon which he was indicted.

6. That the defendant cannot be convicted on the second, fifth and sixth counts in the indictment, because no legal offense is charged in either of these counts, the said counts not charging that the General Winder was built, fitted, equipped, loaded, or otherwise prepared, within the jurisdiction of the United States; and that the said fifth and sixth counts are also defective in charging the defendant with intent that the vessel should be employed in the slave trade, instead of charging him with intent to employ her.

7. That the defendant cannot be convicted on the third, fourth, fifth and sixth counts, unless there be a previous conviction of the principal in the offense, in the said counts mentioned.

The opinions of the judges being divided upon these points, and also upon the question of allowing objections to the form and sufficiency of the indictment to be discussed at the trial before the jury, the questions were certified to this court for final determination.

The cause was argued by the Attorney-General and Mr. Coxe for the United States, and by Mr. Taney and Mr. Mitchell for the defendant.

Mr. Justice Story delivered the opinion of the court:

This is the case of an indictment against Gooding for being engaged in the slave trade, contrary to the prohibitions of the act of Congress of the 20th of April, 1818. It comes before us upon a certificate of divison of opinions in the Circuit Court of the district of Maryland, upon certain points raised at the trial. We take this opportunity of expressing our anxiety, least, by too great indulgence to the wishes of counsel, questions of this sort should be frequently brought before this court, and thus, in effect, an appeal in *crim- [*468] inal cases become an ordinary proceeding, to the manifest obstruction of public justice, and against the plain intendment of the acts of Congress. Cases of real doubt and difficulty, or of extensive consequence as to principle and application, and furnishing matter for very grave deliberation, are those alone which can be reasonably presumed to have been within the purview of the legislature in allowing an appeal to this court upon certificates of division In this very case, some of the questions certified may have been argued and decided in the court below upon the motion to quash the indictment; and there are others upon which it is understood that the Circuit Court had no opportunity of passing a deliberate judgment.

The first question that arises is upon the division of opinions whether, under the circumstances of the case, the testimony of Captain Coit to the facts stated in the record was admissible. That testimony was to the following effect: That he, Captain Coit, was at St. Thomas while the General Winder was at that

island in September, 1824, and was frequently on board the vessel at that time; that Captain Hill, the master of the vessel, then and there proposed to the witness to engage on board the General Winder as mate for the voyage then in progress, and described the same to be a voyage to the coast of Africa, for slaves, and thence back to Trinidad de Cuba; that he offered to the witness seventy dollars per month, and five dollars per head for every prime slave which should be brought to Cuba; that on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, "Uncle John," meaning (as the witness understood) John Gooding, the defendant.

It is to be observed, that, as preliminary to the admission of this testimony, evidence had been offered to prove that Gooding was owner of the vessel, that he lived at Baltimore, where she was fitted out, and that he appointed Hill master, and gave him authority to make the fitments for the voyage, and paid the bills therefor; that certain equipments were put on board peculiarly adapted for the slave trade; and that Gooding had made declarations that the vessel had been engaged in the slave trade, 469*] and had made him a good *voyage. The foundation of the authority of the master, the nature of the fitments, and the object and accomplishment of the voyage, being thus laid, the testimony of Captain Coit was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us. The argument is, that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel are not evidence to charge the owner with an offense; and that the doctrine of the binding effect of such declarations by known agents, is, and ought to be, confined to civil cases. We cannot yield to the force of the argument. In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must, indeed, be shown, that the agent has the authority, and that the act is within its scope; but these being conceded, or proved, either by the course of business, or by express authorization, the same conclusion arises, in point of law, in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants, or idiots, employed to administer poison. The proof of the command, or procurement, may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency. So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other in furtherance of the common object. Upon the facts of the present case, the master was just as much a guilty principal as the owner, and just as much within the purview of the act by the illegal fitment.

The evidence here offered was not the mere declarations *of the master upon other [*470 occasions totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise. He had an implied authority to hire a crew, and do other acts necessary for the voyage. The testimony went to establish that he endeavored to engage Captain Coit to go as mate for the voyage then in progress, and his declarations were all made with reference to that object, and as persuasives to the undertaking. They were, therefore, in the strictest sense, a part of the res gestæ, the necessary explanations attending the attempt to hire. If he had hired a mate, the terms of the hiring, though verbal, would have been part of the act, and the nature of the voyage, as explained at the time, a necessary ingredient. The act would have been so combined with the declaration, as to be inseparable without injustice. The same authority from the owner which allows the master to hire the crew, justifies him in making such declarations and explanations as are proper to attain the object. Those declarations and explanations are as much within the scope of the authority as the act of hiring itself. Our opinion of the admissibility of this evidence proceeds upon the ground that these were not the naked declarations of the master, unaccompanied with his acts in that capacity, but declarations coupled with proceedings for the object of the voyage, and while it was in progress. We give no opinion upon the point whether mere declarations, under other circumstances, would have been admissible. The principle which we maintain is stated with great clearness by Mr. Starkie, in his Treatise on Evidence. 2 Stark. Evid. part. 4, p. 60. "Where," says he, "the fact of agency has been proved, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal, whose mere instrument he is, and then, whatever the agent says within the scope of his authority, the principal says, and evidence may be given of such acts and declarations as if they had been actually done and made by the principal himself."[1]

*The other questions arise from the [*471 instructions or opinions prayed for by the defendant at the trial upon matters of law, upon which, also, the judges were divided in opinion.

The first instruction prayed puts the point, whether the burthen of proof of the offenses charged in the indictment did not rest upon the United States. Without question it does in all cases where a party stands charged with an offense, unless a different provision is made by some statute; for the general rule of our jurisprudence is, that the party accused need not establish his innocence; but it is for the government itself to prove his guilt before it is entitled to a verdict or conviction. This question has been abandoned at the argument here, and

1.—See also 2 Stark. Evid. part 4, p. 403, 404.

is too plain for controversy, since there is no statutable provision altering the general principle in this particular.

The second instruction is conceived in very general terms, so general, indeed, that it cannot be supported if it is to be understood in its obvious sense. It asks the court to instruct the jury that evidence that the defendant caused the vessel to be fitted out by Captain Hill, or anyone else, will not support the first count in the indictment, in which the defendant is charged with fitting her out himself. This obviously covers the case where the fitting out is by the instrumentality of any other persons, however innocent of his design, even though the defendant himself should be personally present, either really or constructively, and superintending the whole operations. To this extent it is clearly unmaintainable. But, in a more restrictive sense, it involves the question, whether evidence that the owner commanded, authorized and superintended the fitment through his agents, without his personal presence, would support this count. We are of opinion in the affirmative. The act of Congress does not require that the fitting out should be by the owner personally, without the assistance or agency of others. The act itself is of a nature which forbids such a supposition. The fitment of a vessel is ordinarily, and, indeed, must be done through the instrumentality of others. It is not a single act, but a series of subordinate operations, requiring the co-operation of persons in various trades and arts, all conducing to the same end. It would be against the 472*] plain sense of the *legislature, to interpret its language to mean that the act which it punishes, and which must or may be done by many in the ordinary course of business, shall only be punishable when the extraordinary fact occurs of its being done by one person. If done by others under the command and direction of the owner, with his approbation and for his benefit, it is just as much in contemplation of law his own act, as if done by himself. To this extent, at least, the maxim may be safely applied, qui facit per alium, facit per se. And it cannot be material whether it be done in his absence from, or his presence in, the scene. Especially there can be no doubt that the principle ought to be applied with increased force, where the owner resides at the same port, or neighborhood, and superintends the course of the operations, even if he does not see them. Even in the highest crimes, those who are present, aiding and commanding, or abetting, are deemed principals; and, if absent, in treason and in misdemeanors, they are still deemed principals; though it may be necessary, in treason, to lay the overt acts precisely according to the fact, from considerations peculiar to that offense. This instruction ought, therefore, to have been refused.

The third instruction turns upon the point, whether the fitting out, in the sense of the act of Congress, means a complete equipment, so that a partial equipment only will extract the case from the prohibitions of the statute. This objection appears to us to proceed from a mistaken view of the facts applicable to the case. If the vessel actually sailed on her voyage from Baltimore for the purpose of employment in the slave trade, her fitment was complete for all the purposes of the act. It is by no means necessary, that every equipment for a slave voyage should have been taken on board at Baltimore; or, indeed, that any equipments exclusively applicable to such a voyage should have been on board. The presence of such equipments may furnish strong presumptive proof of the object of the voyage, but they do not constitute the offense. The statute punishes the fitting out of a vessel with intent to employ her in the slave trade, however innocent the equipment may be, when designed for a lawful voyage. It is the act combined with the intent, and not either separately, which is punishable. Whether the *fitting out be [*473 fully adequate for the purposes of a slave voyage may, as matter of presumption, be more or less conclusive; but if the intent of the fitment be to carry on a slave voyage, and the vessel depart on the voyage, her fitting out is complete, so far as the parties deem it necessary for their object, and the statute reaches the case.

But we are also of opinion, that any preparations for a slave voyage, which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, and before the departure of the vessel from port, do yet constitute a fitting out within the purview of the statute. This was held by this court upon full consideration in the cases of The Emily and Caroline, 9 Wheat. Rep. 381, and The Plattsburg, 10 Wheat. Rep. 133. Those cases, indeed, arose upon the construction of the slave trade acts of 1794, 1800 and 1807; but the language of those acts is almost literally transcribed into the statute of 1818, and the construction adopted therein must govern the present case. In either view, therefore, our answer to the third prayer is, that a complete equipment is not necessary to be proved, but any partial preparation, which demonstrates or accompanies the illegal intent, will bring the case within the statute, and support the charge in the first count of the indictment.

The fourth instruction respects the sufficiency of the averments of the first count; and it is contended that there ought to have been a specification of the particulars of the fitting out, and that it is not sufficient to allege the act itself without them. The indictment, in this respect, follows the language of the statute, and is as certain as that is. We cannot perceive any good reason for holding the government to any greater certainty in the averments of the indictment. The fitting out of a vessel may, and must, consist of a variety of minute acts and preparations, almost infinite in their detail, and the enumeration would answer no valuable purpose to the defendant to assist him in his defense, and subserve no public policy. The fitting out of a vessel is a sort of business which is as clear and definite as any other; and we might just as well in an indictment upon the act for building a ship with the illegal intent, require that the government *should particularize the acts of build- [*474 ing through their whole details, as those of equipment. The building of a ship is not an act more certain in its nature than the fitting out of a ship. The particular preparations are matters of evidence, and not of averment. Every man may well be presumed to know what are the fitments of a vessel for a voyage, with-

out more particularity. The objection proceeds upon the supposition that ordinary equipments only, though combined with the illegal intent, are not within the act; and that extraordinary equipments only for such a voyage are provided for. This has been already shown to be an incorrect exposition of the statute. It imputes no guilt to any particulars of the equipment, but to the act combined with the illegal intent.

In general, it may be said that it is sufficient certainty in an indictment to allege the offense in the very terms of the statute. We say in general, for there are doubtless cases where more particularity is required, either from the obvoius intention of the legislature, or from the application of known principles of law. At the common law, in certain descriptions of offenses, and especially of capital offenses, great nicety and particularity are often necessary. The rules which regulate this branch of pleading were sometimes founded in considerations which no longer exist either in our own or in English jurisprudence; but a rule, being once established, it still prevails, although if the case were new, it might not now be incorporated into the law. So, again, in certain classes of statutes, the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. Such are the cases of indictments for false pretenses, and sending threatening letters, where the pretenses and the letters are required to be set forth from the close analogy to indictments for perjury and forgery. Courts of law have thought such certainty not unreasonable or inconvenient, and calculated to put the plea of autre fois acquit, or convict, as well as of general defense at the trial, fairly within the power of the prisoner. But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to 475*] be decided *very much upon its own peculiar circumstances. Thus, in cases of conspiracy, it has never been held necessary to set forth the overt acts or means, though these might materially assist the prisoner's defense. So, in cases of solicitation to commit crimes, it has been held sufficient to state the act of solicitation, without any averment of the special means. And in endeavors to commit a revolt, which is by statute in England made a capital offense, it has always been deemed sufficient to allege the offense in the words of the statute, without setting forth any particulars of the manner or the means. These cases approach very near to the present; and if any, by way of precedent, ought to govern it, they well may govern it. The case of treason stands upon a peculiar ground; there the overt acts must, by statute, be specially laid in the indictment, and must be proved as laid. The very act, and mode of the act, must, therefore, be laid as it is intended to be proved. If the party be only constructively a principal, as an absent and distant coadjutor or leader, it may be necessary to aver the fact accordingly. There is great good sense in the rule which has been laid down, that where the offense is made up of a number of minute acts, which cannot be enumerated upon the record without great prolixity and inconvenience, and the danger of variance, they ought to be dispensed with. The present case is a fit illustration of the rule; the fitting out is a compound of various minute acts, almost incapable of exact specification.

The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor, and the doctrine, therefore, cannot be applied to it; for in cases of misdemeanors, all those who are concerned in aiding and abetting, as well as in perpetrating the act, are principals. Under such circumstances there is no room for the question of actual or constructive presence or absence; for whether present or absent, all are principals. They may be indicted and punished accordingly. Nor is the trial or conviction of an actor indispensable to furnish a right to try the person who aids or abets the act; each in the eye of the law is deemed guilty as a principal. In the *present indict- [*476 ment, the offense is in the third and fourth counts laid by aiding and abetting, in the very terms of the act of Congress. If the crime, therefore, could be supposed to be of an accessorial nature, it is truly alleged, according to the fact, and not merely according to the intendment of law. We do not consider that the terms "aid" and "abet," used in this statute, are used as technical phrases belonging to the common law, because the offense is not made a felony, and, therefore, the words require no such interpretation. The statute punishes them as substantive offenses, and not as accessorial, and the words are, therefore, to be understood as in the common parlance, and import assistance, co-operation, and encouragement. These remarks furnish an answer to the seventh instruction, which must share the fate of the fifth.

The sixth instruction is that which has presented the most difficulty. It embraces two propositions; the first is, that the second, fifth, and sixth counts in the indictment, ought to have contained an averment that the vessel was built, fitted out, etc., within the jurisdiction of the United States; the second is, that the fifth and sixth counts do not allege the offense in the words of the statute, those words being, "with intent to employ the vessel" in the slave trade, etc., whereas each of these counts avers, "with intent that the said vessel should be employed" in the slave trade, which imports a very different state of facts. In order to understand these exceptions, it is necessary to attend carefully to the very words of the act of Congress. The second section enacts, "that no citizen or citizens, etc., shall, after the passing of this act as aforesaid, for himself, themselves, or any other person or persons whatsoever, either as master, factor, or owner, build, fit, equip, load, or otherwise prepare, any ship or vessel, in any port or place within the jurisdiction of the United States, nor cause any such ship or vessel to sail from any port or place whatsoever within the jurisdiction of the same, for the purpose of procuring any negroes, etc., to be transported, etc., as slaves." The third section enacts, "that every person or persons so building, fitting out, equipping, loading, or otherwise preparing, or sending away, or causing any of the acts aforesaid to be done, with intent to employ such *ship or vessel in such trade or business,[*477

after the passing of this act, contrary to the true intent and meaning thereof, or who shall in any wise be aiding or abetting therein, shall severally, on conviction thereof by due course of law, forfeit," etc., etc. The first point turns upon the interpretation of the words "such ship or vessel," in each of these sections. To what do they refer? The only ship or vessel spoken of in either section, is such as have been built, fitted out, etc., in some port or place of the United States. "Such ship or vessel" must, therefore, refer to a ship or vessel so built, fitted out, etc., as its antecedent, or the relative "such" can have no meaning at all. The word is sensible in the place where it occurs, and it is the duty of the court, when it can, to give effect to every word in every enactment, if it can be done without violating the obvious intention of the legislature. This is a penal act, and is to be construed strictly, that is, with no intendment or extension beyond the import of the words used. There is no certainty that the legislature meant to prohibit the sailing of any vessel on a slave voyage, which had not been built, fitted out, etc., within the jurisdiction of the United States. If a foreign vessel, designed for the slave trade, and fully fitted out for that purpose, were, by accident or design, to anchor in our ports, it would not be reasonable to suppose that the legislature could have intended the sailing of such a vessel from our ports to be an offense within the purview of our laws. Yet, if the construction contended for on behalf of the United States be adopted, that would be the result.

But it is sufficient to say, that the word "such" has an appropriate sense, and can be reasonably referred only to the ship or vessel previously spoken of; and such ship or vessel is not merely one built, fitted out, etc., but one built, fitted out, etc., in a port or place within the United States. The whole description must be taken together. If we were to adopt any other construction, we should read the words as if "such" were struck out, and the clause stood, "any ship or vessel." Such a course would not be defensible in construing a penal statute. It is remarkable that in the slave trade acts of 1794, 2 U. S. L. 383, and of 478*] 1807 *4 U. S. L. 94, the word "such" is omitted and seems to have been introduced into the act of 1818, ex industria. We must take the law as we find it, and, upon examination of its language, we are of opinion, that this exception is well taken. The cases of the United States v. Lacoste, 2 Mason's Rep. 129, and The United States v. Smith, 2 Mason's Rep. 143, have been cited at the bar as containing a different opinion expressed in the Circuit Court in Massachusetts. I owe it in candor to acknowledge, that the fact is so; but I have no recollection that the point was made at the argument, and I am confident that it never was insisted upon in the view which has been presented by the argument in this court. My own error, however, can furnish no ground for its being adopted by this court, in whose name I speak on the present occasion.

The other point is equally fatal. There is a clear distinction between causing a vessel to sail, or to be sent away, with intent to employ her in the slave trade, and with intent that she should be employed in that trade. The former applies to an intent of the party causing the act, the latter to the employment of the vessel, whether by himself or a stranger. The evidence may fully support these counts, and yet may not constitute an offense within the act of Congress; for the employment by a mere stranger would not justify the conviction of the party charged with causing her to sail, or to be sent away, with intent to employ her in the slave trade, as owner. There is no reason, in criminal cases, why the court should help any such defective allegations. The words of the statute should be pursued.

It remains only to consider the point, whether these objections to the sufficiency of the indictment could be properly taken at this stage of the proceedings. Undoubtedly, according to the regular course of practice, objections to the form and sufficiency of an indictment ought to be discussed upon a motion to quash the indictment, which may be granted or refused in the discretion of the court, or upon demurrer to the indictment, or upon a motion in arrest of judgment, which are matters of right. The defendant has no right to insist that such objections should be discussed or decided during the trial of the facts by the jury. It would *be very inconvenient and embarrassing [*479 to allow a discussion of such topics during the progress of the cause before the jury, and introduce much confusion into the administration of public justice. But, we think, it is not wholly incompetent for the court to entertain such questions during the trial, in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature. The Circuit Court, in the present case, did allow the introduction and discussion of these questions during the trial, and were divided upon the propriety of the practice. We can only certify, that the court possessed the authority, but that it ought not to be exercised except on very urgent occasions.

A certificate will be sent to the Circuit Court of the District of Maryland, according to this opinion.

Certificate.—This cause came on, etc. On consideration whereof, it is ordered and adjudged, that the following opinions be certified as the opinions of this court on points of division to the Circuit Court aforesaid.

First. That the testimony of Peter L. Coit, set forth in the record, was under the circumstances of the case, admissible as competent evidence against the defendant, Gooding.

Second. That the opinions prayed for by the counsel for the defendant, Gooding, in the first and sixth prayers, set forth in the record, were correct in law and ought to have been given by the court.

Third. That the opinions prayed for in all the other prayers of the defendant, were incorrect in law, and ought to have been refused.

Fourth. That the objections taken to the form and sufficiency of the indictment by the defendant's counsel, were not matters of right which the defendant might insist upon, and discuss, and require to be decided during the trial of the issue by the jury; and that the same should, according to the regular course of

practice, have been discussed on a motion to quash the indictment, or on demurrer, or on motion in arrest of judgment; but that the 480*] court had, nevertheless, *competent authority, in the exercise of a sound discretion, to permit such objections to be discussed and decided during the trial.

[Practice.]

THE UNITED STATES
v.
MARCHANT & COLSON.

Where two or more persons are jointly charged in the same indictment with a capital offense, they have not a right, by law, to be tried separately, without the consent of the prosecutor, but such separate trial is a matter to be allowed in the discretion of the court.

THE opinion of the court in this case was delivered by Mr. Justice Story:

The question, which comes before us upon a certificate of a division of the opinion of the judges of the Circuit Court of Massachusetts, is this, whether two or more persons, jointly charged in the same indictment with a capital offense, have a right, by the laws of the country, to be tried severally, separately, and apart, the counsel for the United States objecting thereto, or whether it is a matter to be allowed in the discretion of the court.

We have considered the question, and are of opinion that it is a matter of discretion in the court, and not of right in the parties. And it has become my duty briefly to expound some of the reasons which urge us to that conclusion.

The subject is not provided for by any act of Congress; and, therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the courts of the United States are bound to recognize and enforce. The crimes act of 1790, ch. 9, provides, in the 29th section, for the right of peremptory challenge in capital cases; and this right, to the extent of the statute, must, 481*] *in all cases, be allowed the prisoners, whether they are tried jointly or separately. Upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one, is withdrawn from the panel as to all the prisoners on the trial, and thus, in effect, the prisoners in such a case possess the power of peremptory challenge to the aggregate of the numbers, to which they are respectively entitled. This is the rule clearly laid by Lord Coke, Lord Hale, and Sergeant Hawkins, and, indeed, by all the elementary writers.[1]

One consequence of this, in ancient times, was, that embarrassments often arose at trials at the assizes, on account of a defect of sufficient jurors. The statute of Westminster 2, ch. 38, ordained, "that in one assize no more shall be returned than twenty-four." The common practice under this statute used to be, for the sheriff to return forty-eight jurors, although the precept named but twenty-four. It was, indeed, held, at an early period, that the statute of Westminster did not apply to criminal cases; but, notwithstanding this, the usual practice prevailed, unless the court directed a larger number to be returned. And it was not until the reign of George II. that a larger number was required by law to be returned at the assizes. The history of this branch of the subject is very clearly stated in 3 Bac. Abr. tit. Juries, b. 6, and in Kelyng's Rep. 16.[2] It is obvious, that on joint panels, returned for joint trials, at the assizes, a defect of jurors might, from this limitation, often take place. And it became a question, in very early times, whether, under such circumstances, the court had power, against the will of the prisoners, to sever the panel, and to try them severally, if they insisted upon their right of several challenge. It was decided, upon full consideration, that the court had this power. To this effect are the cases in Plowden, 100; in Dyer, 152, b., and in Kelyng's Rep. 9; and the doctrine has received the sanction of Lord Hale, and other writers of the highest authority.

*Whether, then, prisoners, who are [*482 jointly indicted, can, against their wishes, be tried separately, does not admit of a doubt. It remains to consider, whether they can insist upon a several trial.

The sole ground upon which this claim can rest must be, if maintainable at all, that they have a right to select their jury out of the whole panel, and that as upon a joint trial, one may desire to retain a juror who is challenged by another, and, if challenged by one, he must be withdrawn as to all; this right of selection is virtually impaired. But it does not appear to us that this reasoning can, upon the principles of the common law, be supported. The right of peremptory challenge is not of itself a right to select, but a right to reject jurors. It excludes from the panel those whom the prisoner objects to, until he has exhausted his challenges, and leaves the residue to be drawn for his trial according to the established order or usage of the court. The elementary writers nowhere assert a right of this nature in the prisoner, but uniformly put the allowance of peremptory challenges upon distinct grounds. Mr. Justice Blackstone, in his commentaries, 4 Bl. Comm. 353, puts it upon the ground, that the party may not be tried by persons against whom he has conceived a prejudice, or who, if he has unsuccessfully challenged them for cause, may, on that account, conceive a prejudice against the prisoner. The right, therefore, of challenge, does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him. The law presumes, that every juror sworn in the case is indifferent and above legal exception, for otherwise he may be challenged for cause. What jurors, in particular, shall try the cause, depends upon the order in which they are called; and the result is a mere incident following

1.—Hawk. P. C., b. 2, ch. 41, s. 9; 2 Hale's Pl. C. 268; Co. Litt. 156; Beauchamp's case, 9 Edw. IV., folio 27; pl. 40; Plowd. Rep. 100; Kelyng's Rep. 9.

2.—See also 2 Hale's P. C. 263.

the challenges, and not the absolute selection of the prisoner, resulting from his power of challenge.

This view of the general principle of the common law is very much confirmed by other considerations. It is laid down by Hawkins Pl. Cr. b. 2, ch. 41, s. 8, that where several persons are arraigned on the same indictment, and severally plead not guilty, it is in the election of the prosecutor, either to take out joint venires against them all, or several against 483*] *each of them. This plainly supposes that it is in the election of the prosecutor whether there should be a joint or separate trial. If there had been any known right in the prisoner to control this election, it seems incredible that so accurate and learned an author should not have stated it, when the occasion indispensably required him to take notice of a qualification so important to his text. His silence is, under such circumstances, very significant.

But a still more direct conclusion against the right may be drawn from the admitted right of the crown to challenge in criminal cases, and the practice under that right. We do not say that the same right belongs to any of the states in the Union; for there may be a diversity in this respect as to the local jurisprudence or practice. The inquiry here is, not as to what is the state prerogative, but, simply, what is the common law doctrine as to the point under consideration. Until the statute of 33 Edw. I., the crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the crown to those for cause shown. But the practice since this statute has uniformly been, and it is clearly settled, not to compel the crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says, Pl. Cr. b. 2, ch. 43, s. 2, s. 3, "if the king challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge, till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge, touts paravaile; yet it hath been adjudged, that the defendant shall be first put to show all his causes of challenge before the king need to show any." And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times.[1]

484*] *This acknowledged right of peremptory challenge existing in the crown before the statute of 33 Edw. I., and the uniform practice which has prevailed since that statute, to allow a qualified and conditional exercise of the same right, if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner; and that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial, he could at any time be defeated by the crown of such choice, by its own admitted prerogative.

The circumstances already alluded to, of the right of each prisoner on a joint trial to exercise his full right of peremptory challenge, and the small number of jurors usually returned on the panel at the assizes, accounts in a very satisfactory manner for the language used in some of the cases, as to the necessity of directing separate trials where the prisoners refused to join in their challenges. The plain reason was, that otherwise there could be no trial at all, for defect of jurors, at the same assizes; and, therefore, the court, in furtherance of public justice, were accustomed, without the consent of the prisoners, to direct a separate trial. In this way the reason of the practice is understood by Lord Hale, 2 Hale P. C. ch. 34, p. 263, and by Hawkins, Hawk. P. C. b. 2, ch. 41, s. 9, and by other more recent writers on common law.[2] In this manner the language of Lord Holt in Charnock's case, 12 Howell's State Trials, 1454; S. C. 3 Salk. 81, is to be interpreted; for it is manifest, that he could not intend that there could not be a joint trial where the prisoners challenged separately, for no rule was better settled in his time than that they could. Indeed, in Rex v. Grahme, 12 Howell's State Trals, 646, 673, the same learned judge uses similar language in a sense which admits of no other interpretation; and this was the answer given to it when cited in a later case for the like purpose.

*That case is Rex v. Noble and others, [*485 in 1713, before Lord Chief Justice Parker, and reported in the State Trials, 9 Hargr. St. Tr. 1; S. C. 15 Howell's St. Tr. 731. In that case, which was an indictment for murder, Noble moved the court for a separate trial, and the motion was denied. He was convicted, and when brought up for judgment, he moved in arrest of judgment this very matter, that there was a mistrial, because (to use his own words) "we were severed in our challenges, and yet were tried together by the same jury," and he relied upon the language of Lord Holt, in Charnock's case, as in point. The court overruled the objection, and stated, that Lord Holt's language referred solely to the public inconvenience, on account of a probable defect of jurors, and not to any matter of right in the prisoners. Sentence was accordingly passed upon the prisoner, and he was executed. There is a curious and learned commentary appended in a note to this trial, which was printed before the execution of Noble, in which an attempt was made to question the correctness of the decision. But it is therein admitted, that Noble's counsel declined to argue the point, though requested; from which we cannot but infer, that they thought the objection unfounded. The decision itself has never since been questioned, or denied. We have, therefore, in the present case, not merely the absence of any authority

1.—Hale's P. C. ch. 36, p. 271; 3 Bac. Abr. Jury E. 10; Rex v. Conigsmarke, 9 Howell's State Trials, 1; Rex v. Stapleton, 8 Howell's State Trials, 502; Rex v. Borosky, 9 Howell's State Trials, 1; Rex v. Gray, Id. 127, S. C., T. Raym. 473; Rex v. Grahme, 12 Howell's State Trials, 646; Rex v. Cook, 13 Howell's State Trials, 311; Rex v. Horne Tooke, 25 Howell's State Trials, 1, 24; 1 Chitty's Crim. Law, 537; Rex. v. Campion, 1 Howell's State Trials, 1050.

2.—1 Chitty's Crim. Law, 535; See Starkie's Crim. Pl. 35.

for, seize, and secure, any such goods," etc., and "all such goods, etc., on which the duties shall not have been paid, or secured to be paid, shall be forfeited."

491*] *The argument upon this section is, that after the goods are stored, according to the provisions of the 62d section, the fraudulent removal of them from the place in which they are so deposited, without a permit, and without paying or securing the duties, in the mode prescribed by the act, amounts to a concealment of them, in whatever place, and under whatever circumstances, they may be found; that the real ground of forfeiture of goods so removed, is the non-payment of the duties, or the not securing of the same according to the provisions of this section; and the concealment of them is merely a circumstance to warrant the custom-house office in searching for, seizing, and bringing them to adjudication.

The court cannot yield its assent to either of these propositions. The act provides for, and defines, by express enactments, the various acts which should draw after them the penalty of forfeiture of the goods imported. Thus, if they be unladen at any other time than in open day, unless by a special license, or at any other time, without a permit by the proper officer, they are subject to forfeiture under the fiftieth section; and the like consequence follows as to distilled spirts, wines or teas, which are landed without the special permit provided for by the 37th section, or otherwise than under the inspection of the surveyor or other officer acting as inspector of the revenue, contrary to the direction of the 38th section. These are all acts of illegal importation, and, on that ground, the goods are made liable to forfeiture. But after they are regularly entered, landed, bonded and stored, there is no part of this act which exposes them to this penalty for being illegally withdrawn from the place of their deposit, without a permit from the proper officer, or without the duties thereon being first paid or secured to be paid. Nor would it seem, but for the extraordinary circumstances which have attended these and the other teas mentioned in these proceedings, to have been necessary to devise other guards than those which the 62d section of the act has provided for securing to the United States the payment of the duties. The key of one of the locks to be placed on the store in which the teas are deposited, is directed to be

492*] retained by the inspector, who is *forbidden to deliver out any part of them without a written permit from the collector and naval officer, to the obtaining of which, it is necessary that the duties should be first paid on the parcel which the owner desires to remove, or should be secured to be paid by a bond with surety or sureties to the satisfaction of the collector, on the penalty and on the terms prescribed in this section. The security thus provided by the deposit might be lost by the destruction of the articles themselves by fire, or might be jeoparded by the fraudulent, the felonious, or the violent removal of them from the place of their supposed safe custody. But that they should be so removed with the fraudulent connivance, or in consequence of the culpable carelessness of the inspector, or of any other officer of the customs, was a risk which probably did not enter into the contemplation of the legislature. Be this as it may, it is perfectly clear, that no provision is anywhere made to meet the case of goods so illegally removed, whether by subjecting them to forfeiture, or by pointing out any other remedy to guard the government against the loss to which those acts might expose it. A remedy, although it may, under certain circumstances, be an inadequate one, is nevertheless, provided by the general principles of law. The lien of the government for the duties, which attached upon the articles from the moment of their importation, was not, and could not be, discharged by the unauthorized and illegal removal of the articles from the custody of the inspector, or other custom-house officer, having charge of them, and might have been enforced by the ordinary remedies provided by law in similar cases. Whether it could be enforced against a fair bona fide purchaser of goods, removed from the store by a permit from the proper officers, without notice that the duties were not paid or secured, is a question which does not arise in this case, and upon which no opinion, therefore, is intended to be given.

In order, then, to subject teas illegally removed from the storehouse in which they were deposited, to forfeiture, under this count in the libel, it is essential for the United States to prove, upon the trial, not only that the duties for which they were liable were unpaid, or not secured to be paid, but that they were found concealed at the time they were seized. A suspicion *of this fact, if honestly enter- [*493 tained by the person searching for, and making the seizure, would be sufficient to protect him against any claim for damages in consequence of those acts, although it should afterwards appear, on the trial, that, in point of fact, the articles were not concealed. But the owner of the goods is not put upon his trial to prove that the duties were paid or secured, until that fact is established. The expressions in the latter part of this section leave no room for doubt upon this point. They are, that "all such goods, etc., on which the duties shall not have been paid, or secured to be paid, shall be forfeited;" that is to say, the goods so concealed and seized.

The argument, that goods subject to duties are, in the view of the law, and by a fair construction of this section, concealed wherever and under whatever circumstances they may be found, is equally inadmissible. If that were the intention of the legislature, the offense would consist, not in the concealing of such goods, but in having the possession of them; and the authority to seize, applying to such a case, would, no doubt, have extended to all goods wherever found out of their place of deposit, on which the duties had not been paid, or secured to be paid. The term "concealed" used in this section, is one of plain interpretation, and obviously applies to articles intended to be secreted and withdrawn from public view on account of their being so subject to duties, or from some fraudulent motive.

But if the argument upon this part of the case were well founded, the count in the libel which we are now examining could not be maintained, since we are all of opinion, that

the duties upon these teas were secured to be paid, within the fair construction of the 62d section of the duty law. By this section, the duties upon all goods imported, and subject thereto, are to be paid, or secured to be paid, before a permit to land them can be granted. If the importer elect not to pay them, he is at liberty to secure them by bond with one or more sureties to the satisfaction of the collector, or the collector may accept his own bond without sureties; but, in the latter case, the goods themselves must be deposited with the proper custom-house officer pointed out in the section. These provisions apply, thus far, to all kinds of
494*] *goods. The difference as to the mode of securing the duties between teas imported from China or Europe, and other goods, consists in the following particulars: As to the former, the teas, where bond without sureties is given, are to be deposited, at the expense and risk of the importer, in a store to be agreed on by him and the inspector, on which the inspector is to affix two locks, the key of one to be retained by himself, and the other to be kept by the importer; and it is made the duty of the inspector to attend, at all reasonable times, for the purpose of delivering out the teas as the same may be required; but he is forbidden to deliver any part of them without a permit in writing, signed by the collector and naval officer, to be the obtaining of which, it is required, that the duties on the teas to be delivered shall be first paid, or secured to be paid, by a bond to be given with a surety or sureties, to the satisfaction of the collector, for payment of the duties at particular periods mentioned in the section. And in case the duties should not be paid at the period so stipulated in the first bond, or secured to be paid in the manner last specified, the collector is required to sell, at public auction, so much of the teas as may be necessary, and after retaining the sum which shall not have been so paid, or secured, together with the expenses of sale and safe keeping of the teas, to return the overplus, if any, to the owner thereof.

As to goods other than teas, if the importer elect, instead of paying the duties, or securing the same by giving bond with satisfactory sureties, to give his own bond without sureties, the collector is required to accept such bond, together with a deposit of so much of the goods on which the duties are payable, as in his judgment shall be sufficient security for the amount of the duties for which such bond shall have been given, together with the charge of safe keeping, and seizing the same, which goods, so deposited, are to be kept by the collector at the expense and risk of the party on whose account they were deposited, until the sum specified in the bond shall become due; and if the same be not then paid, so much of the goods deposited as may be necessary to discharge the duties and expenses, are to be sold, and the proceeds to be disposed of as in the former case.

495*] *From this recital of the most material parts of the above section, it is most apparent, that the legislature contemplated the bond of the importer, accompanied by a deposit of all the teas imported, to be kept under the lock and key of the inspector, and subject to the control of the collector and naval officer until the duties were paid, or otherwise secured, as an equivalent security, with a bond, and approved sureties, if the importer had elected to give such a bond in the first instance. By no other construction can the express terms of the section be satisfied. The importer has an option allowed him, at the time of making his entry, to secure the duties, instead of paying them. How may he secure them? The section proceeds immediately to point out the two following modes: "On the same terms and stipulations as on other goods imported;" that is to say, by bond, with sureties satisfactory to the collector, or "by his own bond in double the amount of the duties," which latter bond, accompanied by the deposit of the teas, as before mentioned, the collector is required to accept. It is perfectly obvious, that this latter security is to be accepted in lieu of, and as equivalent to the former. And we may confidently ask, is it not so? The condition of the China trade must be in a deplorable state, and must necessarily be discontinued, whenever the value of the teas imported from that country shall fall below the amount of the duties imposed upon them; and unless such a state of things could have been contemplated, what better security for payment of the duties could have been devised, consistent with the existence of the trade itself, than the uncontrolled possession of the articles subject to the duties, with the power to sell the same for their discharge in case they should not be paid when they should become due, or should not be otherwise secured to be paid? As an additional evidence that Congress considered this security as at least equivalent to bond with approved securities, this section goes on to provide, that the amount of each bond taken for the duties on any teas delivered under a permit from the store after a deposit, shall be indorsed immediately on the original bond given by the importer, specifying the amount of duty secured on the teas delivered out, by whom, and the term of payment. If, *then, the whole quantity of teas de- [*496
posited should be withdrawn in the mode prescribed by this section, either at one, or at different periods, before the expiration of the term of credit allowed, the United States would have precisely the same security that they would have had if the importer had, in the first instance, elected to give bond, with approved sureties, instead of his own bond, accompanied by a deposit of the articles themselves, subject to the duties.

In consequence of an intimation of the Attorney-General, that, in case the decision of the court should be against the United States upon what we have called the second count in the libel, he should move to amend the libel by inserting a count under the 43d section of this law, the cause was argued at the bar as if such a count now formed a part of the libel. But, if the above opinion be correct, it is manifest that such a count would not help the case, since, if the duties were secured to be paid according to the provisions of the 62d section, no forfeiture could be decreed under the 43d section. The facts agreed, present, besides an additional reason why such a decree could not properly be made under that section, since they admit, that each chest of the teas in question, at the time of seizure, was duly numbered, and had

on it all the marks which the law requires, and that the certificates required by the act to accompany each of the chests, remained in the hands of the claimants at Philadelphia. Now, we are all of opinion, that, to authorize a seizure of teas, and bringing them to adjudication. it is necessary, under the 43d section, not only that the chests should be accompanied by the proper certificates, but also that they should be unaccompanied by the marks required to be placed upon them by the 39th section. Both must concur in order to justify a seizure, and to raise such a presumption that the teas are liable to forfeiture. as to throw upon the claimant the burthen of proving that they were imported according to law, and that the duties theron were paid, or secured to be paid, in order to avoid a sentence of condemnation.

Enough has already been said to dispose of the third count in the libel, even if it had been pressed in the argument of the cause, since it 497*] is not pretended that there *is any section of the above act which subjects teas to forfeiture, on the ground of their having been clandestinely and fraudulently removed from the store in which they were deposited. by the importer or by any other person, without a permit, and without the duties thereon having been first paid or secured to be paid. It is quite unlikely that a case so extraordinary and disgraceful as that which has given rise to this controversy, was or could have been anticipated by the legislature, which enacted the law under consideration. One would have supposed, but for the instance before us, that the act had provided every guard for the safety of the public interest, which any imaginable contingency could have rendered necessary.

The only remaining objection taken to the decree of the Circuit Court is, that the payment of the duties to which these teas were subject, ought to have been made a condition of their restitution to the claimants, or that they should have been decreed to be sold towards the payment of the duties for which the original bond of Thomson was given, and which remained unpaid.

Admitting that those duties were even now due, which is not the case, we could not yield our assent to the correctness of this objection, even if the prayer of the libel had corresponded with such a decree, and even if the teas in question were liable for duties beyond those properly chargeable against the quantity seized, which is by no means conceded.

By the 9th section of the judiciary act, the district courts have exclusive original cognizance. amongst other subjects, of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade, of the United States, where the seizures are made on waters navigable from the sea by vessels of a specified burthen, within their respective districts, as well as upon the high seas; and, also, of all seizures made on land, or other waters than as aforesaid, and of all suits for penalties and forfeitures incurred under the laws of the United States. They have, also, cognizance concurrent with the state courts, of all suits at common law where 498*] the United *States sue, where the matter in dispute, exclusive of costs, amounts to the sum or value of $100.

Now, it is not pretended that this is a civil cause of admiralty and maritime jurisdiction; and it has already been shown, that there is no law of the United States, of impost or otherwise, to warrant the seizure of the teas in question, or to subject them to forfeiture. But. even if there were such a law, the only proceeding which could have been instituted under it, must have been, to forfeit the articles seized, and not to subject them to the payment of duties. If the case be not one of forfeiture, we can perceive no ground upon which the District Court could entertain a suit, by way of libel, to enforce the payment of duties. No jurisdiction is conferred upon that court in such a case, either by the above section of the judiciary act, or by any other act of Congress. There is no doubt, but that a suit at common law might be instituted in that court, as well as in the Circuit Court, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or damages for the illegal taking or detaining of the same. But the remedy which has been selected, is not one which can obtain the sanction of this court.

The decree of the Circuit Court, reversing that of the District Court, and awarding restitution to the claimants, must be affirmed.

[Devise of lands charged with the payment of debts.]

POTTER, Appellant,
v.
GARDNER et al., Respondents.

A devise: "I give and devise to my beloved son, E. W. G., two-third parts of that my ferry farm, so called," etc., "to him, the said E. W. G., and to his heirs and assigns forever, he, my said son, E. W. G. paying all my just debts out of said estate. And I do hereby order, and it is my will, that my son E. W. G. shall *pay all my just debts [*499 out of the estate herein given to him as aforesaid," creates a charge upon the estate in the hands of the devisee.

A bona fide purchaser, who pays the purchase money to a person authorized to sell, is not bound to look to its application, whether in the case of lands charged in the hands of an heir or devisee with the payment of debts, or lands devised to a trustee for the payment of debts.

But if the money be misapplied by the devisee or trustee, with the co-operation of the purchaser, he remains liable to the creditors for the sum so misapplied.

On a bill filed by an executor against a devisee of lands charged with the payment of debts, for an account of the trust fund, etc., the creditors are not indispensable parties to the suit. The fund may be brought into court, and distributed under its direction, according to the rights of those who may apply for it.

THIS cause was argued by the Attorney-General and Mr. Potter for the appellant, and by Mr. Webster and D. B. Ogden for the respondents.

NOTE.—As to legacies and debts, when chargeable on the realty, see notes ante, 303, and 7 L. ed. U. S. 273.

Effect of creation of testamentary trust for payment of debts, see note to 5 L.R.A.(N.S.) 355.

Mr. Chief Justice **Marshall** delivered the opinion of the court:

This is an appeal from a decree of the court of the United States for the first circuit in the District of Rhode Island. The case was this:

On the 7th of July, 1817, Peleg Gardner made his last will, in which, among other things, he devised as follows: "I give and devise to my beloved son Ezekiel W. Gardner two-third parts of all that my ferry farm, so called," etc., "to him the said Ezekiel W. Gardner, and to his heirs and assigns forever, he, my said son Ezekiel W. Gardner, paying all my just debts out of said estate. And I do hereby order, and it is my will, that my son Ezekiel W. Gardner shall pay all my just debts out of the estate herein given to him as aforesaid." The testator gives to his wife, the plaintiff, Hannah, a part of his real and personal estate for life, in lieu of dower, and to his daughter, the other plaintiff, other parts of his real and personal estate.

Peleg Gardner died soon after the making of his will, and his several devisees entered into the estates devised to them respectively.

On the 13th of July, 1818, the Court of Pro-
500*] bates for the *county, in pursuance of a statute made for that purpose, appointed commissioners to receive and examine the claims of the creditors, who made a report on the 10th day of July, 1820, from which it appears that the debts proved against the estate and allowed amounted to $7,593.14, exclusive of a claim of $1,000 exhibited by one Mann, which was disallowed, and for which a suit has been commenced against the executrix.

The testator had devised the remaining third part of his ferry estate to his daughter Isabel, who had sold and conveyed the same to her brother Ezekiel. After which Ezekiel agreed to sell the whole estate to the appellant, Elisha R. Potter, for the amount of $15,000.

This bill is filed by the executrix and devisees of Peleg Gardner, to subject the purchase money of the ferry estate to the payment of the testator's debts. The decree of the Circuit Court was in favor of the plaintiffs below; and from that decree Elisha R. Potter has appealed to this court.

The bill contains many charges of fraudulent combination between Ezekiel W. Gardner and Elisha R. Potter, which it would be waste of time to review in detail, because they are not sustained, and because the case rests on principles of equity, which are believed to be well settled.

The first objection made to the decree is, that the plaintiffs have no right to ask the aid of a court of equity, because they cannot assert the claims of the creditors who could have proceeded at law against the estate in the hands of Ezekiel, and may now proceed at law against the remaining estate of Peleg. That the plaintiffs can give no discharge which will extinguish the rights of the creditors, and that the creditors ought, for that reason, to have been made parties to the suit.

The bill states, and so is the fact, that the whole estate of Peleg Gardner, both real and personal, was disposed of by his will and as the ferry estate devised to Ezekiel was the

fund provided for the payment of his debts, his devisees and legatees took immediate possession of the property bequeathed to them respectively, and nothing remains in the hands of the executrix wherewith to satisfy the creditors. The *bill also states that Ezekiel [*501
W. Gardner is insolvent, or in very doubtful circumstances; that a considerable part of the purchase money has been applied to the payment of his own debts, and that the plaintiffs have cause to fear that the residue will be misapplied in the like manner, so that the whole trust fund will be wasted, and the property bequeathed to them be taken by the creditors. These allegations are not controverted, and make, we think, a very clear case for an application to a court of equity. It is true that the creditors might have been made parties defendants, but we do not think them parties who may not be dispensed with. So much of the fund as yet remains may be brought into court, and may be distributed according to the rights of those who may apply for it. We have, then, no doubt of the jurisdiction of the court.

We have as little doubt of the liability of the ferry estate while in the hands of Ezekiel, to the creditors of the testator. The words of the will create an express charge. "I give and devise to my beloved son Ezekiel W. Gardner and his heirs, forever, two-thirds of my ferry farm, he paying all my just debts out of said estate." More explicit words could not have been used. It is admitted by the counsel for the appellant, that these words would charge the estate in a country where the law did not previously charge it; but since in Rhode Island lands are liable, by law, to the debts of the testator, the will superadds nothing to this legal charge.

It may be admitted that as between the devisee and the creditor, no charge is superadded by the will; but the relation of the devisees to each other is materially affected by it. A testator cannot, by his will, withdraw from his creditors, any property which the law subjects to their claims, but he may provide a particular fund for his debts, and if the creditors resort to a different fund, those to whom the property so taken by them was given, are entitled to compensation out of the fund provided for debts. Examples of this principle abound in the books. Personal property is universally liable for debts. If the particular fund provided by the testator for that object, be of that description, and a specific thing, bequeathed to another, be taken in *execution by a [*502
creditor, it has never been doubted, that the legatee whose property has been taken, may resort to the trust fund for compensation. The principle is too well settled to be now a subject for discussion. The law of Rhode Island, then, subjecting lands to the payment of debts, can have no influence on the case before the court. The ferry estate, had it remained in the possession of the devisees, would not only have been liable to the creditors, but would have been liable to the other devisees and legatees, for such portions of their property as had been applied in payment of the debts of the testator.

What change has been made by the sale to Elisha R. Potter?

Although this question has been urged with great earnestness, and at considerable length, scarcely any real difference exists between the parties. The appellees seem to yield to the authority of those modern decisions which deny the distinction between lands charged in the hands of an heir, or devisee, with the payments of debts, and lands devised to a trustee for the payment of debts. They admit that in either case, the purchaser who pays the purchase money to the person authorized to sell, is not bound to look to its application. But they contend, that if the purchase money be misapplied with the co-operation of the purchaser, he remains liable to the creditors for the sum so misapplied. The counsel for the appellants assent to this proposition. It is scarcely necessary to say, that so much of the purchase money as remained unpaid when this suit was instituted, is liable to the creditors, and is applicable by the court to the purposes of the trust. What, then, is really in dispute between the parties? Nothing but the questions how much of the purchase money remains unpaid, and how much of it has been applied to the debts of Ezekiel, with the co-operation of Mr. Potter.

The whole purchase made by Mr. Potter amounted to $15,800, of which $15,000 were given for the ferry estate, and $800 for a lot in Jamestown, purchased by Ezekiel from his sister Isabel. One-third of the ferry estate had also been purchased by Ezekiel from Isabel, so that $5,800 of the whole purchase money was 503*] given *for property not charged by the will of Peleg Gardner with his debts, and the remaining $10,000 for property which was so charged. That sum constituted the trust fund.

In the arrangement between the parties, Mr. Potter retained $3,500 for a debt due to himself, and paid debts due from Ezekiel, to the amount, as stated in the answers of $1,830, making in the whole $5,330. On a subsequent agreement between the parties, Potter paid a debt of Ezekiel amounting to $800; so that Potter has himself paid the debts of Ezekiel to the amount of $6,330 being $330 out of the trust fund. His cash payments, at that time, are stated at $318.66.

In June, 1820, the parties came to a settlement, when a balance of $7,729.62, was found to be in the hands of Potter, for which he says he gave his note, payable to order in good mortgages in South Kingston, or in the state of New York, and a negotiable cash note, payable to the defendant's order, for $4,000 on the 25th of March, 1822.

The cash payments stated by the defendants, amounted to $4,318.64. The residue of the purchase money has either been applied by Potter himself to the payment of Ezekiel's debts, or is comprehended in the note payable in mortgages, or remains in his hands unaccounted for. In either case it is liable, so far as it exceeds the sum of $5,800, which is not charged by the will to the creditors of Peleg Gardner. This court does not enter into minute calculations to ascertain the precise sum due. An account, if it be found necessary, comprehending the necessary calculations of interest, may be taken in the Circuit Court. The note payable in mortgages is not alleged to be paid, and, not being negotiable, would pass to an assignee, subject to the equity which was attached to it when in the hands of Ezekiel W. Gardner.

The defendant, Elisha R. Potter, has been stated to be liable for the debts of Peleg Gardner, for so much of the purchase money of the trust estate as remains in his hands. So far he is liable directly and immediately, and is properly *decreed to pay the money [*504 into court. But so far as he has applied the money to the debts of Ezekiel, his responsibility is not, we think, immediate, but depends on the failure of Ezekiel to pay; the decree ought, in the first instance, to be against Ezekiel, and if the money cannot be obtained from him, then against Elisha R. Potter.

No doubt exists of the right of any of the parties to contest the claim of any creditor. The report of the commissioners may be prima facie, but is not conclusive evidence of the claim. The creditor may ascertain his debt by a suit in the state court, or the executrix may contest it in the court of the United States. If Elisha R. Potter, or Ezekiel W. Gardner, suppose the executrix to be unfaithful to her duty in this respect, the court will permit either of them to use her name in opposition to the claim.

We are of opinion, that so much of the decree as may subject Elisha R. Potter to the debts of Peleg Gardner, beyond the purchase money remaining in his hands, and beyond the money paid by him in discharge of the debts of Ezekiel W. Gardner, after deducting therefrom the amount of the estates purchased by the said Ezekiel from his sister Isabel, ought to be reversed, and that, in all other things, it ought to be affirmed.

Decree.—This cause came on, etc. On consideration whereof, this court is of opinion, that there is error in so much of the decree of the said Circuit Court as subjects Elisha R. Potter to the payment of a larger sum of money than now remains in his hands of the original purchase money, added to the sum he has applied to the payment of the debts of Ezekiel W. Gardner, after deducting therefrom the amount given for the estate purchased from Isabel Gardner; and in so much of the said decree as directs the said Elisha R. Potter to pay the sum he has misapplied to the debts of Ezekiel W. Gardner, and for which he, the said Ezekiel, is liable in the first instance, before he, the said Ezekiel, shall have failed to pay the same. It is, therefore, the opinion of this court, that so much of the said decree as is contrary to this opinion, be reversed and annulled, and that the same be, in all other *respects, affirmed; and the cause is [*505 remanded to the said Circuit Court, with directions to reform the said decree according to this opinion, and to do all other things therein as equity and justice may require. In taking any account between any of the parties which may be necessary for giving effect to this order, interest is to be computed according to law and usage.

[Surety.]

THE UNITED STATES v. NICHOLL.

The act of May 15th, 1820, ch. 625, s. 2, which requires new sureties to be given by certain public officers on or before the 30th of September, 1820, does not expressly, or by implication, discharge the former sureties from their liability.

The sureties are not responsible for moneys placed by the government in the hands of the principal, after the legal termination of his office; but they are responsible for moneys which came into his hands while in office, and which he subsequently failed to account for and pay over.

In general, laches is not imputable to the government. But quære, whether, in case there is an express agreement between the government and the principal, giving time to the latter, and suspending the right of the former to sue, the sureties are not discharged as in a similar case between private individuals.

A mere proposition to give time, and suspend the right to sue, upon certain conditions and contingencies, which are not proved to have been complied with, or to have happened, will not discharge the sureties.

The cases of the United States v. Kirkpatrick, 9 Wheat. Rep. 720, and the United States v. Vanzandt, 11 Wheat. Rep. 184, applied to the determination of the present case.

THIS cause was argued by the Attorney-General and Mr. Sampson for the plaintiffs, and by Mr. D. B. Ogden for the defendant.

Mr. Justice Trimble delivered the opinion of the court:

506*] *The questions to be decided in this case arise out of a bill of exceptions, taken by the plaintiffs, to the charge and instructions of the Circuit Court to the jury upon the trial of the cause.[1]

The suit was founded on the official bond of Robert Swartwout, as navy agent, and with whom the defendant had become bound as one of his sureties. The bond bears date the 22d day of February, 1819, and is in the penalty of $20.000, with the usual condition, to be void if Swartwout should faithfully perform the duties of his office, and account for, and pay over, when required, the public property and money placed in his hands.

The declaration alleges, as a breach of the condition of the bond, that Swartwout's accounts had been settled by the proper accounting officers on the —— day of ————; and that, upon that settlement, a large balance had been found against him, which he had failed and refused to pay over to the United States when required. The pleadings having been made up according to the practice of New York, so as to put in issue the matters in controversy between the parties, the plaintiffs gave in evidence to the jury the bond, with its condition, and Swartwout's settled account, duly certified from the treasury department; and the defendant gave in evidence a letter from the Secretary of the Navy to Robert Swartwout, dated the 25th day of February, 1819; two commissions to Swartwout as navy agent, the one dated the 16th day of October, 1818, and the other the 30th day of November, 1818, and the following letter, dated the 8th day of December, 1823, from Mr. Pleasanton, agent of the treasury, to Mr. Tillotson, the district-attorney, which will be more particularly noticed hereafter:

"Treasury Department, Fifth Auditor's Office, December 8, 1823.

"Sir—From the best information I can obtain, it seems pretty certain that if we foreclose the mortgage given to the United States by General Robert Swartwout, and expose *the [*507 property to sale, subject to a previous mortgage given to Mr. Coster, we shall lose the whole, or nearly all of our debt, this property being our only reliance, if the sureties should be discharged by due course of law from their responsibility for the payment of it. Under these circumstances, the only alternative which presents itself for securing any considerable portion of the debt is, to allow General Swartwout time within which to make an advantageous disposition of the property. He expresses a confident belief that in seven years he would be enabled, by connecting it with a banking institution for which a charter has already been granted by the state of New Jersey, not only to pay off the first mortgage, but our mortgage also.

"It has been recommended by the navy department to allow this time, and I have, accordingly, instead of three years, as intimated to you some time age, determined to allow him seven years, provided the first mortgagee will pledge himself in writing, not to molest him for the same space of time; and provided, also, that the bank with which the property is to be connected, shall go into operation on or before the first of October next. Should the banking capital not be made up by the time mentioned, and the bank fail to go into operation, this agreement is to be considered wholly null and void. You will be pleased to take such steps as will give this arrangement effect.

"As the sureties on General Swartwout's bond dispute our right to recover the penalty from them, it will be your duty forthwith to institute suits against them in the Circuit Court, and judgment going against us there, you will remove the cause to the Supreme Court, it being very desirable that the law should be settled in relation to bonds so situated.

"I have the honor, etc.,
(Signed) S. Pleasanton,
Agent of the Treasury."

The Circuit Court decided, and, accordingly, instructed the jury, first, "That the defendant, Francis H. Nicoll was not responsible for any defalcation that took place on the part of Robert Swartwout, as navy agent, subsequent to the *30th day of September, 1820, when, [*508 in and by the act of Congress, passed the 18th of May, 1820, new sureties were required by law to be given by the said Robert Swartwout.

Second, "That the defendant was not responsible for any deficiency of public money reported on by the account officers of the United States, subsequent to the 30th of November, 1822, when it appeared in evidence that the appointment of Robert Swartwout, as navy agent, expired by its legal termination.

Third, "That he left it to them to decide whether the letter from S. Pleasanton, Esq., addressed to Robert Tillotson, Esq., which had been read in evidence before the jury, did give further time to Robert Swartwout for the payment of the debt due the United States; and that if, in the opinion of the jury, the letter in question did give time to the said Robert Swartwout until October, 1824, or any subse-

1.—This cause was tried in the court below by the late District Judge, Van Ness.

quent period, that then the defendant was discharged from his liability, and their verdict should be rendered for the defendant. And, lastly, that the said several matters so produced and read in evidence, on the part of the said Francis H. Nicoll, were sufficient, in law, to maintain the issue on his part, and that the United States ought not, upon all the matters produced in evidence, to maintain the said action, etc.

These several opinions and instructions, are brought before this court for re-examination by the present writ of error.

Upon looking into the act of Congress, passed May 15th, 1820, entitled, "An act providing for the better organization of the treasury department," which is the one referred to in the first instruction, we are satisfied it was misconstrued by the judge. The second section of the act provides a new and summary process against public defaulters and their sureties, after the 30th of September, 1820. The scope and design of the act, in requiring new sureties to be given by that day, was in order that, if such new sureties should be given, the summary process might operate upon them, as well as upon the principal, if the treasury department should elect to pursue such summary process. This is manifest from the provision in the act, that the summary process shall not effect the existing sureties,

509*] *The act nowhere directs the principals to be discharged from office upon failure to give new sureties and if the act had so directed, they would have remained in office until actually removed. The law does not, in terms, declare the existing sureties shall be discharged from and after the 30th of September, 1820. It would require a very strained construction of the statute to discharge them by implication, while their principals were permitted to remain in office. Such construction would be, we think, against the manifest intention of the legislature. The 10th section enacts "that nothing in this act contained shall be construed to take away or impair any right or remedy which the United States now have, by law, for the recovery of taxes, debts or demands."

The cases of the United States v. Kirkpatrick, 9 Wheat. Rep. 720, and the United States v. Vanzandt, 11 Wheat. Rep. 184, are, in principle, undistinguishable from this case.

They decide, 1st. That laches is not imputable to the government; 2d. That the provisions of the law requiring settlements by its officers to be made at short periods, are designed for the security and protection of the government, and to regulate the conduct of those officers; that they are merely directory to those officers, and form no part of the contract with the sureties. And the last case decides, 3d. That where the act expressly directs a defaulting officer to be recalled at the expiration of six months from the time of his default, his sureties are not discharged, but remain liable for his defaults thereafter, until he is actually recalled.

If the second instruction given to the jury was intended to inform them that the defendant, as surety of Swartwout, was not legally responsible for money placed by the government in his hands, after the legal termination of his office, it was unquestionably correct; and this is the sense in which we suppose the court meant to be understood. But if it was intended to convey the idea that he was not responsible for money which came to Swartwout's hands while in office, but which he afterwards failed to account for and pay over, it was clearly incorrect.

*In deciding upon the third instruc- [*510 tion given, as to the effect and operation of Mr. Pleasanton's letter to the district-attorney, it is not intended to give any intimation of what would be the opinion of this court, if it had appeared from the letter that the government had made any arrangement with Swartwout, without the assent of his sureties, whereby the right of the government to sue upon the bond had been suspended to the first day of October, 1824, or to any subsequent time. Nothing of the kind appears from the letter. It speaks of a mortgage which had been given by Swartwout, upon property subject to a former mortgage to Mr. Coster; but it does not appear that, by the terms of the mortgage, the right to sue on the official bond was suspended; and the taking of a collateral security, without suspending the right to sue on the bond, could not bar the action on the bond. The letter speaks of an intention formed of giving time upon the mortgage, upon specified conditions and contingencies; but none of those conditions or contingencies are shown to have been complied with, or to have happened. The letter contains no contract, and gives no time per se, upon any consideration binding on the government; and that the letter did not intend to suspend the right of the United States to sue on this bond, is palpable, because it directs suit to be brought thereon immediately. As no fact connected with the letter was proved by evidence aliunde, the construction of the letter upon its face was matter of law, and the Circuit Court ought to have decided and instructed the jury accordingly, that nothing on the face of the letter constituted any defense to the action. There was nothing but the construction of the letter to be left to the jury, and, the court ought to have informed the jury that, according to its true construction, it did not give time so as to bar the action against the surety.

After the observations already made, it cannot be necessary to go into any further reasoning to show that the Circuit erred in its concluding instruction, that, upon the whole matter, the law was for the defendant. It was a conclusion drawn by that court from the premises it had assumed in the former instruction given, and the error of these premises *having been shown, the error of the [*511 conclusion necessarily follows.

Some observations were made by the defendant's counsel in argument, as to the manner in which the debits and credits in Swartwout's account had been adjusted by the accounting officers; and he seemed to suppose that credits which ought to have been applied towards the extinguishment or lessening of the debits, for money placed in his hands before the 20th of November, 1822, had been improperly applied to the transactions of Swartwout with the government after that day.

The case of The United States v. January & Patterson, 7 Cranch's, Rep. 572, is in point to

show, that, as to any disbursements of money after the 30th of November, 1822, for which Swartwout was entitled to credit, it was at the election of the government to apply them to either account. But there is no necessity for the application of the principle to this case; for, upon looking into the account, we find that after crediting Swartwout with all his disbursements up until the 30th of November, 1822, there remained, on that day, a balance in his hands unaccounted for, much beyond the penalty of the bond; so that no injustice is done to the surety in the manner of settling the account.

Judgment reversed, and a venire facias de novo awarded.

[Surety.]

M'GILL et al., Plaintiffs in Error,

v.

THE PRESIDENT, DIRECTORS AND COMPANY, OF THE BANK OF THE UNITED STATES, Defendants in Error.

A. W. M'G. gave a bond to the Bank of the United States, with sureties, conditioned for the faithful performance of the duties of the office of cashier of one of the offices of discount and deposit during the term he should hold that office. The president and directors of the bank having discovered 512*] that he had been guilty of *a gross breach of trust, passed a resolution at Philadelphia on the 27th of October, 1820, "that A. W. M'G., cashier, etc., be, and he is hereby suspended from office, till the further pleasure of the board be known;" and another resolution, "that the president of the office at Middletown be authorized and requested to receive into his care, from A. W. M'G., the cashier, the cash, bills discounted, books, papers, and other property in said office and to take such measures for having the duties of cashier discharged as he may deem expedient." These resolutions were immediately transmitted by mail to the president of the office at Middletown, who received them on the morning of Sunday, the 29th of the same month, but did not communicate them to the cashier, nor carry them into effect, until the afternoon of the 30th, between four and five o'clock: Held, that the sureties continued liable for his defaults until that time.

On such a bond, the recovery against the sureties is limited to the penalty.

Partial payments having been made by the sureties (subject to all questions), the application of these payments was made by deducting them from the penalty of the bond, and allowing interest on the balance thus resulting, from the commencement of the suit, there having been no previous demand of the penalty, or acknowledgment that the whole was due.

But interest was refused to the sureties on the payments.

THIS cause was argued by Mr. D. B. Ogden for the plaintiff in error, and by Mr. Webster for the defendants in error.

Mr. Justice Johnson delivered the opinion of the court:

This cause comes up by writ of error from the Circuit Court of the United States, held for the district of Connecticut, in which the defendants here obtained a judgment against the plaintiffs upon a penal bond, in which M'Gill was principal, the other defendants sureties.

M'Gill was cashier of one of the branches of the Bank of the United States, and this bond was given in the penal sum of $50,000, conditioned for the due performance of that office.

The replication sets out a great variety of breaches, and the cause was decided below upon a special verdict, by which was found for the plaintiffs the sum of $66,548, consisting of a variety of items upon which interest is *charged severally, from the date of [*513 the embezzlement or other breach, to the time of finding the verdict.

The verdict then finds two payments, one of $20,000, made by one of the sureties on the 16th of December, 1820; the other of $500, made by another of the sureties on the 22d of December, 1820, on which they also calculate interest to the date of the verdict, and deducting the amount of principal and interest, strike a balance of $43,182.50.

It also finds the following facts: "That the president and directors of the Bank of the United States, on the 27th of October, 1820, at Philadelphia, passed the following resolution, to wit: "Whereas it appears, by the report of a committee of the office of discount and deposit at Middletown, that Arthur W. M'Gill, cashier of that office, has been guilty of a gross breach of trust, in knowingly suffering overdrafts to be made by individuals; also by making overdrafts himself; therefore, resolved, that A. W. M'Gill, cashier of the office at Middletown, be, and he is hereby, suspended from office till the further pleasure of the board be known.

"On motion, resolved, that the peresident of the office at Middletown, be authorized and requested to receive into his care, from A. W. M'Gill, the cashier, the cash, bills discounted, books, papers, and other property in said office, and to take such measures for having the duties of cashier discharged, as he may deem expedient."

Which resolutions were immediately transmitted by mail to the president of the Middletown office, who received them on the morning of Sunday, the 29th of the month, but did not communicate them to M'Gill until the afternoon of the 30th, between the hours of four and five in the afternoon.

It then finds, that all the breaches were incurred before the 30th, and goes on to find alternately, so as to enable the court to give judgment, according to its views of the law, as between the parties. There appear to have been various questions argued in the court below, some of which were decided for the plaintiff, some for the defendant; but *as the [*514 plaintiff below seeks an affirmance of the judgment, and has not sued out a writ of error, it follows, that we confine ourselves to those points only which were decided against the plaintiff here. These were two, one of them going to the whole right to recover, the other

NOTE.—As to liability of sureties on official and other bonds, see notes to 3 L. ed. U. S. 709; ante, 578, 42 L. ed. U. S. 987.

to the application of the payments towards the discharge of the sum to be recovered.

The first of these was, whether the sureties were not discharged ipso facto from further liability, by the resolution of the parent bank on the 27th; or if not on that day, then on the 29th, the day on which it was received at Middletown by mail. If discharged on either of those days, it would follow, that the plaintiffs below could not have judgment, since the finding was up to the day following.

We are unanimously and decidedly of opinion, that the ground assumed by the defendants below cannot be maintained. What was there in the resolutions of the parent bank to discharge the obligors at all from their liability? The resolution was only to suspend, and this implies the right to restore. The cashier's salary went on, and had the board rescinded their resolution, what necessity would there have existed for a redelivery of his bond?

But there is no necessity for placing the decision on this ground, since, notwithstanding the resolution of the board is expressed in the present tense, a future operation must necessarily be given it, from a cause that could not be overcome, the distance of the parties from each other. Time became indispensable to giving notice, and the day on which the communication reached the president of the Middletown bank, was a day not to be profaned by the business of a bank. There was, then, no obligation to deliver the notice, and dispossess the cashier, until the 30th, and the law makes no fractions of a day.

The court below, in applying the payments, directed them to be deducted from the penalty of the bond, and then gave interest upon the balance thus resulting. This, with the exception of the interest, was the most favorable application possible for the defendants below, and the interest on the balance having been only allowed from the date of the suit, and the sum thus ascertained falling short of the penal-
515*] ty of the bond, *we think the defendant below has nothing to complain of. It will be discovered, by reference to dates, that the payments here made preceded the institution of the suit, and although made by the sureties, they were made severally, for anything that appears to the contrary from the verdict. Technically, then, the judgment to be entered would have been a judgment for the penalty of the bond, and, in applying the partial payment, the court would have been governed by those principles which have been transferred in practice from the courts of equity to the courts of law, in deciding on what terms a party shall be released from the penalty of his bond. These always are, on payment of principal, interest and costs. And it can constitute no objection to the application of this principle to the case of these obligors, that no interest was allowed them during the snort interval between the payment and the suing out of the writ, since the breaches were incurred long before, and interest for the same period is refused to the bank.

Judgment affirmed, with six per cent. interest.

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[Guaranty. Evidence.]

RICHARD DRUMMOND, surviving partner of Charles Drummond,

v.

THE EXECUTORS OF GEORGE PRESTMAN.

The following letter of guaranty,

"Baltimore, 17th Nov. 1803.

"Capt. Chas. Drummond,

"Dear Sir—My son William having mentioned to me, that, in consequence of your esteem and friendship for him, you had caused and placed property of your's and your brother's in his hands for sale, and that it is probable, from time to time, you may have considerable transactions together; on my part, I think proper to guarantee to you the conduct of my son, and shall hold myself liable, and do hold myself liable, for the faithful discharge of all his engagements to you, both now and in future." (Signed,) Geo. Prestman."

will extend to a partnership debt incurred by William P. to *Charles Drummond, and Richard [*516 his brother, it being proved that the transactions to which the letter related were with them as partners, and that no other brother of the said Charles was interested therein.

In such a case, the record of a judgment confessed by the principal, William P., to Richard D., as surviving partner of Charles and Richard D., for the amount of the debt due by William P. to the partnership firm, was held to be admissible in evidence, inter alia, to charge the guarantee, George P., under his letter of guaranty.

THIS cause was argued by the Attorney-General and Mr. Meredith for the plaintiff,[1] and by Mr. Taney and Mr. Donaldson for the defendant.[2]

Mr. Justice Johnson delivered the opinion of the court:

This case arises on the following state of facts: Richard and Charles Drummond, being engaged in some joint mercantile adventures, which appear to have been carried on chiefly by Charles, made consignments in the year 1803 to William Prestman, then doing business as a commission merchant in Baltimore. George Prestman, the father of William, thereupon addressed to Charles Drummond a letter of guarantee in these terms:

1.—11 Wheat. Rep. 74; 2 Evans' Pothier, 212; 3 Stark. Ev. 1021, 1602; 7 Taunt. 295; 10 East's Rep. 271; Tell. Guarant. 105; 3 Term. Rep. 454; 3 Cranch, 492; 3 Wheat. Rep. 148; Note 1.

2.—2 Saund. 411, 415; 2 Maul. & Selw. 363; 5 Bos. & Pull. 175; 4 Cranch. 224; 7 Cranch, 69; 1 Mason's Rep. 361, 371; 5 Esp. Cas. 26; 3 Stark. Ev. 1386; 1 Stark. Ev. 192; 3 Harris & M'Henry, 342; 4 Johns. Rep. 511; 10 Ves. 123.

NOTE.—Continuing guarantees.

Where defendant gave plaintiff a guarantee for the payment of "any goods he hath or may supply W. P. to the amount of 100*l.*" It was held that the guarantee was a continuing or standing guarantee, not confined to the first hundred pounds worth of goods furnished, but to all future supplies of goods. Mason v. Pritchard, 12 East, 227.

So, where the guarantee was "in consideration of your supplying my nephew with earthenware and china, I hereby guarantee the payment of any bills you may draw upon him on account thereof to the amount of 200*l.*," it was held a continuing guarantee, remaining as standing security to the amount specified. Mayer v. Isaac, 6 Mees. & W. 612; Hitchcock v. Humfrey, 6 Scott. N. R. 549.

From a continued liability under seal the surety has no means of escape at common law; he cannot recall the bond, covenant or obligation, that he has entered into, and say that he will no longer be re-

"Capt. Charles Drummond,

Baltimore, 17th Nov. 1803.

"Dear Sir—My son William having mentioned to me, that, in consequence of your esteem and friendship for him, you have caused and placed property of yours and your brother's in his hands for sale, and that it is probable, from time to time, you may have considerable transactions together; on my part, I think proper, by this, to guarantee to you the conduct of my son, and shall hold myself liable, and do hold myself liable, for the faithful discharge of all his engagements to you, both now and in future."

517*] "The connection in business was kept up between the Drummonds and William Prestman until Charles' death, after which Richard, who resided in Norfolk, came up to Baltimore to adjust the accounts of the concern with William, and then received from him an account stated as between him and Charles Drummond, on which, after some corrections, which appear on the face of the account, the balance is struck, for which this suit is instituted.

This account commences with an acknowledgment of a balance due the Drummonds in November, 1804, and brings down their transactions to December 20th, 1805.

Upon this account a suit was instituted against William Prestman in 1806, in the name of Richard, survivor of Richard and Charles Drummond, and a judgment confessed. William Prestman was dead at the time of the trial of this cause.

This suit is now instituted upon the letter of guaranty; and the declaration, after setting out the letter and the subsequent transactions with William, demands the sum acknowledged due upon the account stated.

Upon the trial, the plaintiff gave in evidence the letter of guaranty, the account stated by William, parol evidence of subsequent acknowledgments of its correctness, and the record of recovery upon that account, in which he confesses judgment to Richard, as survivor of Richard and Charles Drummond; also parol evidence conducing to prove the joint dealings of the Drummonds.

In the progress of the trial the defendants took exception to the admission in evidence of the record of recovery against William. The court overruled the exception, and it went to the jury, but the court refused to grant a prayer of the plaintiff, that they would instruct the jury that, upon the whole evidence he was entitled to a verdict. And to this refusal the bill of exceptions is taken, upon which the principal question in this cause arises.

As evidence was permitted to go to the jury, conducing to prove, as well the copartnership between Richard and Charles Drummond, as the balance due by William Prestman, and the interest of Richard in that balance, it follows, that the refusal of the court to give that instruction, could *only have been upon [*518 the ground, that the guaranty did not cover this demand; and this, accordingly, has been the principal question made in argument.

It is contended, that the correct construction of this guaranty will exclude a copartnership debt; that, in its language and import, it is confined to liabilities to be incurred by William to Charles or Richard severally, or to Charles individually, and cannot be extended to a copartnership interest under a trade ostensibly carried on as between Charles solely, and William.

We have considered this question attentively, and are unanimous in the opinion, that the guaranty may well be construed to cover the joint trade of Charles and Richard. An interest of Richard is expressly contemplated by the guaranty, and the language of the letter seems more naturally adapted to a joint, than a several interest. For, a concern being represented in the person of any one of its members, the use of the pronoun of the second person is naturally suggested, and familiarly resorted to, when we address ourselves to an individual of the concern. This court is not called upon to decide whether the words might not also be correctly applied to an individual interest as

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sponsible for advances or supplies to the principal, unless in the contract of suretyship he has expressly reserved to himself such power, and his liability may be prolonged indefinitely, and for the whole life of the principal, however reckless and extravagant the latter may become. Hassell v. Long, 2 Maule & S. 370; Calvert v. Gordon, 1 Man. & R. 497; 3 Man. & R. 124; Addison on Contr. 668, 2d Am. ed.

But in the case of simple contracts, the surety, though liable for all advances and supplies made with faith of his promise, may at any time revoke such promise, and discharge himself from the future and continuing liability by giving notice to that effect. Ibid.

One therefore comes more readily to the conclusion that a continuing liability was contemplated by the parties when the undertaking is by simple contract and the surety can so readily free himself from the continued liability by notice, than when it is by deed and he is precluded from so doing. The courts seem to favor the more extended and continued liability in the case of simple contracts. See Grant v. Risdale, 2 Har. & J. 186; Rapelye v. Bailey, 5 Conn. 149; Clark v. Bendett, 2 Hall. 197; Bent v. Hartshorn, 1 Met. 24; White v. Reed, 15 Conn. 457; Boyer v. Ewart, 1 Rice, 126; Fellows v. Prentiss, 3 Den. 512; Farmers' Bank v. Kercheval, 2 Mich. 504; Agawan Bank v. Strever, 16 Barb. 82.

The language of the following guarantees has been held clearly to import a continuing liability: "I consider myself bound for any debt A. B. may contract with you in his business not to exceed 100*l*." Merle v. Wells, 2 Camp. 413. "I undertake to be answerable to the extent of 100*l*., for any tallow supplied by you to A. B." Bastow v. Bennett, 3 Camp. 220. "I hereby agree to guarantee the payment of goods to be delivered in umbrellas to S. & Co., according to the custom of their trading with you in the sum of 200*l*." Hargrave v. Smee, 3 Moore & P. 573. "As an inducement to you to sell W. C. goods and continue your dealings with him, I hereby agree and undertake to guarantee to you in a sum of 100*l*. payable to you in default on the part of the said W. C. for two months." Allen v. Kenning, 2 Maule & S. 768. "In consideration of your agreeing to supply goods to K. we agree to guarantee any future debt with you to the amount of 600*l*." Martin v. Wright, 6 Q. B. 917. An agreement with a firm that P. "who has purchased, or is about to purchase, anthracite coal of said firm shall and will pay said firm at such time or times, and at such prices as may be agreed upon between said firm and said P. for all coal that may be delivered to him up to the 1st day of January, 1878, and in default of his so doing we agree to pay for the same, provided the amount so in default shall not, at any time, exceed the sum of $1,000." Pratt v. Matthews, 24 Hun, 386.

A guarantee indorsed on a lease for years, which provides for a renewal, is a continuing one. Decker v. Gaylord, 8 Hun, 110.

What circumstances establish the fact that a guarantee was intended as a continuing one. Whyte's Bank v. Myles, 73 N. Y. 335.

"I will be and am responsible for any amount which A. B. may draw on you, for any sum not to exceed $1,500, on condition of your acceptance of

well as a joint concern; it is enough, for the purposes of this action, if they will cover the latter.

It is a rule, in expounding instruments of this character, "that the words of the guarantee are to be taken as strongly against him as the sense will admit." But it is not necessary to test this letter by any canon of the law of guaranty more rigid than the first and most general, to wit, "that no party shall be bound beyond the extent of the engagement which shall appear from the expression of the guaranty, and the nature of the transaction." There is nothing on the face of the letter which holds out the idea of a connection between William and the Drummonds, exclusively in their individual capacity. The object is, to throw business into the hands of the guarantee's son, and it could not have been inconsistent with this idea to guaranty a joint trade, as well as an individual trade. The grammatical construction of the language will sanction this idea, and the nature and object of 519*] the guaranty favors it. If it be *conceded, that there is a latent ambiguity on the face of the instrument, that ambiguity might well be explained by the objects of the instrument, and the circumstances attending its origin. We are, therefore, of opinion, that the court erred in refusing the instruction as prayed, and, for that reason, the judgment must be reversed, and a venire facias de novo awarded.

But, as is the practice of this court, where questions present themselves on the record, and are argued, upon which the same cause may possibly be brought back here, the court has also considered the question whether the record of the judgment between this plaintiff and William, was properly admitted in evidence.

On this subject, it is necessary to observe, that it was not set up as a plea in bar, nor as a decision conclusive of the right of the party to recover in this action. There was evidence in the cause to establish the defendant's guaranty, and the balance acknowledged by William; also, evidence conducing to prove the joint trade carried on by Charles and Richard Drummond, through the hands of Charles, with William. This record was certainly competent to prove a fact which every judgment is competent to prove between any parties, to wit, that such a judgment was obtained between certain parties in a certain cause of action. It was also evidence to prove that the cause of action was identically the same with the one on which this action was instituted; and that, in that suit, William Prestman solemnly acknowledges that the statement made by him in favor of Charles Drummond, was of a debt really due on a joint trade between Charles and Richard Drummond. And why should not this be evidence against George, the guarantee, who had tendered himself as security to these individuals, in these very transactions?

We are perfectly aware of the rule, that he who cannot profit by a judgment between other parties, should not be damnified by it. But, here, the application of the rule is in favor of the admission of this record. Suppose the suit against William Prestman had gone to a jury, and a verdict obtained against this plaintiff, can there be a doubt, *that the record [*520 would have been admissible in evidence in favor of this defendant?

The material fact on this subject is, that the liability of the guarantee is dependent upon the liability of the principal; the case, therefore, is not widely different from that of accessory and principal, in which the record of the conviction of the principal is prima facie evidence against the accessory.

Nor is it unlike the case of Green v. The New River Company, 4 Term Rep. 590, in which it was held, that a judgment against a master for damage, from the negligence of his servant, was good evidence against the servant in an action against him, by the master for the same negligence; the recovery in the one case being dependent upon that in the other. See also Stark Ev. 188, 189. There, the case is presented, of a master suing the servant for damage sustained by the negligence of the servant; the questions are, whether the master has been damnified by the negligence of the servant, and to what amount; and the record of a judgment

same." Held, a continuing guarantee and not satisfied by the payment of acceptances to the extent of $1,500. Crist v. Burlingame, 62 Barb. 351.

A letter as follows: "Messrs. A. & Co. The bearer, S. W. is going to start a peddling route to sell cigars and tobacco. He wishes to buy his goods of your firm. If you will give him a liberal credit, we, the undersigned, will be his security to the amount of $1,000. T. B. S.; P. J. M." Held to be a continuing guarantee, rendering the signers liable to the amount specified for all goods bought by S. W. of A. & Co. until notice given to terminate it. Sickle v. Marsh, 44 How. Pr. N. Y. 91.

The following guarantees have been held to limit the liability of the surety to one solitary transaction, or to a particular course of dealing to a certain amount, and to be discharged or extinguished as soon as supplies or advances to the amount named have been made and paid for, or satisfied by the principal. "I engage to guarantee the payment of A. M. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of you." Melville v. Hayden, 3 B. & Ald. 593. "I hereby agree to be answerable to K. for the amount of five sacks of flour to be delivered to P. W. payable in one month." Kay v. Groves, 6 Bing. 276. "I hereby agree to be answerable for the payment of 50*l.* for T. L. in case he does not pay for the gin he receives from you." Nicholson v. Paget, 1 Car. & M. 48.

Where the defendant gave a guaranteee in the following form: "In consideration of your supplying S. with goods to the extent of 100*l.* I undertake to pay you, if he does not," it was held that the liability of the surety was dependent upon credit to the amount of 100*l.* being given if required, but that if the debtor did not demand 100*l.* worth of goods, the surety would be liable for whatever was supplied. Dimmock v. Stirla, 14 Mees. & W. 758; 15 Law J. Exch. 65.

A contract of indemnity against the liabilities of a late firm, is limited and controlled by a schedule of its debts thereto annexed. Holmes v. Hubbard, 60 N. Y. 183.

A guarantee against loss on certain shares of stock, purchased by plaintiff, is not a continuing one; it only applies to the identical shares first purchased. Strong v. Lyon, 63 N. Y. 172.

On a bond conditioned for the payment of any paper discounted for a third person, "to be binding for one year only from date," the obligor is liable for paper discounted within the year, though not maturing until after its expiration. Davis v. Copeland, 6 Daly, 221; S. C. 67 N. Y. 127.

A continuing guarantee by a firm is terminated by a notice of dissolution to the party to whom it is given. Bank of Poughkeepsie v. Phelps, 16 Hun, 158.

"We bind ourselves to be responsible to you at any time for a sum not exceeding $8,000, should the said H. fail to do so." Held, a continuing guarantee. Douglass v. Reynolds, 7 Pet. 113.

against the master is admitted in evidence against the servant. The present case, however, is a much stronger one; it seems unique in its principle; since the object of introducing the record seems not so much to prove that a judgment was obtained, as that a judgment was confessed. Now, the proof of William Prestman's liability to Drummond, was indispensable to Drummond's recovery against the guarantee. But this liability might have been proved by a confession in writing, or even by parol, after his death, if not before; then why not by the more solemn act of confessing it of record?

It is worthy of remark in this case, that the guaranty purports, by its terms, to be something more than a mere suretyship for a debt. The words are, I guaranty to you "the conduct of my son." It partakes, therefore, of the nature of a bond given by a surety for the faithful discharge of a duty; and it cannot be doubted, that, in proving the fact of a breach of the condition of such a bond, the confessions of the principal, after his death, would be evidence. It would be difficult to assign a 521*] reason why his confessions *should lose that character by increasing in their solemnity.

We are aware that there are cases which have been thought to maintain principles inconsistent with these doctrines. They are chiefly collected together in the 2d vol. of Mr. Metcalf's edition of Starkie's Treatise on Evidence, title surety.

We have examined those cases, and find some of them of very little authority, others inapplicable to the circumstances of the present case, and generally, in support of our opinion.

The case of Davis et al. v. Shed et al., executors, 15 Mass. Rep. 6, has no application. It was a suit against the surety of an executor, by a creditor of the deceased, who had obtained judgment against the executor, and received payments of interest upon the debt. The question was, whether this precluded the surety from his plea of the act of limitations of that state, made in favor of executors. The court decided, that it did not preclude him. In that case the record was pleaded in bar, and the decision given, that it was not conclusive.

In the case of Respublica v. Davis, 3 Yeates, 128, an attempt appears to have been made to introduce a record for the purpose of proving an admission of counsel in evidence; we cannot understand on what principle it was rejected; but the suit being on a recognizance that one Cobbett should keep the peace, and the breach proposed to be established being the publication of a libel, parol evidence of the confession of Cobbett was admitted to prove, against the surety, that he had published a libel. So that this authority would seem in favor of our doctrine.

So, in the Sheriffs of London v. Tindall, 1 Esp. Cases, 394, which was a suit against the surety of a bailiff, a receipt indorsed on a warrant, in the handwriting of the principal, was admitted in evidence, which amounted to nothing less than a confession that the bailiff had received a sum of money, and ordered the prisoner discharged. It was objected, that the bailiff himself should be sworn, but the judge refused and admitted the evidence, declaring. 522*] that the bailiff *was, in fact, the defendant in the action. This would go far to prove, that even in William Prestman's life, the stated account would have been evidence against George; and the fact of a judgment being entered upon it by confession, could not have been immaterial to corroborate it.

The case of Evans et al. v. Beatie, executors, 5 Esp. Cas. 26, seems contra; for there, in a suit against the guarantee of one Copper, for "any woollens that should be furnished him by plaintiff," evidence was offered to prove Copper's parol acknowledgment of certain goods delivered, but refused on the ground that he might be sworn, and it was not the best evidence the nature of the case would admit of.

Here, it will be observed that the principal was living; but we must not be thought to concur without further consideration, in the doctrine that he could have been equally sworn for the one party, or compelled to give evidence for the other. With the surety he had a direct interest, and against the plaintiff it was equally direct. In the present case the principal was dead. This case is loosely reported, and attributes some observations to Lord Ellenborough which we doubt much the authenticity of.

In the case of Higham v. Ridgway, 10 East's Rep. 122, the doctrine on these subjects is laid down with so much good sense as to speak its own correctness. It is to this effect that the principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his life-time. On this principle it is, that entries in receivers' accounts are admitted; so, also, an acknowledgment by a writness, of a debt to another, or of an acquittance of a debt to himself; because the individual who makes the acknowledgment has no interest of his own to subserve, but does it to his own prejudice. In all such cases, however, the evidence is received with due caution, and its weight must rest with the jury.

The most stubborn case on this subject that we have considered, is that of Beal v. Beck, reported in 3 Harris & M'Henry.

*This was debt upon a sheriff's bond, [*523 brought against a surety in Maryland. The same plaintiff had brought suit, and recovered judgment against the sheriff for the same cause of action, and the court refused to receive the record of that judgment in evidence as against the surety. In the inferior court it was rejected on a division of opinion, but in the court of the last resort, we are told, the judgment was affirmed.

On this decision we can only remark, that the report of it is very brief and unsatisfactory; there is no argument of counsel, or other means of determining on what the decision turned. If the attempt was made to introduce the record as final and conclusive against the surety, it was properly rejected, and, in the absence of anything to prove the contrary, we cannot but suspect that such was the true import of that decision. In any other view, we should not feel satisfied to recognize its authority.

Judgment reversed, and a venire facias de novo awarded.

[Construction of Treaty. Local Law.]

HARCOURT et al. v. GAILLARD et al.

A grant made by the British Governor of Florida, after the declaration of independence within the territory lying between the Mississippi and the Chatahouchee rivers, and between the 31st degree of north latitude, and a line drawn from the mouth of the Yazoo River due east to the Chatahouchee, is invalid as the foundation of title in the courts of the United States.

THIS cause was argued by Mr. White and Mr. Isaacks for the plaintiffs, and by Mr. Coxe and Mr. Worthington for the defendants.[1]

524*] *Mr. Justice Johnson delivered the opinion of the court:

The questions upon which this cause turns arose out of a British grant to the ancestor of the plaintiff, dated the 24th of January, 1777.

The land in controversy is situated in that tract of country which lies between the Mississippi and Chatahouchee rivers, and between the 31st degree of north latitude to the south, and a line drawn from the mouth of the Yazoo River, due east to the Chatahouchee. From the earliest times of the settlement of North America, the region of territory in which that tract of country is described, was the subject of wars and negotiations with France, Spain, and Great Britain, until 1763, when Great Britain became the undisputed proprietor of the whole, from the lakes Maurepas to Ponchartrain, and the gulfs of Mexico and Florida, by the Mississippi northwardly. Before that time her claim extending southwardly to the 29th degree of north latitude, as is evidenced by her charter to the lords proprietors of 1677; and from the same instrument it appears that she interfered with the province of Louisiana by extending her southern line to the Pacific Ocean. The country of Florida, therefore, south of the 29th degree, was a conquest; that north of the 29th degree, and up the Mississippi, was held as a part of her own territory, concerning which her treaties with France and Spain only established a disputed boundary.

On the 7th of October, 1763, the king, exercising a right which was never questioned, over what were then called royal provinces, issued his proclamation, by which he established the northern boundary of the Floridas at the 31st degree of north latitude from the Mississippi to the Apalachichola, down that stream to its confluence with Flint River, and from that point by a line to the head of St. Mary's and by that river to the sea. And this way the line which, by treaty of peace, was established as the southern boundary of the United States. After the peace, the United States, Spain, and South Carolina, and Georgia, succeeded to the disputes of Great Britain, France and Spain, relative to the same tract of country.

525*] *The original title of South Carolina, under the grant to the lords proprietors was unquestionable; and she contended that she had never been legally devested of soil or sovereignty.

Georgia founded her claim on the commission, to her Governor Wright, which comprised, within its jurisdiction, the territory in question; and the United States claimed it as a conquest, from the British province of West Florida. While Spain insisted that it was a part of Louisiana or Florida, and as such ceded to her by the treaty of 1783. Finally, South Carolina, by the treaty of Beaufort, relinquished her claim to Georgia, and the United States settled her claim by taking a cession from Georgia of the land in controversy; so that, at present, the claims of the United States, of the state of South Carolina, and of Georgia, have become united in the general government.

The grant of Harcourt, it will be perceived from its date, was subsequent to the declaration of independence, and within the acknowledged limits of the United States; it, therefore, involves the question whether such a grant can be valid; a question which would have been involved in less difficulty, if the United States had never set up the claim of conquest. That ground would admit the original right of the Governor of West Florida to grant, and if so, his right to grant might have continued in force until the treaty of peace; and the grant in that case to Harcourt might have had extended to it the benefit of those principles of public law which are applicable to territories acquired by conquest; whereas, the right set up by South Carolina and Georgia deny all power in the grantor of the soil; the question which they present, is one of disputed boundaries, within which, the power that succeeds in war is not obliged to recognize as valid any acts of ownership exercised by his adversary.

There are several reasons for putting the claim of the United States out of the question. She has abandoned it, and it is very clear, could never have sustained it. The very ground on which she denied the capacity of Spain to conquer, or take by cession, the territory on the Mississippi, was fatal to the pretensions set up by her against Georgia and South Carolina, *to wit, that Spain could not acquire [*526 by conquest a territory within the limits claimed by an ally in the war.

But there was another reason. There was no territory within the United States that was claimed in any other right than that of some one of the confederate states; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the states.

We are, then, referred to the belligerent rights of South Carolina and Georgia; and it is immaterial to the question here, to which of those states the territory appertained. Each declared itself sovereign and independent, according to the limits of its territory, and both extended their claims of territory to the 31st parallel of north latitude. There is no evidence that either at that time had acquiesced in the extension of the territory of Florida beyond that line.

The facts upon which the right of the Governor of Florida to issue grants beyond the 31st degree of north latitude rested, are these: After the proclamation of 1763, the board of trade of Great Britain, which, at that time, had the affairs of the colonies committed to them, passed a resolution, of the date of March, 1764, in which they advise the king to extend

1.—Hall's Law Journ. 412, 202, 430; 4 Johns. Rep. 163.

the limits of West Florida up to a line drawn from the mouth of the Yazoo, east to the Chatahouchee. It does not appear that the king ever made an order adopting this recommendation. No proclamation was issued in pursuance of it; but it appears that, from that time, the commissions to the governors of West Florida designated that line as the northern limit of that province; notwithstanding which, Governor Wright continued to preside over Georgia under his commission of 1763, which embraced in its limits the whole of that country, bounded south by the 31st degree of north latitude. Thus stood the rights of the parties at the commencement of the revolution, and when, by the treaty of peace, the southern boundary of the United States was fixed as the ancient boundary of South Carolina or Georgia (it matters not which Georgia insisted on that line as the limit which she was entitled to, and which she had laid claim to when she declared herself independent; or which the United States had asserted in her behalf in the declaration of independence. But as there had been nothing 527*] very unequivocal *done at the time of the declaration of independence, as to designating the limits of the United States, it is still contended, that the tract of country in which the grant lies had been legally separated from Georgia before the revolution, and attached to West Florida; and that, therefore, a grant by the Governor of the latter province was valid, if made at any time previous to the treaty of peace.

Two questions here occur: first, whether this separation had taken effect by any valid act; and, second, if it had, whether it made any difference in the case upon international principles.

On both these points we are of opinion that the law is against the validity of this grant. It is true, that the power of the crown was at that time admitted to be very absolute over the limits of the royal provinces; but there is no reason to believe that it had ever been exercised by any means less solemn and notorious than a public proclamation. And although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory, was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit by a solemn grant from the crown, to the lords proprietors, from whom, in fact, she had wrested it by a revolution, even before the rights of the proprietors had been bought out by the crown.

But this is not the material fact in the case; it is this, that this limit was claimed and asserted by both of those states in the declaration of independence, and the right to it was established by the most solemn of all international acts—the treaty of peace. It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limits were as much theirs at the declaration of independence as at this hour. By reference to the treaty it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession, or relinquishment of *right, on the part of Great Britain. [*528 In the last article of the treaty of Ghent, will be found a provision respecting grants of land made in the islands then in dispute between the two states, which affords an illustration of this doctrine. By that article a stipulation is made in favor of grants before the war, but none for those which were made during the war.

And such is unquestionably the law of nations. War is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made flagrante bello by the party that fails, can only derive validity from treaty stipulations. It is not necessary here to consider the rights of the conqueror in case of actual conquest; since the views previously presented put the acquisition of such rights out of this case.

The remaining question is, whether the parties plaintiffs have been established in their rights by any act or treaty of the United States.

The treaty of peace contains no stipulation of their favor. Nor does the treaty with Georgia, since all the reservations there made in favor of British or Spanish grants, and inchoate titles, are expressly confined to the case of actual settlers. But the spontaneous bounty of the United States has gone further, and confirmed a great variety of questionable titles, emanating from British and Spanish authority.

Is this one of the titles embraced within the provisions of the statutes passed upon this subject? It is obvious that it is not.

It is true that the act of the 3d of March, 1803, although making no express provision in favor of British or Spanish grants unaccompanied with possession, does seem to proceed upon the implication that they are valid; recognizing the principle that a change of sovereignty produces no change in individual property, yet it imputes to them only a modified validity, since by the 5th section it imposes a positive necessity upon the proprietors to record such grants, and makes expressly void all the rights claimed under the three first sections of that act, or the Georgia treaty, if the duty so imposed be not complied with. And with regard to all other *evidences [*529 of title not recorded in the time limited, declares that they shall never be admitted in evidence against any grant derived from the United States.

The first section of the supplementary act of 27th of March, 1804, extends the time for recording British grants, and vests in the board of commissioners a power of examining, and confirming the claims, to be filed under its provisions, as extensive as that given by the previous act over the rights claimed under the cession from Georgia, or the three first sections of that act.

But the grant to Harcourt appears neither to have been recorded, nor passed upon by the commissioners; it has, therefore, nothing to claim from the bounty of the United States; and that provision in the 5th section of the act of 1803, which forbids its being received in evidence as against American grants, would certainly have operated against it in any case

clearly within the provisions of that act. Here it is contended that the court anticipated the question, and rejected the grant before it was possible that the question could arise, whether the same land had passed under an American grant.

On this subject, it must be observed that neither of the acts of 1803, or 1804, contains an express recognition of the validity of any British grants besides those which were accompanied with possession; and, for that reason, coming within the Georgia treaty, and those which should be confirmed by the commissioners under the first section of the act of 1804, with regard to which there seems to be a very general power given to that board. All others must rest upon their validity according to the principles of the modern law of nations. Upon these principles, it has been shown that the grant to Harcourt was invalid, and, if so, it was not admissible as evidence to sustain the plaintiff's action under any circumstances. The rule, therefore, applies to this case, that a plaintiff must recover by the strength of his own title, not the weakness of his adversary's; for which reason, we think the grant was properly rejected, and that the judgment below must be affirmed, with costs.

530*] [*Construction of Treaty. Local Law.]

HENDERSON, Plaintiff in Error,
v.
POINDEXTER'S LESSEE,

Defendant in Error.

Spanish grants, made after the treaty of peace of 1782, between the United States and Great Britain, within the territory east of the river Mississippi, and north of a line drawn from that river at the 31st degree of north latitude, east to the middle of the river Apalachicola, have no intrinsic validity, and the holders must depend for their titles exclusively on the laws of the United States.

No Spanish grant, made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the compact between the United States and the state of Georgia, of the 24th of April, 1802, or has been laid before the board of commissioners constituted by the act of Congress of the 3d of March, 1803, ch. 340, and of March 27th, 1804, ch. 414.

THIS cause was argued by Mr. **Webster** and Mr. **Coxe** for the plaintiff in error,[1] and Mr. **D. B. Ogden** for the defendant in error.[2]

Mr. Chief Justice **Marshall** delivered the opinion of the court:

This is a writ of error to a judgment rendered in the court of the United States for the district of Mississippi, in an ejectment brought by the defendant in error.

George Poindexter, the lessor of the plaintiff, claimed title to the premises in controversy by virtue of several patents regularly issued to him under the laws of the United States. If lands were, at the time, grantable, his title is unquestionable. Consequently, the case depended, in the District Court, on the title of the defendant in that court. Under several opinions given by the judge to the jury, to which bills of exceptions were taken, a verdict was found *for the plaintiff in [*531 ejectment, the judgment on which has been brought before this court. The case must depend on the correctness of the opinions given by the district judge; but as those opinions bring the title of the defendant in ejectment before this court, the case will be best understood by taking a general view of the principles on which that title stands.

The defendant gave in evidence a grant from the government of Spain for 1,000 acres of land, bearing date on the 20th of June, 1795, with a plat and certificate of survey annexed; under which grant he claimed so much of the land in controversy as is covered. He also offered in evidence a duly certified copy of a certificate of survey and patent issued thereon to David Pannell, for 500 acres, the residue of the premises in controversy; the certificate by the Spanish Surveyor-General Carlos Trudeau, dated the 25th of March, 1795, and the patent issued December 7th, 1797, by Manuel Gayoso, the Spanish Governor of West Florida, with a deed of release and confirmation from David Pannell to him, dated January 19th, 1820. It was admitted that the originals of the plat, and certificate of survey, and of the patent thereon, of which copies were offered, were not in his possession, nor under his control. These papers were rejected, and a bill of exceptions was taken to the opinion rejecting them.

The defendant also read the deposition of Tessias, to prove the firmness of the grants under which he claimed, and that they were regularly issued by the proper officers of the Spanish government at the time they bear date respectively. To rebut this testimony, the plaintiff in ejectment produced a letter of instructions found among the papers of William Atcheson, deceased, the deputy-surveyor, by whom the lands in controversy were surveyed. This letter was directed to William Atcheson, and was proved to be in the handwriting of William Dunbar, who is also dead, and who was proved to be the principal surveyor of the district of Natchez, under whom Atcheson acted. The signature appears to have been torn off. This paper tended to show that the surveys and grant were not made at the time they bear date, but afterwards. The defendant objected *to its admission but his ob- [*532 jection was overruled, and to this opinion, also, he took an exception.

The defendant prayed the court to instruct the jury,

1st. If they should find that, at the time of the sale by the United States of the premises in question, the defendant was in full possession thereof under an adverse title, or color of title, such sale was void, and passed no title on which the plaintiff could recover.

2d. If they should find that the defendant, and those under whom he claimed, had the uninterrupted and quiet adverse possession of the premises, claiming under a Spanish title legally and fully executed prior to October 27th, 1795, under which the possession was

1.—Las Partidas, 381, l. 16, 384, l. 21, 382, l. 18; Civ. Code of Louisiana 478, art. 23, 24, 484, art. 43, 486, art. 57; 5 Hall's Law Journ. 390; 3 Dyer, 355, (a); 10 Johns. Rep. 23.

2.—Vattel, Droit, des Gens, l. 1, ch. 20, ss. 244, 263.

originally taken, that the plaintiff cannot recover.

3d. If the jury should find, that on the 20th of June, 1795, a patent emanated from the Spanish government to Joseph Pannell, under whom the defendant claimed, then such patent constituted a good title in the grantee, and those claiming under him, although the grantee was not, on the 27th of October, 1795, an actual resident of the territory ceded by Georgia to the United States.

4th. If the jury should believe that Joseph Pannell, under whom the defendant claimed, on or before the 27th of October, 1795, was a resident of the said territory, and that he claimed the premises in controversy by virtue of a Spanish patent legally and fully executed prior to that day, the defendant is entitled to a verdict.

5th. That the paper purporting to be a copy of the articles of agreement between Joseph Pannell and Francis Boussett, dated September 20th, 1796, was competent testimony to prove any fact in controversy between the parties in this suit.

6th. If the jury should be of opinion that the date attached to the paper purporting to be the instructions from William Dunbar to William Atcheson, is an interpolation or forgery, in such case they shall disregard it altogether.

7th. In this action of ejectment, after a long and continued possession of thirty years on the part of the defendant, and those under whom he claims, under title, or color of title, the jury are authorized to presume that it had 533*] a legal *origin, and was legally continued in the defendant, and those under whom he claims, in the absence of satisfactory proof to the contrary.

8th. If the jury should believe that the survey made by William Atcheson in September, 1795, was made at the time it purports to bear date, that then, and in such case, it will constitute an instrument of a higher and superior nature to the instrument purporting to be private instructions from said Dunbar to said Atcheson, for the purpose of proving the residence of the said Pannell at that time.

9th. That if, on the whole matter, the jury should have a reasonable doubt, then their verdict should be for the defendant.

The court granted the 4th, 6th, 7th, and 9th prayers, but refused the 1st, 2d, 3d, 5th, and 8th, to which refusal the counsel for the defendant excepted.

In argument, two general questions have been made.

1st. Is the title set up by the plaintiff in error under the Spanish government, sufficient in itself to protect his possession?

2d. Has it been recognized and confirmed by the United States?

1. The first point has been argued very elaborately, and with deep research. The court will not enter into the reasoning of the parties, but will state the result of an attentive consideration of that reasoning.

It is undoubtedly true, that the exact boundary line between the southern British colonies and Florida, was never adjusted while that province remained in possession of Spain. Each crown claimed territory which had been granted by the other, and was settled by its subjects. Florida was at length ceded to Great Britain; after which, the 31st degree of north latitude was, by the proclamation of 1763, established as the dividing line between that province and Georgia. The crown, however, was in the habit of changing the limits of the colonies; and, though we complained of the manner in which this branch of the prerogative was exercised, we did not resist it. In consequence of a recommendation of the board of trade, the limits of Florida were supposed to be extended, as appears by the commissions to *its [*534 governor, so as to comprehend the land in controversy. This was the state of things when the war of our revolution commenced. In its progress Spain took part in it, and reconquered Florida. At the treaty by which that war was terminated, Great Britain acknowledged the United States to be free, sovereign and independent, and treated with them as such. Their boundaries were particularly described, so as to comprehend the land in controversy. The preliminary articles of peace between the United States and Great Britain were signed at Paris, on the 30th of November, 1782. But these articles were provisional, and were not to take effect until terms of peace should be agreed upon between Great Britain and France. On the 20th of January, 1783, preliminary articles of peace were signed between Great Britain and France, and between Great Britain and Spain. In the treaty with Spain, the Floridas were ceded to that power without any description of boundary.

The United States continued to assert a claim to the 31st degree of north latitude, while Spain maintained perseveringly her pretentions to extend farther north. This was the subject of long and fruitless discussion between the two governments, which was terminated by the treaty signed at San Lorenzo el Real on the 27th day of October, 1795. By this treaty, "the high contracting parties declare and agree, that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, at the northermost part of the 31st degree of latitude north of the equator; which from thence shall be drawn due east to the middle of the river Apalachicola, or Catahouchee; thence," etc. This treaty declares and agrees that the line which was described in the treaty of peace between Great Britain and the United States as their southern boundary, shall be the line which divides their territory from East and West Florida.

The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States. Nor is there anything extraordinary in this admission. The negotiations were all *depending at the same [*535 time and the same place. That between the United States and Great Britain was first completed and signed; it must have been communicated to France, and, of course, was known to Spain, in it the southern boundary of the United States was accurately defined. The subsequent cession of the Floridas to Spain contained no description of boundaries. Great Britain could not, without a breach of faith,

cede to Spain what she had acknowledged to be the territory of the United States. No general words ought to be so construed. We think that Spain ought to have understood the cession, and must have understood it, as being made only to the extent that Britain might rightfully make. This opinion is confirmed by a subsequent part of the same article, which respects the troops, etc., of either party in the territory of the other. It is in these words: "And it is agreed that, if there should be any troops, garrisons, or settlements of either party in the territory of the other, according to the above-mentioned boundaries they shall be withdrawn from the said territory within the term of six months after the ratification of this treaty, or sooner, if it be possible; and that they shall be permitted to take with them all the goods and effects which they possess."

It has been very truly urged by the counsel for the defendant in error, that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy, as well as of justice and humanity, is always required, and is never refused. Had Spain considered herself as ceding territory, she could not have neglected a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States could not have refused. But instead of requiring an article to this effect, she has expressly stipulated for the withdrawal of the settlements made within what the treaty admits to be the territory of the United States, and for permission to the settlers to bring their property with them. We think this an unequivocal acknowledgment, that the occupation of that territory by Spain was wrongful; and we think the opinion thus clearly indicat-
536*] ed was supported *by the state of facts. It follows, that Spanish grants, made after the treaty of peace, can have no intrinsic validity, and the holders must depend for their titles on the laws of the United States. We proceed, then, to inquire into the rights of the plaintiff in error under those laws.

The first act to which our attention has been directed, is that by which Georgia ceded her western territory to the United States. That act provides, "That all persons who, on the 27th day of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed prior to that day by the former British government of West Florida, or by the government of Spain."

On the 3d of March, 1803 (Vol. III., s. 546), Congress passed "an act regulating the grants of land, and provided for the disposal of the lands of the United States south of the state of Tennessee."

The first section enacts, that any person or persons "who were resident in the Mississippi territory on the 27th day of October, 1795, and who had, prior to that day, obtained, either from the British government of West Florida, or from the Spanish government any warrant or order of survey for lands lying within the said territory, to which the Indian title had been extinguished, and which were, on that day, actually inhabited and cultivated by such person or persons, or for his or their use, shall be confirmed in their claims to such lands, in the same manner as if their titles had been completed."

This section places those persons, who had obtained a warrant or order of survey on the 27th of October, 1795, on equal ground with those whose titles were completed, provided the Indian title was extinguished, and provided, also, the land claimed was actually inhabited and cultivated either by the person claiming title, or by some other for his use.

The second section provides for those who did, on that day of the year, 1797, when the Mississippi territory was finally evacuated, by the Spanish troops, actually inhabit and cultivate a tract of land in that country; and the third section *gives a pre-emption to [*537 those who did actually inhabit and cultivate a tract of land at the time of passing the act.

The 4th section enacts, that two land-offices shall be established for the disposal of the lands of the United States in the Mississippi territory, one in the county of Adams, and the other in the county of Washington; and the fifth directs, "that every person claiming lands by virtue of any British grant, or of the three first sections of the act, or of the articles of agreement and cession between the United States and the state of Georgia, shall, before the last day of March, in the year 1804, deliver to the register of the land-office within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also, on or before that day, deliver to the said register, for the purpose of being recorded, every grant, order of survey, and conveyance or other written evidence of his claim, and the same shall be recorded," etc.; "and if such person shall neglect," etc., "all his right, so far as the same is derived from the above-mentioned articles of agreement, or from the three first sections of this act, shall become void, and forever thereafter be barred."

The sixth section directs the appointment of two boards of commissioners, for the purpose of ascertaining the right of persons claiming the benefit of the articles of agreement and cession between the United States and the state of Georgia, or of the three first sections of the act. One of these boards was to take cognizance of claims to lands lying west of Pearl River, and the other of claims to lands lying east of that river. Each board was empowered to hear, and determine, and decide, in a summary manner, all matters respecting such claims within their respective districts; and their determination, so far as relates to any rights derived from the articles of agreement with Georgia, and from the three first sections of the act, was declared to be final. The act proceeds to direct that each board may appoint a clerk, "whose duty it shall be, to enter in a book, to be kept for that purpose, perfect and correct minutes of the proceedings, decisions, meetings and adjournments of the boards, together with the evidence *on which such decisions are [*538 made; which books and papers, on the dissolution of the boards, shall be transmitted to, and lodged in the office of the Secretary of

State. The commissioners are directed to grant certificates to all persons in whose favor decisions shall be made, which certificates are to be recorded by the register of the land-office, and amount, in all cases where grants have been made, to a complete relinquishment on the part of the United States; and, where grants have not been made, entitle the party to receive one from the United States.

A supplemental act was passed in March, 1804, which prolonged the time until the last day of November in that year for giving the notice prescribed by the 5th section of the original act, to the register of the land-office, of claims to lands lying west of Pearl River, for the purpose of being recorded. This act provides, that in cases of a complete British or Spanish grant, it shall not be necessary for the claimant to have any other evidence of his claim recorded except the original grant or patent, together with the warrant or order of survey, and the plat. The 3d section enacts, "that when any Spanish grant, warrant, or order of survey, shall be produced to either of the said boards, or lands which were not, at the date of the instrument, or within one year thereafter, inhabited, cultivated or occupied, by or for the use of the grantee, or whenever either of the said boards shall not be satisfied that such grant, warrant, or order of survey, did issue at the time when the same bears date, the said commissioners shall not be bound to consider such grant, warrant, or order of survey, as conclusive evidence of the title, but may require such other proof of its validity as they may deem proper; and the said boards shall make a full report to the Secretary of the Treasury, to be by him laid before Congress for their final decision, of all claims grounded on such grants, etc., as may have been disallowed by the said boards, on suspicion of their being antedated or otherwise fraudulent."

It is contended by the plaintiff in error, that these several acts confirm the titles of all those who held lands under the Spanish government, by virtue of grants or orders of survey which were made with good faith prior to the 27th 539*] day of *October, in the year 1795. The defendant in error maintains that they confirm the titles of those only who were actual settlers of the Mississippi territory anterior to that day.

It is admitted that the state of Georgia, in its act of cession, has stipulated for those only who were actual settlers on the 27th of October, 1795, and who held grants legally and fully executed at that time.

The first section of the act of 1803 comprises incomplete titles only, and does not extend to those which were comprehended in the act of cession. It is, in terms, limited to actual settlers; and no person who was not an actual settler can claim under that act. The silence observed by Congress respecting grants fully executed, countenances the opinion that the articles of agreement between the United States and Georgia were supposed to be in themselves a confirmation of the titles of those who were within the words of the instrument. But as the legislature was making provision for the sale of the vacant lands within the ceded territory, it was deemed necessary to ascertain the particular lands which were appropriated. The 5th section of the act, therefore, requires that every person having such claims shall, before the last day of March, in the year 1804, deliver a notice in writing, specifying the extent of his claims, to the register of the land-office, together with his title papers, that they may be recorded. On failure, his title, so far as it is derived from the three first sections of the act, or from the articles of agreement with Georgia, shall become void; nor shall such title paper "be considered or admitted as evidence in any court of the United States, against any grant derived from the United States."

So far as titles were derived from the act itself, no person could complain of this restriction. It was, however, a very rigorous law as respected those who were protected by the articles of agreement of Georgia.

This act certainly contains no confirmation of Spanish titles, except of those which were held by persons who were actual settlers at the time prescribed in the law itself. It provides for the sale of all the unappropriated lands, and establishes a tribunal with power to decide on all titles.

The language of the act of the 27th of March, 1804, is *less explicit. It de- [*540 clares, "that persons claiming lands in the Mississippi territory, by virtue of any British or Spanish grant, or by virtue of the three first sections of the act to which this is a supplement, or of the articles of agreement and cession with the state of Georgia, may, after the last day of March, in the year 1804, and until the last day of November then next following, give notice in writing of their claims to the register of the land office, for the lands lying west of Pearl River, and have the same recorded, in the manner prescribed by the 5th section of the act to which this is a supplement."

The defendant in error contends, that, although the descriptive words of the act apply generally to persons claiming lands under British or Spanish grants, they ought to be confined to the actual settlers of the country. This construction rests chiefly on the argument, that the act of 1804 is a mere supplement to the act of 1803; that the two laws ought to be construed together; that their great object is to quiet possession, and that the main purpose is to give a longer time for recording claims to lands lying west of Pearl River.

There is, we think, great difficulty in maintaining this construction. It has been observed, and the observation has great weight, that all British and Spanish grants held by persons who were actual inhabitants of the country, on the 27th of October, 1795, were protected by the articles of agreement with the state of Georgia. Yet these persons are enumerated in the act as constituting a distinct class of claimants not provided for in that compact. The inference is very strong, that Congress must have supposed there was such a class. The concluding words of the section indicate the same idea. They are, "and the powers vested by law in the commissioners appointed for the purpose of ascertaining the claims to lands lying west of Pearl River, shall, in every respect, extend and apply to claims which may be made by virtue of this

section; and the same proceedings shall thereupon be had as are prescribed by the act aforesaid, in relation to claims which shall have been exhibited on or before the last day of March, in the year 1804."

541*] *This language, we think, adapted to new claims, as well as to a prolongation of the time in which claims may be recorded, as the preparatory step to laying them before the commissioners. It is observable, too, that the 5th section of the act of 1803 mentions British, but not Spanish grants. They are comprehended in that class of claims which were confirmed by the articles of agreement with Georgia. The act of 1803 contemplates no Spanish grant that was not protected by those articles. The act of 1804, however, introduces Spanish with British grants, and places them together, as forming a class of cases not provided for in the compact with Georgia. We cannot suppose that the legislature would have changed its language, and have introduced the words Spanish grants, with directions that they should be recorded, and laid before the commissioners, if nothing existed to which the words would be applicable.

The language of the third section also indicates an opinion that persons, not inhabitants of the country on the 27th of March, 1795, might be entitled to land under a Spanish grant, warrant, or order of survey. It provides for the case of a claim to land which was not, at the date of such grant, etc., or within one year thereafter, inhabited, cultivated, or occupied by or for the use of the grantee. Now, land might be inhabited, cultivated, or occupied, for the use of a grantee who was not himself an inhabitant of the country, or might be occupied by himself within one year after the date of the grant, though not so occupied on the 27th of October, 1795. The act goes on to provide, that, in such case, or whenever the commissioners shall not be satisfied that the grant, etc., issued at the time it bears date, such grant, etc., shall not be conclusive evidence of the title. This language might certainly justify the implication that Congress supposed the commissioners might establish titles in favor of nonresidents.

The decision of the commissioners against them is not to be final. They are to be reported to the Secretary of the Treasury, to be by him laid before Congress for the final decision of that body.

On the 28th of February, 1809, Congress appears to have acted on this report. An act was

542*] then passed, directing the *lands, the claims to which had been disallowed by the commissioners, to be sold in the same manner as other public lands. The same act reserves the right of the Spanish claimant to institute his suit in the highest court of law or equity in the said territory, for the recovery of the land, within one year after it shall have been sold by the United States. If he shall fail to sue within the time limited, his right to sue shall be forever barred. The second section makes the decision of such cause to depend entirely on the claimant's proving that the survey was made before the 27th of October, 1795, and on the fairness of the transaction; and the third section declares parol evidence to be admissible.

This act relates solely to those claims which were laid before the commissioners and disallowed.

The patent under which the plaintiff in error claims the tract of 1,000 acres, appears to have the following indorsements on it:

"Entered on record at Natchez, in the county of Adams, Mississippi territory, in lib. B., fol. 149 a 150, this second day of April, A. D. 1801. "JOHN HENDERSON,
Recorder."

"Land-office west of Pearl River.

"This plat, certificate, and letters-patent, are recorded in the register's book B., of written evidences of claims, fol. 621, etc.

"Examined and corrected by
"J. GIRAULT, Translator."

The plat, and certificate of survey, and patent for 500 acres, appear to have been registered in the land-office west of Pearl River, on the 26th of March, 1804.

The patent for this last survey gives no additional title, because it was granted after the authority of Spain over the country had ceased. It does not appear that either of these title papers was laid before the board of commissioners.

There is certainly some difficulty in construing these acts of Congress. It is not easy to resist the conviction, that the government has legislated on the idea that Spanish titles might be valid, though held by persons who were not *residents of the country on the 27th of [*543 October, 1795. Yet no law has, in express terms, imparted this validity to them. The act of 1804 allows them to be recorded, and to be laid before the commissioners, to be decided on by them. It goes farther, and seems to point the attention of the commissioners to the fairness of the claim, rather than to the residence of the claimant. The certificate of the board in favor of the claimant is conclusive against the United States. Their determination against him is to be reported to the Secretary of the Treasury, in order to be laid before Congress; and this determination is to be founded on the opinion that the document of title is antedated, or otherwise fraudulent. When Congress acts on this report, no absolute decision is made against the rejected claims, but the claimant is allowed time to assert his title in a court of law or equity. These provisions are scarcely to be reconciled with the idea that no Spanish grant could be valid if made to a non-resident of the territory. It would seem as if the commissioners might have taken cognizance of such a claim, might have decided in its favor, and that such a decision would have been conclusive.

But, we repeat that there is no act of Congress expressly confirming such titles, and that they derive no validity from any other source.

The whole legislation on this subject requires, that every title to lands in the country which had been occupied by Spain should be laid before the board of commissioners. The motives for this regulation are obvious; and as the titles had no intrinsic validity, it was opposed by no principle. Claimants could not complain, if the law which gave validity to their claims should also provide a board to examine their fairness, and should make the va-

lidity depend on their being laid before that board. The plaintiff in error has failed to bring his case before the tribunal which the legislature had provided for its examination, and has, therefore, not brought himself within the law. No act of Congress applies to a grant held by a non-resident of the territory in October, 1795, which has not been laid before the board of commissioners. It is true, that no act has declared such grants void; but the legis-544*] lature has ordered the lands to be *sold which were not appropriated in a manner recognized by law, and the land in controversy is of that description.

If this view of the subject be correct, no Spanish grant, made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the contract with Georgia, or has been laid before the board of commissioners.

This opinion is decisive of every point on which the court gave an opinion, so far as respects title.

The first bill of exceptions, taken by the plaintiff in error, is to the rejection of a duly certified copy of a certificate of survey, and a patent issued thereon by the Spanish Governor of West Florida in December, 1797.

The patent was properly rejected, because Spain no longer occupied the territory, and the authority which had been exercised, in fact, by the Spanish government, had ceased. The order and certificate of survey were properly rejected, because they were not confirmed by the three first sections of the act of 1803, and had never been laid before the board of commissioners.

The paper dated the 19th of October, 1796, purporting to be private instructions from William Dunbar, the principal surveyor of the district of Natchez, to William Atchison, the deputy, who made the surveys for the land in controversy, was admitted to rebut the testimony of a witness whose deposition had been taken to prove that the Spanish title papers were fair, and were correctly dated. This paper was admitted, because it related to the official duties of the deputy, was found among his papers after his death, and was proved to be in the handwriting of his principal, who was also dead. Doubts are entertained by some of the judges respecting the propriety of its admission. But this is a question which we think it unnecessary to decide, because the grant, not having been laid before the board of commissioners, could not have availed the defendant in the court below, who did not bring himself within the reservation of the cession from Georgia.

The plaintiff in error, after the testimony had been laid before the jury, prayed the court to instruct them on several points of law which grew out of it. The first of these, which was 545*] *refused, questioned the validity of a grant made by the United States for land occupied at the time under color of an adverse title. There can be no doubt of the correctness of rejecting this proposition.

The 2d, 3d, and 5th points, which the court was prayed to state as law to the jury, depend on the position that residence in the country on the 27th of October, 1795, was not necessary to the validity of the title set up by the defendant in that court. As the title had not been laid before the board of commissioners, and as residence was indispensable to the validity of a claim, supported by the act of cession from Georgia, we think these instructions were properly refused.

The 8th was unimportant to the case in the view which this court has taken of it. If the question, whether the survey, purporting to bear date in September, 1795, was really made on that day, or was antedated, had been the question to be decided by the jury, as it would have been had this paper been laid before the board of commissioners, the court did right in refusing to grant this prayer. It seems to request the court to say, that, in deciding on the verity of a paper alleged to be fraudulent, the paper itself is entitled to more credit than the parol testimony which impeaches it, though the law declares parol testimony to be admissible.

On the other points, the court gave the instruction asked by the plaintiff in error.

We think the plaintiff in error has neither brought himself within the articles of agreement between the United States and the state of Georgia, nor within the acts of Congress; and that the judgment of the District Court must be affirmed with costs.

[*Practice.] [*546

THE ANTELOPE.

The Spanish and Portuguese Consuls, Claimants.

Further explanation of the decree of this court, in S. C. ante, Vol. X. p. 66, and Vol. XI. p. 413.

The Africans captured, except those restored to the Spanish claimants, to be delivered to the United States, absolutely and unconditionally, without the precedent payment of expenses.

No judgment or decree can be rendered directly against the United States for costs and expenses.

The fees and compensation to the marshal, where the government is a party to the suit, and his fees or compensation are chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the court, or one of the judges.

Decree of the Circuit Court, in respect to the apportionment among the several parties to the suit of the costs and expenses, affirmed.

Identity of the Africans restored to the Spanish claimant established by sufficient evidence.

THIS is the same cause which is reported ante Vol. X., p. 66, and Vol. XI., p. 413, and was again brought before the court upon a further appeal, and certificate of a division of opinions as to the proceedings of the court below in execution of the former decree of this court.

It was argued by the Attorney-General and Mr. Key for the appellants, and by Mr. Berrien, Mr. C. J. Ingersoll, and Mr. Wilde, for the respondents.

Mr. Justice Trimble delivered the opinion of the court:

This case having been before this court, and a decree rendered therein at February term, 1825, and again brought up, an explanatory decree made therein at February term, 1826, the reports of the case in 10 Wheat. Rep. 66,

NOTE.—As to the African slave trade, see note ante, 268.

and 11 Wheat. Rep. 413, are referred to for the general history of its facts and circumstances, and for the principles settled in it by the former decrees of this court. The case was remanded to the Circuit Court, with directions 547*] to make *a final disposition of the controversy between the parties, pursuant to the principles of the decrees of 1825 and 1826 of this court.

The Circuit Court, in order to enable it to decree finally in the case, directed the register to take and report an account of the costs, and also of the expenses of keeping, maintaining, etc., of the Africans, by the marshal, and which account was accordingly reported. Exceptions were filed to the report by both the Portuguese and Spanish claimants.

The Circuit Court also caused proofs to be taken for the purpose of identifying individually the Africans to be delivered to the Spanish claimants, as directed by the decree of 1826.

Thus circumstanced, the case came on for final hearing before the Circuit Court. The court decreed that the Portuguese claimant should not be made liable for costs, or any proportion of the expenses and charges of the marshal for maintaining, etc., the Africans; and being of opinion that thirty-nine of the Africans were sufficiently identified by proof, as being the property of the Spanish claimants, directed the thirty-nine Africans, so identified, to be delivered to the Spanish claimants, upon their paying a proportion of the costs and expenses reported by the registrar, in the ratio of the number of Africans delivered, to the whole number; and the Circuit Court was further of opinion, that the residue of the Africans not directed to be delivered to the Spanish claimants, should be delivered to the United States, to be disposed of according to law; but, on the question whether they shall be delivered absolutely, or on condition of payment of the balance of the expenses which will remain unsatisfied after charging the Africans adjudged to the Spanish claimants in their due ratio, the judges of the Circuit Court being divided in opinion, ordered this difference of opinion to be certified to this court.

The case comes up on this certificate of division, and, also, upon an appeal prayed by the district-attorney on behalf of the United States, and allowed. "From so much of the said final order of the Circuit Court as relates to the apportionment among the several parties of the costs and expenses, in the preserva- 548*] tion, maintenance, *and custody of the said Africans, and of the costs and expenses of the various proceedings which have been had in relation to the said Africans, and, also, from so much of said order as decrees thirty-nine of the said Africans to the Spanish claimants."

We will first consider the question arising upon the certificate of division of opinion between the judges of the Circuit Court.

It appears, from the opinion delivered by the Circuit Court, and from the registrar's report, that, in making up that report as to the amount of expenses, sixteen cents per diem was allowed the marshal for the custody, maintenance, etc., of the Africans; and the Spanish claimants were charged, as a condition precedent, with the proportion of expenses of the marshal, after this rate, in the ratio of the number of Africans to be delivered to them. The residue of the marshal's expenses, at the same rate per diem, is supposed to be meant by the term "expenses," in the question on which the judges were opposed in opinion; and it is supposed the question upon which the judges were opposed in opinion was, whether the Africans not directed to be delivered to the Spanish claimants, should be delivered by the marshal to the United States, absolutely and unconditionally, to be disposed of according to law, or whether it should be imposed on the United States as a condition precedent to their delivery, that the United States should pay to the marshal his claim for expenses at the rate aforesaid, in the ratio of the number of Africans to be delivered to the United States.

The Spanish claimants have not appealed from the decree of the Circuit Court. As the court had decided that they ought to bear some proportion of the expenses, it was necessary, for the purpose of ascertaining the amount which they were to pay, to fix upon some data for making up the account of expenses so far as related to them. But, as they do not complain, this court is not called upon to decide whether they were overcharged or not, nor to determine whether the rate of sixteen cents per diem was warranted by law, as the Circuit Court supposed, so far as the Spanish claimants are concerned.

*As relates to the United States, the [*549 question propounded by the judges of the Circuit Court, and upon which they were divided in opinion does not necessarily draw in question the data or rate of the marshal's allowance for expenses; but whether the payment of his expenses, at any rate, or to any amount, ought to be made a precedent condition to the delivery of the Africans to the United States. It may well be doubted, however, whether the state law does, as supposed by the court, authorize the marshal to charge, as matter of right, sixteen cents per diem, for keeping, maintaining, etc., the Africans; although it might furnish some guide, in an appeal to the sound discretion and justice of the government, in making him a reasonable compensation. It is true, the first section of the "Act for providing compensation for the marshal," 3d vol. ch. 125, after declaring the fees and compensation to be allowed the marshal for certain enumerated services, etc., adds, "For all other services not herein enumerated, such fees or compensation as are allowed in the Supreme Court of the state where the services are rendered." This has generally been construed, and, we think, rightly, to mean, that where the services performed are not enumerated in the act of Congress, but such services are enumerated, and a fixed allowance made therefor in the state laws, they shall fix the rule of compensation. The case under consideration is wholly unprovided for by the laws and usages of the state. The Africans to be delivered to the United States, are neither slaves in contemplation of law, nor prisoners of war, nor persons charged with crimes. The compensations allowed by the laws of the state to sheriffs and jailers, in these cases, do not, therefore, furnish any positive rule of law or right, as to

the compensation which ought to be allowed the marshal in the peculiar circumstances attending these Africans. He is, no doubt, entitled to a reasonable compensation; but that must depend upon the circumstances of the case, and not any positive rule. But be that as it may, it could not legally enter into the judgment and decree of the court, so far as that judgment or decree was to affect the rights of the United States, or the rights of the mar- 550*] shal as *against the United States. It is a general rule, that no court can make a direct judgment or decree against the United States, for costs and expenses, in a suit to which the United States is party, either on behalf of any suitor, or any officer of the government. As to the officers of the government, the law expressly provides a different mode.

The third section of the "Act for regulating process," etc., Vol. II. ch. 137, makes provisions for the fees and compensation to be allowed the marshal, similar to the "Act for providing for compensation to marshals," etc., above cited. The fourth section makes some further regulations concerning the fees and compensation to be allowed clerks and marshals, and then provides, "that the same having been examined and certified by the court, or one of the judges of it, in which the services shall have been rendered, shall be passed in the usual manner at, and the amount thereof paid out of the treasury of the United States," etc.

These provisions show, we think, incontestably, that, whether the marshal's fees and compensation for services rendered the United States be fixed by some positive statutory rule, as in enumerated services, or depends upon what is reasonable or just under the circumstances of the case, as in non-enumerated services, they must be certified to, and paid out of, the treasury, and cannot lawfully constitute any part of the judgment or decree in the cause. It would, indeed, be extraordinary, if the marshal, who is the servant of the government, and holds possession of the Africans merely by its authority, could obstruct the operations of the government by a claim for compensation for his services. The laws give the marshal no lien on the Africans, and we can discover no principle which will justify the court in creating a lien, in effect, by its decree. There is no necessity for such a proceeding.

The seventh section of "An act in addition to the acts prohibiting the slave trade," appropriates one hundred thousand dollars to carry the law into effect. The second section of the act authorizes the President of the United States to make such regulations and arrange- 551*] ments as he may deem *expedient for the safe keeping, support, and removal, beyond the limits of the United States, all such negroes," etc. 5 vol. ch. 511.

It is not to be doubted, that if a reasonable account for expenses were certified according to law, that arrangements would be made to pay it out of the fund appropriated for carrying into effect the laws prohibiting the slave trade.

We are of opinion it ought to be certified to the Circuit Court, that all the Africans captured in the Antelope, except those directed to be delivered to the Spanish claimants, should be decreed to be delivered to the United States, absolutely and unconditionally, without the precedent payment of expenses.

In that part of the case brought up by appeal, it is insisted on behalf of the United States, that so much of the decree of the Circuit Court "as relates to the apportionment among the several parties of the costs and expenses in the preservation, maintenance, and custody of the Africans, and the costs and expenses of the various proceedings which have been had in relation to said Africans," is erroneous. It is contended, that these costs and expenses were occasioned by the prosecution of a groundless claim by the Portuguese and Spanish claimants, and that they should have been decreed to pay them.

It may well be doubted whether these questions are now open to discussion. By a former order and decree of the Circuit Court, made before the former appeals, the ordinary costs and charges were regulated, and they were paid accordingly; that order is not now before this court in this appeal. By the former decree of the Circuit Court, rendered before the former appeals, a principle was established as to the ratio in which the Spanish and Portuguese claimants should be chargeable with the expenses of maintenance, etc. The principle was, that they should be charged in the ratio of the number of Africans to be delivered to them respectively.

There was no appeal from that part of the former decree of the Circuit Court; or if there was, it was virtually affirmed by the former decree of this court.

In the application of the principle to the case as it now *stands, it seems to fol- [*552 low, necessarily, that as none of the Africans are to be delivered to the Portuguese claimant, he should pay none of the expenses of keeping them; and that the Spaniard should pay in the ratio of thirty-nine, the number to be delivered to him. The condition of the Portuguese consul, too, is very peculiar. Under the circumstances in which these Africans were captured, and brought into the United States, it was his duty to interpose a claim for part of them, on behalf of the subjects of His Majesty the King of Portugal. That claim was sustained in the district and circuit courts, and the general propriety of the claim was also recognized by the former decree of this court, but as no individual Portuguese claimant of the property appeared before the hearing of the appeal, the claim of the Vice-Consul of Portugal was dismissed on that ground. It would be too much to visit him with the extraordinary expenses under such circumstances, and he has heretofore paid his proportion of the ordinary expenses of the suit.

We think there is no just ground of complaint on the part of the United States, that the Spanish claimants have not been burdened with more than a ratable proportion of the expense of keeping the Africans.

It only remains to be inquired, whether the Circuit Court erred in directing thirty-nine of the Africans to be delivered to the Spanish claimants.

It has been argued, that there is no credible

and competent evidence to identify them, or any of them.

We are not of that opinion. We think, that under the peculiar and special circumstances of the case, the evidence of identity is competent, credible, and reasonably satisfactory, to identify the whole thirty-nine.

It ought not to be forgotten, that in the original cause it had been established to the satisfaction of this court, that ninety-three of the Africans brought in with the Antelope were the property of the Spanish claimants; but, as many of the Africans had died, it was the opinion of this court, that number should be reduced according to the whole number living. The Circuit Court, proceeding upon this principle, fixed the whole number to which the 553*] Spanish claimants *were entitled at fifty, and then proceeded to inquire as to their identity.

Grondona, who had been examined as a witness in the original cause, was second officer on board the Antelope when the Spanish Africans were purchased, and put on board the Antelope, on the coast of Africa.

It appears that the Africans captured, and brought in with the Antelope, were put into the possession of Mr. William Richardson; and that he had about fifty of them employed at work upon the fortifications at Savannah; that while there, Grondona came out with the marshal for the purpose of identifying the Spanish Africans; that the fifty Africans were drawn up in a line; that Grondona made signs and spoke to the negroes, and they to him, and they generally appeared to recognize him as an acquaintance. On cross-examination, he says, he cannot say that every one of the negroes recognized the sign made by the person accompanying the marshal to the fortifications, but that they generally did.

The Africans of the Antelope being paraded in front of the court-house, Mr. Richardson was directed by the court to point out, and designate, individually, the Africans who had worked on the fortifications, and he designated thirty-four. It is proved by Mr. Morel, the marshal, that Grondona recognized five others, who were with other persons, and that they appeared to recognize Grondona as an acquaintance. These five are described by name, and pointed out by other witnesses.

Before these proofs were taken in open court, for the purpose of identifying the Africans claimed by the Spaniards, Grondona had disappeared, and it is suggested was dead. He had, however, in his examination as a witness in chief in the cause, shown that he was an officer on board, and knew the Africans belonging to the Spanish claimants. Grondona, and the Africans, both spoke languages not understood by the witnesses; yet it could well be seen by them that Grondona and the Africans knew and understood each other; and Mr. Richardson swears that many of them appeared to know him very well, and that he 554*] claimed them as *part of the Africans originally put on board the Antelope by the Spanish owners.

We think this evidence was sufficient, under the very peculiar circumstances of this case, reasonably to satisfy the mind of the identity of thirty-nine of the Africans as belonging to the Spanish claimants.

Decree and Certificate.—This cause came on, etc. On consideration whereof, this court is of opinion, that there is no error in the decree of the Circuit Court so far as the same proceeds, and that it be affirmed; and upon the question on which the judges of the Circuit Court were divided in opinion; it is the opinion of this court, that all the Africans, not to be delivered to the Spanish claimants, ought to be decreed to be delivered to the United States, unconditionally, and without the precedent payment of expenses, to be by them disposed of according to law.

[Bill of Exchange. Surety.]

M'LEMORE, Plaintiff in Error,

v.

POWELL et al., Defendants in Error.

An agreement between the creditor and principal debtor for delay, or otherwise changing the nature of the contract to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties.

A mere agreement by the holder of a bill with the drawer for delay, without any consideration for it, and without any communication with or assent of the indorser, will not discharge the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself.

THIS cause was argued by Mr. White and Mr. Eaton for the plaintiff in error, and by Mr. Webster and Mr. Bliss for the defendants in error.

*Mr. Justice Story delivered the [*555 opinion of the court:

This is a writ of error to the Circuit Court of the United States for the district of West Tennessee.

The original action was assumpsit, brought by Powell, Fosters & Co., as holders of a bill of exchange, drawn by one Thomas Fletcher, in May, 1819, at Nashville, upon Messrs. M'Neil, Fisk & Rutherford, at New Orleans, payable to Thomas Read, or order, for two thousand dollars, in sixty days after date, and by him indorsed to the defendant, John C. M'Lemore, and by him to the plaintiffs. The bill, upon presentment for acceptance, was dishonored, and due notice of the dishonor was given to the defendant.

At the trial, upon the general issue, Thomas Fletcher, the drawer, was, under a release from the defendant, M'Lemore, examined as a witness, and, among other things, testified that, in the month of October following the dishonor of the bill, "one of the plaintiffs applied to him at Nashville for the money on the bill, and threatened to sue immediately if an arrangement was not made to pay the bill. The witness then proposed to the plaintiff, if he would indulge him four or five weeks, he would himself, to a certainty, pay the bill. To this the plaintiff agreed, and told the witness

NOTE.—As to where agreement for delay discharges indorser, see note ante, 190.

he was going to Louisville, Kentucky, and would return by Nashville about the expiration of that time, and would receive said payment. Since said time the witness has never seen said plaintiff." The witness further testified, that the defendant was an accommodation indorser for him on the bill; that the plaintiff told him that the bill would be left with a Mr. Washington at Nashville; that he expected he would himself be at that place at the time agreed on, but that, if he did not come, he would give the instructions to Mr. Washington, by letter, what to do if the witness did not pay at the expiration of the time agreed on. It did not appear that any consideration was paid or stipulated for this delay; and no suit was commenced until after this period had elapsed. The district judge instructed the jury, that if they believed the conversation above stated amounted to no more than an agreement that a suit should not be brought for four or five weeks, and that no premium or consideration was given or paid, or to be paid by Fletcher, 556*] the indorsers were not discharged, *that an agreement for giving day must be an obligatory contract for a consideration which ties up the hands of the creditor, and disables him from suing, thereby affecting the interests and rights of the indorser; that the indorser has a right to require and demand of the creditor to bring a suit against the drawer, and if he has disabled himself from bringing a suit by a contract for a consideration, he has thereby released the indorser; and that, if the jury were satisfied from the testimony, that time was given for a valuable consideration paid, or to be paid, or that a new security was taken by the holder, that the indorser was discharged and absolved from all the obligations of the indorsement.

Under this instruction, the jury found a verdict for the plaintiffs, upon which there was judgment given in their favor. A bill of exceptions was taken to the charge of the court; and the present writ of error is brought for the purpose of ascertaining its legal correctness.

It is unnecessary to give any opinion upon that part of the charge which respects the right of an indorser to require the holder to commence a suit against the drawer. In general, the indorser, by paying the bill, has a complete power to re-instate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties. The same reason, therefore, does not exist, as may in common cases of suretyship, to compel the creditor to active diligence by suit against the principal. Without expressing any opinion on this point, it is sufficient to say, that the error, if any, was favorable to the defendant, and, therefore, it can form no subject of complaint on his part.

The case, then, resolves itself into this question, whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with, or assent of, the indorser, is a discharge of the latter, after he has been fixed in his responsibility, by the refusal of the drawee, and due notice to himself. And we are all of opinion that it does not. We admit the doctrine, that although the indorser has received due notice of the dishonor of the bill, yet, if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the *nature of the original contract, or af- [*557 fecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment the rights of any of the parties. In the present case, the jury have found, that there was no consideration for the promise to delay a suit, and, consequently, the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord Eldon, in English v. Darley, 2 Bos. & Pull. 61, that "as long as the holder is passive, all his remedies remain;" and, we add, that he is not bound to active diligence. But if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him.

The cases proceed upon the distinction here pointed out, and conclusively settle the present question. In Natwyn v. St. Quintin, 1 Bos. & Pull. 652, where the action was by indorsees against the drawer of a bill, it appeared, that after the bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account from the indorser; and to an application from the acceptor, stating that it was probable he should be able to pay at a future period, they returned for answer, that they would not press him. The court held it no discharge; and Lord Chief Justice Eyre, in delivering the opinion of the court, said that if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the bill had not been demanded when due, it was clear the drawer would have been discharged, for it would be giving a new credit to the acceptor. But that, after protest for non-payment, and *notice to the drawer, or an equivalent [*558 to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor. He might forbear to sue him. The same doctrine was held in Arundel Bank v. Goble, reported in a note to Chitty on Bills. Chitty, 379, Note c, edit. 1821. There the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended that this was a discharge of the drawer; but the court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant; and that the understanding that interest should be paid by the acceptor, made no difference. So, in Badnall v. Samuel, 3 Price's Exch. Rep. 521, in a suit

by the holder against a prior indorser of a bill of exchange, it was held, that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place during the negotiation, because there was no binding contract which precluded the plaintiffs from suing the acceptor at any time.

Upon authority, therefore, we are of opinion that this writ of error cannot be sustained, and that the judgment below was right. Upon principle, we should entertain the same opinion, as we think the whole reasoning upon which the delay of the holder to enforce his rights against the drawer is held to discharge the indorser after notice, is founded upon the notion that the stipulation for delay suspends the present rights and remedies of the holder.

The judgment of the court below is, therefore, affirmed with costs.

559*] [*Bills of Exchange.]

THE UNITED STATES

v.

PRISCILLA BARKER, Administratrix of Abraham Barker, deceased.

Wherever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the indorser, as in a transaction between private individuals.

Where the United States were the holders of certain bills of exchange, and their agent in New York was directed, by a letter from the Secretary of the Treasury, dated Washington, December 7th, 1814, to give notice of non-acceptance to the drawer and indorsers, residing in New York, and notice was given to the indorser on the 12th of the same month, the mail which left the 8th having arrived at New York at 35 minutes past 10 o'clock A. M. on the 10th: Held, that the indorser was discharged by the negligence of the holders.

So, also, where the United States were the holders of other bills, and their agent in New York was directed, by a letter from the Secretary of the Treasury, dated Washington, May 8th, 1815, to give notice of non-payment to the drawer and indorsers residing in New York, and notice was given to the indorser on the 12th of the same month, the mail which left Washington on the 8th having reached New York early on the morning of the 11th. Held, that the indorser was discharged by the negligence of the holders.

ERROR to the Circuit Court for the eastern district of Pennsylvania.

This was an action of assumpsit brought in the court below by the United States, against the personal representative of A. Barker, deceased, the indorser of several bills of exchange, drawn in the year 1814, by J. Barker, in New York, on different houses of trade in England. Among the bills, two were protested for non-acceptance, and two for non-acceptance and non-payment. It appeared in evidence at the trial, that the agent of the United States Treasury, in New York, where the bills were drawn, and where the drawer and indorsers resided, received a letter from the Secretary of the Treasury, dated Washington, December 7th, *1814, requesting him to notify the [*560 drawer and indorsers of the non-acceptance of the first set of bills, and that notice was accordingly given to them on the 12th of December. It was further proved that the mail which left Washington on the 8th of the same month, arrived at New York at 35 minutes past 10 o'clock, A. M., on the 10th. It was also proved that the said agent received a letter from the Secretary of the Treasury, dated at Washington, May 8th, 1815, directing him to give notice of the non-payment of the second set of bills of exchange to the drawer and indorsers, and that they were notified on the 12th of the same month. It was further proved that the mail which left Washington, containing letters of the 8th of May, reached New York early in the morning of the 11th. But no notice of the non-acceptance of this second set of bills was proved.

The learned judges in the court below instructed the jury that the holders of the bill had not used due diligence. The letter of the 7th of December, 1814, must be considered as having been written on that day, and ought to have been put into the post-office to come by the mail of the 8th; and, if so, it would have reached New York on the morning of the 10th. That the letter of the 8th of May, 1815, should have been put into the post-office to come by the mail of the 9th, and would have reached New York the morning of the 11th. The earliest notice alleged was on the 12th of May and December, respectively; and it seemed clear, either that the letters were not put into the post-office at Washington in due time, or that the agent in New York was guilty of negligence in giving notice to the parties, in either of which cases they were discharged.

A verdict and judgment was rendered upon this instruction in the court below, on which the cause was brought, by writ of error, to this court.

The cause was submitted without argument, by the Attorney-General for the United States, and by Mr. Webster for the defendant.

NOTE.—When the United States, by their authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibility of individuals who are parties to such instruments. Beers v. United States, Dev. 28; 4 Op. Att.-Gen. 90; 8 Op. Att.-Gen. 1.

Consequently, where a draft is drawn by it, the holder is bound to the same diligence in presenting the same, and of giving notice of non-acceptance or non-payment, as in case of a draft drawn by an individual. 8 Op. Att.-Gen. 1.

The United States, held, under the circumstances, parties to a bill of exchange, both as drawers and drawees, where the bill was drawn by a purser in the navy, in pursuance of instructions from the navy department, upon the Secretary of the Navy, and liable without protest or notice. Beers v. United States, Dev. 27.

That the government should pay the same damages upon a bill of exchange drawn by it, and protested, as a private person would be liable to pay. See Bank of U. S. v. U. S. 2 How. 711; Thorndyke v. U. S. 2 Mas. 1.

The United States are a body corporate, having capacity to contract. The government of the United States has power, as incident to its sovereignty, to make a contract. Stearns v. U. S. 2 Paine, 300; U. S. v. Lane, 3 McLean, 365.

Mr. Chief Justice Marshall delivered the opinion of the court:

561*] *That whatever doubts might be entertained as to the charge of the court below relating to the transactions in England (which it has not been thought necessary to state), in respect to the protest and transmission of the bills, we think there is none as to what took place after their arrival at the treasury of the United States. The question was, whether notice of the dishonor of the bills was transmitted to the party within the time prescribed by the general law in respect to bills of exchange. The court were of opinion that there was negligence either at Washington or New York, as to giving such notice; and that the notice actually given was too late to fix him with the responsibility. The letter from the treasury department giving the notice, was either not sent in due course of mail to New York, or there was negligence at New York in not giving notice there as early as it should have been given, after the letter arrived at that city. Whether, therefore, the judge erred or not, as to the first part of his charge, in respect to the transmission of the bills from England in a reasonable time, there was no doubt that the United States had no right to recover, on account of the neglect in giving due notice after the return of the bills.

Upon this ground, the judgment of the Circuit Court was affirmed.

[Practice.]

PARKER, et al.,
v.
THE JUDGES of the CIRCUIT COURT of MARYLAND.

An injunction out of the Circuit Court, to stay proceedings on a judgment at law in that court, may issue, notwithstanding the pendency of a writ of error on the judgment in this court.

An injunction issued by order of the district judge, expires at the next term of the court, unless continued by the court; but the denial of several successive motions to dissolve the injunction, may, under circumstances, be considered as equivalent to an order for renewing it.

562*] *MR. RAYMOND, for the plaintiffs, having, on a former day, obtained a rule to show cause why a mandamus should not issue to the judges of the Circuit Court of Maryland, cause was this day shown, and the question argued by Mr. Raymond, for the rule, and by the Attorney-General against it.

Mr. Chief Justice Marshall delivered the opinion of the court:

A rule was made upon the judges of the court of the United States for the fourth circuit and district of Maryland, to show cause why an execution should not issue on a judgment rendered in that court in favor of Parkin, Parker, and Clough, against John E. Rigden. A writ of error had been sued out to this judgment, which had been affirmed in this court, and the usual mandate had been awarded. On affidavit that the clerk of the Circuit Court had refused to issue an execution, and that the judges of that court had refused to direct one, this rule was made.

The cause shown is, that, after suing forth the writ of error to the original judgment, Rigden had determined to abandon it. That the counsel who had obtained the judgment took the record from the clerk's office, filed it in this court, and obtained an affirmance of the judgment. Before this affirmance, John E. Rigden obtained an injunction to stay all proceedings at law on the said judgment, which the counsel for Parkin, Parker, and Clough, have made two ineffectual attempts to dissolve; and that the said judges were, and are, of opinion, that to issue execution during the continuance of the injunction, would be a violation thereof.

The record of the proceedings in chancery is annexed to this return, which shows that an injunction was awarded by Elias Glenn, the district judge, on the 19th of February, 1825, at which time the writ of error was depending in this court.

The subpœna was returnable to the May term of the Circuit Court, but the record does not state that any order was made in the cause at that term. In December, a rule was made on the defendants in equity to answer the bill. In *May, 1826, an answer was [*563 filed for Parkin, Parker, and Clough, by William Gwynn and Daniel Raymond, their agents and attorneys, who moved to dissolve the injunction, which motion was rejected. Afterwards, in December, 1826, on the suggestion that there is no bond for the performance of any decree which might be pronounced in the cause, it was ordered by the court, that the injunction be dissolved, unless cause be shown to the contrary on or before the 23d day of December instant. On the 22d this rule was extended. The bond, given on obtaining the injunction, which had been mislaid, was found, and, on the 26th, the court, on argument, again refused to dissolve the injunction.

The cause shown on the return, consists of two parts: 1st. The supposed incorrect conduct of the counsel for the plaintiff at law, in bringing up the record after the defendant had abandoned his intention to prosecute the writ of error. 2d. The pendency of the injunction.

The first cause shown is entirely insufficient. The plaintiff in error having given bond to prosecute his writ, was at liberty at any time to bring up the record; and, although the writ constituted no supersedeas, yet the party who had obtained the judgment would remain exposed to the hazard of its being reversed at a distant day. To obviate such an inconvenience, one of the rules of this court authorizes the defendant in error, where the plaintiff has failed to file the record within the time prescribed, to docket the cause, and file a copy of the record with the clerk. The defendant in error has only conformed to this rule, and can be liable to no censure for doing so.

The second cause assigned for refusing to issue the execution, has been contested on two grounds:

1. It is contended, that an injunction could

not be awarded while the record was before this court on a writ of error.

We do not think this a valid objection. The suit in chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them. It sets up an equity independent of the judgment, which admits the validity of that judgment, but suggests 564*] reasons why the *party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been, and could not be, litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal. The bill is an original bill, and may be filed although an injunction should not be awarded. The injunction arrests proceedings at law, and may be dissolved or continued without making any final decree in the case. The condition of the suit at law may be a reason for imposing terms on the party who applies for an injunction, but can be no reason for refusing it. The subpœna and injunction act on the person to whom they are directed, not on the record, and it can be of no consequence where the record is.

2. The second objection to the pendency of the injunction has more weight. It was awarded in December, 1825, by the district judge, and no order appears to have been made for its continuance at the succeeding term. The act which authorizes the district judges to grant writs of injunction, provides, "that the same shall not, unless so ordered by the Circuit Court, continue longer than to the Circuit Court next ensuing." An order for its continuance, therefore, ought to have been made; and, after the close of the term without such order, an execution might have been sued out on the judgment without any contempt of the court.

But if, in point of law, the injunction ceased to exist, the court could re-instate it at will. The judges acted obviously on the opinion, that the injunction still continued, and ought to continue. Two successive motions to dissolve it were overruled. The same view of the case which induced the court thus to continue the injunction, must have induced a re-instatement of it, had it been supposed to be discontinued by the omission to make an order in it at the term to which the subpœna was returnable. If, upon the ground of this omission, the mandamus should be awarded, it might be rendered useless by granting a new injunction. It ought to be granted, if the case, as it now appears, shows that the plaintiff in equity is entitled to relief. We must suppose that, in the opinion of the court, he is so entitled, 565*] *or the injunction would have been dissolved on motion. The continuance of the injunction is, in substance, equivalent to a renewal of it.

Under these circumstances, some difference of opinion exists on the motion for a mandamus. Some of the judges think that it ought to be awarded; others are of opinion that as the injunction is still continued by the court, and as the judges who have a right to give it force have returned that it is in force, it ought not to be awarded. The motion is overruled.

Rule discharged.

730

[Limitation.]

THOMPSON
v.
PETER & JOHNS, Administrators de bonis non of Peter, deceased.

An acknowledgment of the debt by the personal representatives of the original debtor, deceased, will not take the case out of the statute of limitations.

ERROR to the Circuit Court for the District of Columbia. This was an action of assumpsit brought in September, 1822, by the plaintiff against the defendants, for goods sold, etc., to their intestate. At the trial in the court below, the plaintiff gave in evidence, that in the life-time of the intestate, James Peter, who died in the year 1808, he admitted the payment, at his request and for his use, by the plaintiff, of the $800 charged in the account produced; that after the death of said Peter, and after his brother D. Peter had obtained letters of administration on his estate, an account, of which the one now in suit is a copy, was drawn off, passed the Orphans' Court, and presented to said D. Peter, as said administrator, for payment; to which he answered, there were no funds in hand to pay the debts of the intestate. The said account, with the certificate of allowance by the Orphans' *Court [*566 thereon, and so presented as aforesaid, was left in the hands of said D. Peter after his death, which was in the year 1812; and after the defendants had qualified as administrators de bonus non, some time in the spring or summer of the year 1820, an application was made on behalf of the plaintiff to the defendant, G. Peter, for a settlement of the said account; to which he answered, that he knew very little of the business of the estate, which was principally attended to by the other defendant, Johns, but there were no funds in hand to pay the debts of the estate; and in a subsequent conversation, the said G. Peter, in answer to another application for payment of the said account, said, that until a recovery could be had from one Magruder, to whom lands of the intestate had been sold, for the purchase money of which a suit was pending, the administrators would have no funds to pay James Peter's debts; application for a settlement was then made in behalf of the plaintiff to said Johns, to whom the other defendant had referred as the acting administrator, and the said Johns was requested to see if the said account, before delivered to said David Peter as aforesaid, was not among the files of his papers, and to return it for the purpose of bringing suit on it; to which the said Johns replied that he had seen, or believed the account was on file; would look for and return it; and further said, there were no funds in hand to pay the debts of the estate; and on a second application to the said Johns for the said account, he said he had looked for it and could not find it.

A verdict was taken subject to the opinion of the court, whether the above was sufficient evidence, to be left to the jury, of a subsequent acknowledgment of the debt, to take the case out of the statute of limitations. A judgment having been rendered for the defendants, the

cause was brought by writ of error before this court:

The cause was argued by Mr. Jones for the plaintiff, and by Mr. Key for the defendants.

Mr. Chief Justice Marshall delivered the opinion of the court:

567*] *This was a suit brought in September, 1822, on a promise alleged to have been made by the intestate of the defendant, who died in the year 1808. The defendant pleaded non assumpsit, and the statute of limitations, on which pleas issue was joined. By consent of parties a verdict was found for the plaintiff, subject to the opinion of the court, whether the evidence which is stated in a case made by the parties be sufficient to be left to the jury as evidence of a subsequent acknowledgment, competent to take the case out of the statute of limitations. The court gave judgment for the defendants, which judgment is now before this court on a writ of error.

The court is of opinion that the Circuit Court decided rightly. The original administrator, David Peter, did not acknowledge the debt, but said there were no funds in hand to pay the debts of the testator. This language might be used by a person not intending to give any validity to the claim, and ignorant of its real merits. The conversation with one of the present defendants, George Peter, was still further from being an acknowledgment. Had this even been a suit against the original debtor, these declarations would not have been sufficient to take the case out of the statute. The cases cited from 8 Cranch's Rep. 72, and 11 Wheat. Rep. 209, are expressly in point. But this is not a suit against the original debtor. It is brought against his representative, who may have no personal knowledge of the transaction. Declarations against him have never been held to take the promise of a testator or intestate out of the act. Indeed, the contrary has been held.

Judgment affirmed with costs.

568*] [*Devise.]

WILLIAMSON et al., Appellants,

v.

DANIEL et al., Respondents.

An absolute bequest of certain slaves to P. H. is qualified by a subsequent limitation over, that if either of the testator's grandchildren, P. H. or J. D. A., should die without a lawful heir of their bodies, that the other should heir its estate, which converted the previous estate into an estate tail; and there being no words in the will which restrained the dying without issue to the time of the death of the legatee, the limitation over was held to be on a contingency too remote.

The rule of partus sequitur ventrem is universally followed, unless there be something in the terms of the instrument which disposes of the mother, separating the issue from her.

APPEAL from the Circuit Court of Georgia.

The controversy in this cause arose out of the following clauses in the will of James Daniel: "I lend my wife twenty-one negroes," naming them, and also certain lands, "during her natural life." And subsequently, "I give and bequeath unto my granddaughter, Patsy Hendrick, three negroes, viz., Joe, Parker, and Willis. I also give her one-half of the negroes I have lent my wife, to her and her heirs forever. I give and bequeath unto my grandson, Jesse Daniel Austin, son of Betty Austin, one-half of the negroes I have lent my wife, after the death of my wife, Nancy Daniel. Now, my will is, that if either of my grandchildren, Patsy Hendrick, or Jesse Daniel Austin, should die without a lawful heir of their bodies, that the other should heir its estate." Jesse Daniel Austin (now called by special act Jesse Austin Daniel), survived Patsy Hendrick; and after the death of Nancy Daniel, the widow of the testator, took into possession all the negroes bequeathed to her during her life. Patsy Hendrick died about the year 1805, intestate, and without heirs of her body, being at the time of her death an infant about nine years old, leaving Robert Hendrick, her father, and Louisa Hendrick, her half sister, by the father's *side, now Louisa Gibbes, one [*569 of the complainants, her next of kin. Robert Hendrick died in 1814, having first made his will, bequeathing his estate to the said Louisa, his daughter, and his wife Mary, now Mary Williamson, also a complainant. Some of the slaves, to wit, Sally and her children, were born in the life-time of Nancy Daniel.

The court below determined that the limitation over was too remote, and decreed one-half the slaves to the representatives of Patsy Hendrick, the complainants. It also decreed that the slaves, Sally and her children, did not belong to the estate of the tenant for life. The defendants appealed to this court.

The cause was argued by Mr. Berrien for the appellants,[1] and by Mr. Wilde for the respondents.

Mr. Chief Justice Marshall delivered the opinion of the court:

The first bequest to Patsy Hendrick would pass the slaves therein mentioned to her absolutely, were not this absolute estate qualified by the subsequent limitation over, if either of the testator's grandchildren, Patsy Hendrick, or Jesse Daniel Austin, should die without a lawful heir of their bodies, that the other should heir its estate. We think these words convert the absolute estate previously given into an estate tail; and, if so, since slaves are personal property, the limitation over is too remote.

There are no words in the will which restrain the dying without issue to the time of the death of the legatee. The remainder over is to take effect whenever either of the immediate legatees should die without a lawful heir of his or her body. The gift in remainder is a gift to the stock, and is limited over on a contingency too remote to be allowed by the policy of the law.

*The second point is, we believe, [*570 well settled. The issue is, we believe, uni-

1.—Fearne, 445, 471, 478, 482, 485; Prec. in Ch. 15; 1 P. Wms. 534; Prec. in Ch. 108; 3 P. Wms. 253; 3 Johns. Rep. 289; 2 Mass. Rep. 56; 1 P. Wms. 663; 3 Atk. 396; 2 Term Rep. 720; 7 Term Rep. 585; 8 Ves. 11; 17 Ves. 479.

versally considered as following the mother, unless they be separated from each other by the terms of the instrument which disposes of the mother.

Degree affirmed with costs.

[Sale.]

NEWMAN, Plaintiff in Error.
v.
JACKSON, Defendant in Error.

Question as to the sufficiency of a notice of sale of real property under a deed of trust.

No particular form of such a notice is prescribed by law; it is sufficient if the description of the land is reasonably certain, so as to inform the public of the property to be sold.

THIS cause was argued by Mr. Key for the plaintiff in error, and by Mr. Swann for the defendant in error.

Mr. Justice Trimble delivered the opinion of the court:

This was an action of ejectment, brought to recover lot No. 99, in Threlkeld's addition to Georgetown, with the improvements thereon, fronting sixty feet on Fayette street, and one hundred and twenty feet on Second street.

The plaintiff in error was tenant in possession of the premises, appeared to the action, and, upon entering into the common consent rule, was admitted to defend, and pleaded not guilty, upon which issue was joined.

Upon the trial in the court below, the plaintiff gave in evidence a deed from John W. Bronaugh to Thomas G. Moncure, conveying to him, in trust, for the payment of certain enumerated creditors, "a lot on Fayette street, and Second street, in Georgetown, fronting 60 feet feet on Fayette street, and 120 feet on Second street, with the buildings, improvements, 571*] *and privileges," in trust, to secure the payment of the enumerated debts within thirty days; and, if not then paid, the property conveyed in trust to be sold, "after a week's notice in the Messenger," etc.

The plaintiff gave in evidence the notice published in the Messenger, under, and in pursuance of which, the property was sold at public auction, in these words, to wit: "By virtue of a deed of trust to the subscriber, for the securing certain moneys therein mentioned, will be exposed to public sale, on Thursday, the 4th of March next, for ready money, the following described property, viz., lot No. 99, in Peter, Beatty, Threlkeld, and Deakins' addition to Georgetown, fronting 60 feet on Fayette street, and 120 feet on Second street, with a two-story brick dwelling-house, in excellent repair, thereon. The sale to take place on the premises.

"Thomas G. Moncure, Trustee.

"The above sale postponed until the 4th day of May next, when it will certainly take place. March 24th, 1819."

The plaintiff proved that the lot conveyed by the deed of trust had been sold on the premises, at public auction, by Moncure, the trustee, on the day mentioned in the notice, and that Jackson became the highest bidder and purchaser; and the plaintiff gave in evidence the deed of conveyance made by the trustee to Jackson, for lot No. 99, etc., in pursuance of the public sale. It was proved that the plaintiff in error had entered upon the premises as tenant to John W. Bronaugh, and that he was in possession at the commencement of the suit; and the town plats were also given in evidence.

A verdict was taken for the plaintiff, subject to the opinion of the court, as to the law arising upon the case, and the court below thereupon gave judgment for the plaintiff in that court.

It is contended for the plaintiff in error, that the judgment of the court below is erroneous, and should be reversed:

*1st. Because no valid sale could be [*572 made of the premises in question without the aid of a court of equity.

2d. Because the trustee's "proceedings were irregular, and no title passed to the appellee by Moncure's deed of the 14th of June, 1819."

We do not think there is anything in the first ground assumed by the counsel for the plaintiff in error. Whether the conveyance from Bronaugh to Moncure be regarded as a mortgage, as contended for by the counsel, or as a deed of trust, in the usual and technical sense of the term, there can be no doubt it vested in Moncure the legal title to the premises; and this conveyance of the premises by deed to the appellee, if regularly made, must necessarily be regarded in a court of law as investing the appellee with the legal title. How the matter might be regarded by a court of equity, is not for this court here to say. But it is perfectly clear that the conveyance of the trustee was a sufficient title at law to enable his alienee to recover in the action of ejectment, unless the second objection is maintainable.

The second ground of argument proceeds upon an objection to the notice of sale. It turns out, upon an inspection of the town plats, that the premises in question do not lie in "Peter, Beatty, Threlkeld, and Deakins' addition to Georgetown," as described in the notice, but in "Threlkeld's" addition to Georgetown. And this mistake in the description of the premises, it is insisted, wholly vitiates the notice, and must render the sale made under it void. We think the objection ought not to be sustained. The law has prescribed no particular form for a notice of this description. It is sufficient if, upon the whole matter, it appears calculated reasonably to apprize the public of the property intended to be sold. We think the notice sufficient for that purpose, notwithstanding the inaccuracy of describing the property as being in "Peter, Beatty, Threlkeld, and Deakins' addition," instead of "Threlkeld's addition." It could not mislead those who did not know the precise limits of these respective additions, and they were, to those who might wish to purchase, of so little consequence as scarcely to form a subject of inquiry. That part of the description, all must have known, did not, and could

573*] *not, point out the particular lot intended to be sold. That could only be arrived at by the more certain and specific description of its locality; namely, "lot No. 99, fronting 60 feet on Fayette street, and 120 on Second street." To those who knew the precise limits of the several additions, the notice furnished, upon its face, not only sufficient evidence of the mistake, but a sufficient corrective of that mistake. They could not be ignorant that Fayette street and Second street were not in the addition described, but in the adjoining addition, in the name of Threlkeld. As the lot is described as fronting 60 feet on one of those streets, and 120 on the other, it must have been obvious, at once, that as these streets crossed each other at right angles, and the lots were laid off in right-angled parallelograms, the lot intended lay in the angle formed by these two streets. The streets of a town are its public highways, and must be presumed to be well known to, or easily found by, all those who have an interest in knowing them, or inquiring for them. They are, indeed, the most prominent and notorious landmarks and guides by which the lots are to be sought for, found, and known.

It cannot be believed, that anyone wishing to find, or know, lot No. 99, fronting 60 feet on Fayette street, and 120 feet on Second street, or to purchase, could be, for one moment, misguided by the inaccurate, and palpably mistaken description, of its being in "Peter, Beatty, Threlkeld, and Deakins' addition."

Common sense would dictate, to everyone who read the notice, that the less important, obscure, and indefinite part of the description, which, whether true or false, did not fix and give locality to the lot intended to be described, ought to yield to that palpable and notorious description, in reference to the public streets and highways of the town, which gave it positive locality.

It has been said, that the No. 99, did not appear on the recorded plat of the town, upon which the square only is laid down, without divisional lines and numbers designating the lots of each square; but it is admitted, it was numbered on the plat made out by order of the corporation, and lodged with the register, but not recorded.

574*] *It is believed, no purchaser would have ventured to buy without first inspecting the title deeds, and both the plats. But be this as it may, and even if any should have been so careless as not to examine the latter plat, still it would clearly appear, from the recorded plat, that the lot described did not lie in the addition supposed by the notice, but in Threlkeld's addition, which was all that was necessary to correct the mistake; and it would also appear, it must necessarily lie in the angle made by Fayette street and Second street.

A purchaser, or anyone inclined to become a purchaser, of property upon those streets, could not have failed to have ascertained the particular lot intended by the notice.

We all think the notice was, notwithstanding the mistake in part of the description, certain to a common and reasonable extent, and that is sufficient.

Judgment affirmed, with costs.

[Chancery. Local Law.]

DUNLAP et al., Appellants,
v.
DUNLAP et al., Respondents.

A question of fact, in a suit in equity, respecting the proprietary interest in an entry of lands within the military district of Ohio.

Rule of equity, that where land is sold as for a certain quantity, a court of equity relieves if the quantity be defective, only applicable to contracts for the sale of land in a settled country, where the titles are complete, the boundaries determined, and the real quantity known, or capable of being ascertained by the vendor.

THIS cause was argued by Mr. Scott for the appellants, and by Mr. Doddridge for the respondents.

Mr. Chief Justice Marshall delivered the opinion of the court:

*This suit was brought originally by [*575 John Dunlap, the appellee, in the Circuit Court of the United States, sitting in the District of Ohio, to obtain a conveyance of one moiety of a tract of land in the state of Ohio, which was purchased, as is alleged in the bill, on the joint account of the plaintiff and of his uncle, Alexander, one of the defendants in the Circuit Court. Alexander, who made the contract, obtained the conveyance to himself, and afterwards conveyed the land to his son James. Both Alexander and James were made defendants.

Some time about the year 1792 or 1793, Alexander Dunlap purchased from John Fowler an entry of one thousand acres of land on the Scioto River in the Virginia military district, at the price of £100, Virginia currency. An agreement was entered into at the time between the plaintiff and the defendant, Alexander, that this purchase should be made in partnership, the plaintiff says, with himself, the defendant says, with John Dunlap, senior, his father. The testimony, however, proves incontestibly that, though the moiety of the purchase money was paid by the father, it was paid for the plaintiff, whom he always considered as the rightful proprietor of the land. The purchase will, therefore, be treated as being made on the joint account of the plaintiff and Alexander Dunlap. James Dunlap claims as a volunteer under Alexander, and his title is dependent on that of his father.

The original entry was made the 7th of August, 1787. It was withdrawn, and re-entered on the 22d of April, 1796, and this entry was again withdrawn and re-entered on the 25th of July, 1796. The warrant was re-entered on nearly the same land. The changes were such as might probably be caused by a more perfect knowledge of the country; and the last entry, as surveyed on the 20th of October, 1796, contains about three hundred acres of surplus land. The plat of the surveyor, however, on which the patent issued, specifies only 1,000 acres. The right to this surplus constitutes the chief subject of controversy between the parties. The plaintiffs contend that the whole entry was purchased, and that in such contracts the whole entry passes to the purchaser. The defendants insist that the original contract was *for only 1,000 [*576 acres, and that the surplus land belonged to

Fowler. That he afterwards purchased this surplus, not on joint account, but for himself. In 1802 he obtained a grant for the whole tract in his own name, and now claims the whole surplus as his separate property.

The entry is for 1,000 acres of land. The survey made on the entry purports to be for 1,000 acres of land. The plat and certificate of survey were transferred by John Fowler to Alexander Dunlap, by an indorsement in the following words: "I do hereby assign all my right, title, and interest to the within land to Alexander Dunlap, and request a grant may issue accordingly."

This is the only written evidence of the contract, and purports to be a transfer of the whole entry and survey.

The defendant, Alexander, alleges, in his answer, that the original contract was "only for 1,000 acres of land," that after the survey he discovered the surplus and mentioned it to Fowler, who said that he had contracted to sell but 1,000 acres, and should require additional compensation for the excess. The respondent agreed to give him $300 for the surplus, and Fowler's receipt for that sum, dated the 17th of October, 1800, is annexed to the answer. Though the defendant introduces into his answer the allegation that he purchased only 1,000 acres of land, yet it is remarkable, that in the first part of the same answer he states himself to have purchased the entry, and also says that the surplus was not discovered until many years afterwards, when the survey was made. The reservation of a surplus, when no surplus existed, in a contract which purported to be made for the entire tract, at a time when the purchase of entries was a common transaction, and the probability that an entry might be so surveyed as to comprehend more land than it called for, or so as to interfere with other entries and lose a part of the land it covered, was a matter of general notoriety, is so extraordinary a circumstance as to justify a critical examination of the testimony by which it is supported.

Alexander Dunlap, in the first instance, states the contract to have been, in fact, what it purports to be, a purchase of the entry, that is, of the entire entry. To reconcile this with 577*] *the subsequent declaration, that "the purchase was only of 1,000 acres of land," we must suppose that, as the entry called for that quantity, and he purchased the entry, he might allow himself to say that he purchased only 1,000 acres. He drew an inference, however, which the law does not draw, and on which he ought not to have acted until he consulted his partner.

The defendants also sustain their pretensions by the testimony of John Fowler, whose deposition was first taken on the 24th of October, 1817. He identifies the receipt, and swears that it was a fair transaction.

His deposition is taken a second time on the 3d of August, 1819. He swears "that he sold to Alexander Dunlap 1,000 acres of land within the bounds of a military survey, made in his name, as assignee of Arthur Lind, on the Scioto River, and, afterwards, about the 7th day of October, 1800, he sold to Alexander Dunlap, for the consideration of $300, all the surplus contained within the bounds of the said military survey."

This deposition states the original contract as if a survey, not an entry, had been the subject of it; and as if the transfer had been of a specified portion of that survey, not of the whole.

On the 18th of November, 1820, a copy of the plat and certificate of survey was obtained from the general land-office, by which it appeared that the survey was made on the 20th of October, 1796, three or four years after the entry had been sold.

The deposition of John Fowler was again taken on the 28th of November, 1822. He swears that in 1792 or 1793, he sold to Alexander Dunlap 1,000 acres, part of a military survey made in the deponent's name, as assignee of Arthur Lind, on the Scioto River, at the rate of £10, Virginia currency, per 100 acres, reserving the surplus "should the said survey contain any within the bounds." Some years afterwards he was informed by the late General Nathaniel Massie that "the survey contained about 300 acres of surplus." Some time after which he proposed to sell the said surplus to Alexander Dunlap, who agreed to give him therefor $300.

*In this deposition the witness states [*578 a sale by the acre, although in his preceding depositions he had spoken of a sale in gross. In his second deposition he had mentioned the sale of 1,000 acres of land, "within the bounds of a military survey made in his name on the Scioto;" plainly alluding to a survey already made. In his third deposition he still speaks of a military survey, but plainly speaks of it as of one to be made in future. He reserved the surplus, he said, "should the said survey contain any within the bounds." It is also observable that he says he received the information from Massie; whereas, Alexander Dunlap says, in his answer, that he himself gave the information to Fowler. This, however, taken in itself, would not be a very material contradiction. It might be accounted for. But the various shapes in which Fowler places the contract certainly show that his recollection of it was very imperfect, and is not entitled to much credit.

The assignment which he made to Alexander Dunlap is of the entire survey. It must be considered as an execution of the contract he had previously made; and is written evidence of the extent of that contract. If, instead of selling the whole survey, as the assignment imports, he had sold only a part of it, his natural course would have been either to take out the patent in his own name and give his obligation to convey a part when the patent should issue, or to take it out in their joint names, entering into an agreement specifying their respective interests, or to take some obligation from Alexander Dunlap binding him to reconvey the surplus. A written contract cannot be varied by such suspicious testimony as that of Fowler: especially in a case which contains within itself the strongest circumstances of probability against the attempt.

This probability is supported by other testimony than is furnished by the contract itself. James Dunlap, the brother of John, deposes, that Alexander Dunlap told him he and the plaintiff had purchased the tract of land in partnership; language which certainly alludes to the whole tract. The partition, too, which

was afterwards made, after an actual survey for the purpose, if it divided the tract into 579*] moieties, *is almost conclusive evidence that the idea of Fowler's title to the surplus had not then occurred to the appellant.

The counsel for the appellant endeavors to support Fowler's title to the surplus, independent of the special contract, and cites some cases to show that where land has been sold for a certain quantity, and has, in fact, amounted to much less than the quantity mentioned. a court of equity has interposed and given relief. But the difference is very material between contracts made for land in a settled country where the titles are complete, the boundaries ascertained, and the real quantity either known, or within the reach of the vendor, and those made for land situated as was the whole military district at the date of this contract. It was notoriously the general practice to sell an entry or a survey taking the chance of surplus, and the hazard of losing a part of the land by other entries. A special contract, departing from this general custom, ought to be in writing, or to be very clearly proved, especially when the written evidence of the contract conforms to this general custom.

It is, also, worthy of remark that the entry, as it stood when sold, could not have contained any surplus land. It calls "to begin on the Scioto, at the lower corner of Benjamin Lawson's entry, No. 439, running down the river 1,000 poles when reduced to a straight line, thence from the beginning with Lawson's line so far that a line parallel to the general course of the river shall include the quantity." No excess ought to be anticipated from the survey of such an entry, and the anticipation of such excess is against all probability. The subsequent changes of the location must be supposed to have been made by the owner of the land, and the survey also must have been made by his direction, perhaps through his agent, the locator, or according to the judgment of the surveyor. Nothing could accrue to Fowler from a survey so made.

We are, then, entirely satisfied, that the whole tract was purchased, and ought to be divided between the purchasers in equal moieties, unless some partition has been made or agreed upon between them.

It is certain that an effort towards a parti- 580*] tion has been *made, and the questions which grow out of this effort constitute the sole difficulty in the case.

The bill charges that before the grant was issued, the parties divided the land in equal quantities, and the plaintiff paid Alexander $60 for choice of moieties, and elected to take the northern or upper part. A dividing line was then run, and each party took possession of his land in severalty.

The defendant admits that there was a conversation concerning a division, that the line was partially run, and that the plaintiff paid him $60 for choice; but insists that the line was only partially run, that the division was incomplete, and that the intention was to divide 1,000 acres only.

It is, then, admitted, that some division was made, that some line was run, that John paid Alexander $60 for choice, and chose the northern part. If that line can be found it ought to be established, and if it has been run only a part of the way, it ought to be continued to the outward boundary of the tract. If it cannot be found, the land is now to be divided into moieties in the manner then agreed on.

James and John Stephenson depose, that they were the chain-carriers when the survey for the purpose of a division was made. That a dividing line was run from the back line towards the river. They both think that a marked line to which they were conducted in the presence of the parties, and of James Hough, the surveyor, was the line which was then run. Their opinion is founded on the contiguity of the corner which was shown to them as the beginning, to a branch which is near it, and which they think they recollect. The line was run about twenty years before they gave their depositions, which was in 1818, and they do not know whether the line now shown them is the true line or not.

Other testimony shows that it cannot be the true line. The surveyor proves that the marked tree shown as the beginning, had not, in 1821, been marked more than seven or eight years; and all the testimony in the cause proves that *the line ran through James [*581 Dunlap's orchard, and that he himself frequently said so. The line now claimed by him, and supposed by the Stephensons to be the true line, would not come near his orchard. It is apparent, then, that this line has been made long since the division, and there is some reason to suppose it was made by James Dunlap, who occupied Alexander's moiety of the tract.

The place established by the court as the beginning, is a white oak and blue oak, standing in the western line of the tract, and marked as a corner. Being in the line, there could be no reason for marking them as a corner unless such had been [illegible] trees could be a corner only between the Dunlaps. The surveyor cut a block out of the ash, including one of the chops, and found, from marks which are considered as unerring, that the chop had been made twenty-one years; that is, there were twenty-one years' growth over it. This was in December, 1818. The chop might have been made in the autumn of 1797, or the spring of 1798. The dividing line is supposed to have been run in 1798. A line from this point to the river, so as to divide the tract equally, passes through James Dunlap's orchard, and leaves rather more of it on the side of John than would be left by the line which James Dunlap had admitted. This line is established by the decree of the court. The testimony is, we think, in its favor, and that there is no error in the decree.

It is affirmed, with costs.

[*Local Law.] [*582

M'CONNELL
v.
THE TRUSTEES OF THE TOWN OF LEXINGTON.

A question in equity as to the title to a lot of land in the town of Lexington, Kentucky, reserved as public property, and claimed as having been appropriated by the plaintiff's ancestor. Bill dismissed under the circumstances of the case.

THIS cause was argued by Mr. Rowan for the plaintiff, and by Mr. Talbot for the defendant.

Mr. Chief Justice Marshall delivered the opinion of the court:

This suit was brought in the court of the United States for the seventh circuit and district of Kentucky, against the trustees of the town of Lexington, and others, to obtain a conveyance of in and out lots, No. 43, in that town, or of such other lots in lieu of them as might still remain to be conveyed by the trustees. The whole of out lot No. 43, and a part of the in lot, had been conveyed to other persons who had been in possession for such a length of time as to bar the plaintiff's action. The bill was, therefore, dismissed by the plaintiff as against those defendants, and continued against the trustees.

The commonwealth of Virginia had, in 1773, by an act commonly called "the land law," reserved 640 acres of land for the benefit of those who had settled in a village or station, that it might be afterwards laid out into lots for a town, and divided among such settlers. The inhabitants of Lexington purchased 70 acres adjoining the reserve of 640 acres, and after laying the whole off in lots and streets, petitioned the assembly to establish a town. The legislature, in May, 1782, passed an act vesting the whole 710 acres in trustees, who were empowered to make conveyances to those persons who had already settled on the said lots, as also to the purchasers of lots theretofore 583*] sold; and to lay off *such other parts of the said land as was not then laid off and settled into lots and streets and to sell, or otherwise dispose of the same, for the benefit of the inhabitants.

James M'Connell was one of the settlers in Lexington, and was killed by the Indians in 1782. His brother and heir-at-law, Alexander M'Connell, filed this bill in 1815, and founds his claim on proof that he had in his life-time erected a tannery on in lot No. 43, on which was a large spring; and on the following order of the board of trustees:

"At a meeting of the board of trustees for the town of Lexington, September 30th, 1782, No. 43 in and out lot granted to James M'Connell, to be appraised, and the valuation thereof redound to the heirs of said M'Connell, deceased."

The trustees, in their answer, insist that in lot No. 43 never was granted to James M'Connell, but a part of it has always been considered as reserved, on account of a spring upon it, for the use of the inhabitants. They are informed by the old settlers that the privilege of establishing a tannery on that lot was, in the year 1781, granted to James M'Connell, who did establish one, and that the order of appraisement was intended to cause a valuation of the improvements and of the leather in the tannery, not of the lot itself; and that so much of the entry as applies to the lot itself is a mistake of the clerk. They say that other lots, not these, were granted to M'Connell. They also insist on the length of time which has elapsed, and on the statute of limitations.

Several certificates from the clerk, and extracts from the record books of the trustees, are filed as exhibits in the cause. From one of these certificates it appears that on the 20th of December, 1781, at the first arrangement of in and out lots of the town of Lexington, among the settlers, in lot No. 18, and out lot No. 37, were granted to James M'Connell as his donation lots. The out lot appears to have been transferred by John Clarke, whose connection with M'Connell is not stated, to Robert Parker, to whose assignee a conveyance was made by the trustees in August, 1785.

An assignment by Alexander M'Connell, as heir-at-law of James, of his title to an out lot in the town of Lexington, made in May, 1795, is produced; but this assignment neither mentions *the number of the lot, nor the [*584 name of the assignee.

Another certificate from the clerk states that in lot No. 18 was granted on the 26th of March, 1781, to William Stule, and afterward, on the 20th of December, 1781, to Benjamin Hayden. It was afterwards, on the 1st of July, 1783, awarded to James M'Connell, and afterwards, on the 8th of March, 1785, was forfeited. The cause of forfeiture is not mentioned. The presumption is that it must have been on account of the non-performance of some condition on which the allotment was made.

The entries of the orders made by the trustees seem to be in great confusion. This may be well accounted for by the then situation of that country. Some time in the year 1784 or 1785, Robert Parker, then clerk of the board of trustees, was ordered to transcribe their old books. Many of their entries were made on small scraps of paper, and on backs of old letters. The book then made out is said to be lost. There is, however, a book of records.

The imperfect and confused state of the books has made it necessary to resort to the testimony of witnesses to supply facts which the books do not disclose.

It is very well ascertained that the large spring below which M'Connell's tan vats were sunk, was inclosed within the stockade, and was used by the inhabitants of the fort generally. It is also in proof that the settlers were each entitled to an in and out lot, and that the trustees frequently allowed those who were dissatisfied with the lots which they drew to exchange them for others not previously granted.

William Stule, who was one of the original trustees, deposes, that the lot on which the tan vats were sunk in spring, 1782, was called M'Connell's lot, but he does not recollect any contract between M'Connell and the trustees, or any disposition made by them of the lot, until a part of it was given to Bradford on which to erect a printing-office.

Robert Patterson was also one of the original trustees, and was friend and relation of M'Connell. He deposes that M'Connell was a tanner; the trustees being desirous to attract tradesmen to the station, permitted M'Connell to erect a tan-yard on the lot in contest about the fall, 1781. That the deponent was authorized by the trustees about the year *1783 or 1784, to clear out and wall [*585 up the public spring, for which he was paid by them. That it was called and used as the public spring from the first settlement of the town. He believes M'Connell was permitted to use part of the lot as a tannery for the people of the town, because it was

more convenient, and under cover of the fort. While thus used it was called M'Connell's tan-yard. He does not know that the trustees intended to make any other grant of the lot than to suffer its use by M'Connell. They fixed a market-house on the lot in 1790 or 1791, and then claimed it as their own property. They granted part of it in the year 1787 to John Bradford, on condition of his establishing a printing-office on it, reserving the public spring and a considerable front on Main and Water streets, on which they erected buildings which were rented to Bradford. They reserved a number of lots for public use.

John Torrence, William Martin, Samuel Martin, Benjamin Hayden, Joseph Mitchell, Josiah Collins, and Hugh Thompson, were among the early settlers of Lexington, and were examined, some of them by the appellant, and some by the trustees. They all concur in the declarations, that the spring was public, for the use of the people of the fort generally; that it was called the public spring; some that it was called the public spring lot; that M'Connell sunk vats, and constructed a tan-yard on it, after which it was called M'Connell's tan-yard, and one witness is inclined to think, M'Connell's lot. They all concur, however, in denying having ever heard that the lot was given to M'Connell, or to any other person. Some say, though they never heard him claim the lot, they have heard him claim the tan-yard. Joseph Mitchell swears that M'Connell claimed a lot in a different square. Hugh Thompson says, that the records of the trustees, which are produced to him at the time his deposition is taken, plainly show that in lot No. 18, and out lot No. 38, were granted to James M'Connell. John Parker, and Alexander Parker, came to Lexington, the one in 1783, and the other in 1784. They were each of them members of the board of trustees, and depose to the universal understanding that the spring lot was reserved for public use, and had never been granted to any person, until a part of it was granted to 586*] *Bradford for a printing-office. Alexander Parker says, that on looking into the record books, while a trustee, he saw, with surprise, the entry under which Alexander M'Connell claims; and on making inquiries from Col. Robert Patterson, also a trustee, was informed that the trustees had prevailed on James M'Connell to establish a tannery under cover of the fort, to tan buffalo hides, and had, after his death, appointed appraisers to value his property. That the entry appears in its present form, is the mistake of the clerk who made it. He adds, that the records show, that in lot No. 18, and out lot No. 38, were granted to James M'Connell.

The entry under which the appellant claims lot No. 43, does not purport to grant him that lot, but directs a valuation in terms which import a former grant. No trace of that former grant is, however, found, and the testimony is very strong to prove it was never made. The reasonableness of reserving a public spring for public use; the concurrent opinion of all the settlers that it was so reserved; the universal admission of all, that it was never understood that the spring lot was drawn by any person; the early appropriation of it to public purposes; the fact that James M'Connell actually claimed a different lot, added to the length of time which has been permitted to elapse without any assertion of title to this lot, are, we think, decisive against the appellant. There was no error in dismissing the plaintiff's bill, and the decree is affirmed, with costs.

[Local Law.]

CHOTARD et al. v. POPE et al.

The act of May 8th, 1820, ch. 595, "for the relief of the legal representatives of Henry Willis," did not authorize them to enter lands within the tract surveyed and laid off for the town of Claiborne, in the state of Alabama.

*THIS cause was argued by Mr. E. [*587 Livingston and Mr. Webster for the plaintiffs, and by the Attorney-General and Mr. Sampson for the defendants.[1]

Mr. Justice Johnson delivered the opinion of the court:

The rights of the complainants in the land in litigation in this cause, depend upon the construction of the act of Congress of May 8th, 1820, passed for the relief of the legal representatives of Henry Willis. The words of that act under which the complainants suppose themselves entitled to relief, are these: "That the legal representatives of Henry Willis be, and they are hereby authorized to enter without payment, in lieu, etc., in any land-office, etc., in the states of Mississippi or Alabama, etc., a quantity of land not exceeding thirteen hundred acres, etc." Under the operation of these words, assuming the right to appropriate any unpatented land in the two states, the complainants have asserted the privilege of entering a tract of land which covers the site surveyed and laid off for the town of Claiborne, in the state of Alabama. The proper officers have refused to issue the ordinary evidences of title, and have gone on to sell out the town lots according to law. This bill is filed against the register of the land-office, and the purchaser of one of the town lots, to compel them to make titles to complainants.

On behalf of the United States, it is contended, that the literal meaning of the terms of the act is limited and restrained by the context, and by considerations arising out of the general system of land laws of the United States, into which this act is ingrafted; and that, so construed, the right granted is limited to that description of lands which are liable to be taken up at private sale.

And such is the opinion of this court. That the legislature had distinctly in view its general provisions for disposing of the unappropriated lands of the United States, is distinctly shown in every line of the act under consideration. First, the party is referred to the land-office to make his entry; he is then confined

1.—2 Cranch, 386; 1 Burr. 474; Dougl. 30; Loft's Rep. 371, 401; 1 Bl. Comm. 87, 91; 1 Term Rep. 728; 12 Co. Rep. 8; 11 Co. Rep. 61; 2 Inst. 200; Plowd. 86, 73.

tions of right, considerations of every kind in favor of freedom will always have, at least, their full weight. On the other hand, the natural repugnance of man at remaining in that state is a consideration of great weight in sustaining the presumption from lapse of time.

We think, therefore, that both the points made in argument have been decided. We are 594*] also satisfied that the decisions *of the court are in perfect analogy with general principles, in the application of prescription and presumptions from length of time, and continued acquiescence of the party whose rights are implicated.

We do not deem it necessary to corroborate the Virginia decisions by comparing them with the authorities on this subject, as we are in the habit of regarding with the highest respect the decisions of the state courts upon causes arising under their own statutes. But anyone desirous of pursuing the inquiry, will find the law on this subject very well collected and digested in Mr. Starkie's 3d vol. of his Treatise on Evidence, and the 1225th page of Mr. Metcalf's edition.

Judgment reversed, and venire facias de novo awarded.

[Local Law.]

LIDDERDALE'S EXECUTORS v. THE EXECUTOR OF ROBINSON.

Under the statute of Virginia, giving to debts due on protested bills of exchange, the rank of judgment debts, a joint indorser, who has paid more than his proportion of the debt, has a right to satisfaction out of the assets of his co-indorser, with the priority of a judgment creditor.

THIS cause was argued by Mr. Powell for the plaintiffs, no counsel appearing for the defendants.[1]

Mr. Justice Johnson delivered the opinion of the court:

The question to be decided in this cause is certified to this court on a division of opinion from the judges of the Virginia district.

595*] *The bill is filed to recover a sum of money of Robinson's estate; and the debts being numerous, and the assets probably insufficient to satisfy the whole, the right of priority becomes a material object among the creditors.

The particular demand upon which this question is certified, is that of one Smith, who was joint indorser with Robinson, on a bill of exchange drawn by one Roots, and returned under protest. The bill, of course, must have been drawn payable to Robinson and Smith, and being taken up by them, and the latter having paid more than a moiety in satisfaction of the debt, his administrator now claims of the estate of Robinson the amount by which Smith's payments exceeded the moiety.

There is no question on his right to come in for that sum as a simple contract creditor; but he claims precedence, and the rank of a judgment creditor, under a particular provision of the laws of Virginia in force at Robinson's death, and under an equitable principle, according to which, he who pays a debt of a superior dignity is suffered to rank in the application of assets according to the dignity of the debt satisfied; or, in other words, is substituted for the creditor who held the prior debt.

The terms of the Virginia act are these: "All bills of exchange which are, or shall be protested, shall, after the death of the drawer or indorser thereof, be accounted of equal dignity with a judgment; and the executors or administrators of every such drawer or indorser shall suffer judgment to pass against them for all debts due upon protested bills of exchange before any bond, bill, or other debt, of equal or inferior dignity, under the penalty of being obliged to pay the same out of their own proper goods."

The priority, therefore, of the holder of the bill of exchange, as well against the estates of the indorsers, as the drawer, is unquestionable; but, the other creditors insist, that as between the co-indorsers, the rights of Smith against the estate of Robinson must be determined by the nature of the action to which he would have been put at law to recover back what he paid above his moiety, that is, assumpsit on simple contract. But both on principle and authority we are induced to think otherwise.

*What have the creditors of Robinson [*596 to complain of? They are only referred back to the situation in which they were before they were relieved by the application of Smith's funds to the payment of the bill of exchange. If the bill of exchange still remained in the hands of the holder unsatisfied, his right to a priority from Robinson's estate, as to the moiety of the bill, would be unquestionable, and if relieved from that state by the money of Smith, it is but right that Smith should have refunded to him that sum which they, without that payment, would certainly have been obliged to relinquish. This is in perfect analogy with that class of cases in which real assets have been decreed to make good to simple contract creditors sums that have been taken from personal assets, and applied to relieve the real estate [8 Vesey, 382] or to satisfy specialty creditors. Gibbs v. Onger, 12 Vesey, 413.

That a surety who discharges the debt of the principal, shall, in general, succeed to the rights of the creditor, as well direct as incidental, is strongly exemplified in those cases in which the surety is permitted to succeed to those rights, even against bail, who are themselves in many respects regarded as sureties. 2 Vern. 608; 11 Vesey, 22. That such would be the effect of an actual assignment made by the creditor to the surety, or to some third person for his benefit, no one can doubt. But, in the cases last cited, we find the Court of Equity lending its aid to compel the creditor to assign the cause of action, and thus to make an actual substitution of the sureties, so as to perfect their claim at law. This fully affirms the right to succeed to the legal standing of their principal; and after establishing that principle, it is going but one step farther to consider that as done which the surety has a

1.—8 Ves. 382; 12 Ves. 413; 2 Vern. 608; 11 Ves. 22; 2 Call. 125; 3 Call. 329; 1 Randolph, 466; 3 Wheat. Rep. 520.

right to have done in his favor, and thus to sustain the substitution without an actual assignment. And, accordingly, we find the dictum expressed in Robinson v. Wilson, 2 Madd. Rep. 434, in pretty general terms, "that a surety who pays off a specialty debt shall be considered as a creditor by specialty of his principal."

If the parties in this cause be considered as claiming under assignment from the holder of 597*] the bill, and each as assignee *of the claim against his co-indorsee, according to the actual state of their respective interests, there can be no doubt of the priority here claimed. This subject has undergone a very serious examination in the courts of the United States, and in cases in which, as in this, satisfaction had been made by the surety without taking an actual assignment of the debt.

The first in order of time was that of Burrows & Brown v. M'Whann & Campbell, administrators of Carnes, 1 Desaussure's Rep. 409. This was a case exactly the parallel of the present in all its circumstances. The parties were co-securities to one Banks in a bond to Warrington, and had all contributed, but unequally, to the satisfaction of the judgment obtained against them jointly on the bond. They had taken no assignment of the judgment, and Brown and Burrows, who had paid most, prayed to be let in as judgment creditors of Carnes, their co-obligor, in right of the judgment obtained by the creditor, Warrington. There was, in this case, satisfaction also entered formally on the judgment, but as this was obtained by the management of Carnes's administrators it was treated as a nullity, and the complainants had a priority decreed to them in right of the judgment against themselves, conjointly with Carnes, their co-obligor.

The next case was that of Eppes et al., executors of Wayles v. Randolph, 3 Call. 125, in which the surety to a bond, having paid it off, but having taken no assignment from the creditor, filed his bill to charge the real estate of the principal, upon the ground that he had succeeded to the rights of the creditor by the mere act of satisfying the bond. It was not questioned that such would have been the effect of an assignment, nor that the aid of the court would have been granted to compel the creditor to assign; but the claim to relief was insisted upon the ground that without such assignment the surety could only be considered in the rank of a simple contract creditor, and, as such, neither having a preference to other simple contract creditors, nor the rights of a creditor by specialty, to charge the assets descended.

This is precisely the defense set up in the present case; but in the case of Wayles v. Randolph, the court decided that the surety succeeded to the rights of the creditor, and 598*] *decreed satisfaction accordingly out of the remaining assets, both real and personal (p. 159); modifying their decree, however, so as not to affect the executor with a devastavit for any payment made before the filing of the bill.

In the year 1802, the same point was decided in the courts of Virginia, in the case of Tinsley v. Anderson, 3 Call. 329. In this case, a creditor filed his bill to compel mortgagees and judgment creditors to subject the estate of one Anderson to a sale, that prior incumbrances might be cleared away, so as to let him in for satisfaction; and in applying the proceeds of the mortgaged property, the court was called upon to decide this question in all its latitude. In delivering their decree, the language of the court is, "that for all sums paid by sureties they ought to be placed in the situation of the creditors whose debts they have paid, or are bound to pay."

That this, then, is the settled law of the state in which this contract and this cause originated, cannot be doubted. But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness on a general principle, and on authorities of great respectability in other states.

We will, therefore, order it to be certified to the Circuit Court of Virginia district, that John Smith, executor of John Smith, deceased, is entitled to satisfaction from the assets of the estate of John Robinson, with the priority of a judgment creditor of the deceased.

Certificate accordingly.

[*Local Law.] [*599

DE LA CROIX v. CHAMBERLAIN.

A concession of lands made by the Spanish authorities at Mobile in the year 1806, cannot be given in evidence to support an ejectment in the courts of the United States, the same not having been recorded, or passed upon by the board of commissioners, or register of the land-office, established by the acts of Congress, relating to land titles in that country.

THIS cause was argued by Mr. E. Livingston for the plaintiff, and by Mr. Owen for the defendant.

Mr. Justice Trimble delivered the opinion of the court:

This was an action of ejectment brought by the plaintiff in error against the defendant, in the District Court of the United States for the district of Alabama. The plaintiff excepted to certain opinions of the court given in the progress of the trial, and his exceptions having been signed and sealed by the judge, a verdict and judgment was rendered against him; which judgment and exceptions are brought before the court by writ of error.

The questions in the case arise entirely out of the bill of exceptions. It states, that "the plaintiff claimed the land in the declaration mentioned as devisee of the late Francis Collell, and offered in evidence, as the first link in the chain of his title, a concession from the Spanish government to the said Francis Collell, a copy of which is annexed to the bill of exceptions. The court decided that the concession offered in evidence by the plaintiff, being no higher evidence of title than a warrant or order of survey, would not support an ejectment. The plaintiff offered no other title than that above mentioned in evidence. The court decided, also, that the signature of the grant-

ing officer of the Spanish government (the intendant, as well as the assisting officers), must be proved." These are the opinions excepted to by the plaintiff. A history of the case, somewhat different, is given by the clerk in the transcript of the record sent up. But it was no part of his duty, nor had he authority, as clerk, 600*] *to state upon the record what was offered in evidence on the trials, or what opinions were expressed by the court in relation to the evidence, otherwise than as stated in the bill of exceptions itself. The evidence given on the trial of an issue at common law is no part of the record, unless made a part of it by bill of exceptions, demurrer to evidence, or case agreed by parties, and entered of record. Nor are the opinions of the court, given incidentally, in the progress of the trial, except so made by bill of exceptions, any part of the record. The statements of the clerk, so far as they are contrary to the statements verified by the seal of the judge, must be wholly disregarded.

The concession referred to in the bill of exceptions is, upon its face, not a grant, nor a survey, but it is, as is expressed in the bill of exceptions, only a warrant, or order, authorizing the deputy-surveyor to make a survey, and to report the survey when made to the intendant, in order to found a grant upon it. The order of survey bears date the —— day of ——, 1806. At that date the Spanish authorities were in the actual possession of Mobile, where the land lies; and they claimed it as part of the Floridas, then belonging to the Spanish crown. The United States claimed it as part of Louisiana. But it is not necessary to investigate these conflicting claims. The United States have since obtained the Floridas by purchase and cession from Spain, without having previously settled the controverted boundary between the Floridas, as claimed by Spain, and Louisiana, as claimed by the United States.

A question of disputed boundary between two sovereign independent nations, is, indeed, much more properly a subject for diplomatic discussion, and of treaty, than of judicial investigation. If the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties. But as that was not done, the United States have never, so far as we can discover, distinguished between the concessions of land made by the Spanish authorities within the disputed territory, whilst Spain was in the actual possession of it, from concessions of a similar 601*] character made by Spain within the *acknowledged limits. We will not, therefore, raise any question upon the ground of the want of authority in the intendant to make the concession. No question of that sort seems to have been made in the court below. Assuming, then, the authority of the Spanish intendant to make the concession and warrant of survey, the question made and decided in the District Court fairly arises, was it a sufficient title to recover upon in the action of ejectment? If the concession had been made in a country where, at the time, the principles and practices known to the common law prevailed, it would not bear a contest. It would be regarded, at most, as an incipient, inchoate right, but not a perfect legal estate. It would not be such title as would maintain an action of ejectment.

Was it a perfect legal estate, was it title, according to the Spanish law, which prevailed at Mobile at the time it was made? We apprehend not. It shows, upon its face, that other acts of sovereignty remained to be done to perfect the title, and which the sovereign power might withhold. A survey was to be made, and, according to the laws and usages of Spain, a formal grant was to be made, in such cases, to complete the title.

It may be admitted, that the United States were bound, in good faith, by the terms of the treaty of cession, by which they acquired the Floridas, to confirm such concessions as had been made by warrants of survey; yet, it would not follow that the legal title would be perfected until confirmation. The government of the United States has, throughout, acted upon a different principle in relation to these inchoate rights, in all its acquisitions of territory, whether from Spain or France. Whilst the government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained that the legal title remained in the United States, until, by some act of confirmation, it was passed, or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon their fairness and validity. This is demonstrated by *the laws which Congress have repeat- [*602 edly passed, establishing boards of commissioners to investigate these claims, and to reject or confirm them, or report them to Congress in cases of doubt; and by the acts of Congress requiring all such claims to be recorded within prescribed periods. It does not appear that this order of survey has ever been recorded or passed upon by the board of commissioners, or register of the land-office, established by Congress in the district in which the land lies. It can, therefore, derive no aid from the laws of the United States.

A law of Alabama was mentioned in the argument, as having some bearing on the case. That law provides, "that all certificates issued in pursuance of any act of Congress, by any of the boards of commissioners, register of the land-office, etc., upon any warrant or order of survey, etc., for any lands, etc., shall be taken and received as vesting a full, complete, and legal title, etc., so far as to enable the holder of such certificate to maintain any action," etc. This case is not brought within the provisions of this law; for it does not appear that any such certificate had been issued thereon.

It was insisted by the plaintiff's counsel, that, admitting the order of survey was not in itself title, still the judgment ought to be reversed, because, as the bill of exceptions states "that the plaintiff offered the order of survey in evidence as the first link in his chain of title;" the opinion of the court precluded him from offering other evidence of title—as, for

example, a survey or grant founded on the order of survey. This argument proceeds upon a mistake. The expressions in the bill of exceptions, that he offered the order of survey "as the first link in the chain of his title," do not import, as the argument supposes, that he had, or might have, a survey or grant to offer, in addition to the warrant of survey. The words refer to the statement, that the plaintiff claimed as devisee of Mr. Collell, and mean, that after offering Collell's title, or the warrant of survey granted to Collell, as the first link in the chain of his (the plaintiff's) title, he intended to go on and complete the chain from that first link, by proof to establish the second link, namely, his title as devisee. 603*] This is evident *from what is afterwards stated, that he offered "no other title than the order of survey."

Again; the court does not reject the order of survey, and exclude it altogether as evidence; but assuming that the paper offered is evidence of the party being proprietor of the order of survey, the court decided that such order of survey was not title to recover on in the action of ejectment. It was a decision, not upon the admissibility of the order of survey as evidence, but upon its legal effect when admitted.

It is not easy to comprehend the object of the latter statement in the bill of exceptions, "that the court decided the signatures, etc., ought to be proved." It does not say they were not proved. It does not state that the paper was rejected because the signatures were not proved. But if the bill of exceptions had so stated, we think the exception on that ground could not be maintained. The warrant of survey does not appear to have been recorded; it purported to be the act of foreign officers, and was not verified by the great seal of the nation to which they belonged, or any other authoritive official seal, which was either known, or could be proved. The court and jury could be presumed cognizant of their signatures. How, then, could the genuineness and authenticity of the document be proved, otherwise than by proof of the signatures of the officers by whom it purported to be made? It was not of that class of public instruments which prove themselves, and, consequently, it ought to be proved in the mode ordinary instruments are required to be verified by the rules of evidence.

Judgment affirmed, with costs.

[*Practice.] [*604

DAVIDSON et al., Plaintiffs in Error,

v.

TAYLOR, Defendant in Error.

The bail is fixed by the death of the principal after the return of the ca. sa. and before the return of the scire facias; and the bail is not entitled to an exoneretur in such a case.

THIS cause was argued by Mr. Jones for the plaintiffs in error, and by Mr. Coxe for the defendant in error.

Mr. Chief Justice Marshall delivered the opinion of the court:

This is a case of bail, and is to be decided by the principles of English law, which the case finds constitute also the law and practice of Maryland on the subject. According to these principles, the allowance of the bail to surrender the principal after the return of a ca. sa. is considered as a matter of favor and indulgence, and not of right, and is regulated by the acknowledged practice of the court. To many purposes, the bail is considered as fixed by the return of the ca. sa. But the courts allow the bail to surrender the principal within a limited period after the return of the scire facias against them, as matter of favor, and not as matter pleadable in bar. In certain cases even a formal surrender has not been required, where the principal was still living, and capable of being surrendered, and an exoneretur would be entered, and the principal discharged immediately upon the surrender. But the rule has never been applied to cases where the principal dies before the return of the scire facias. In such a case, the bail is considered as fixed by the return of the ca. sa., and his death afterwards, and before the return of the scire facias, does not entitle the bail to an exoneretur. The plea is, therefore, bad; and the judgment is affirmed, with six per centum damages, and costs.

NOTE.—Bail—exoneretur.

On a question of holding to bail, the court will not travel into the merits of the controversy, where the cause of action is apparent, though liable to controversy. The defendant held to bail. Parasset v. Gautier, 2 Dall. 330.

Although no laches is imputable to a prisoner who has taken the earliest opportunity to procure testimony, yet if he procures the postponement of the trial, on the ground of the absence of such testimony, it furnishes no ground for his being admitted to bail. United States v. Stewart, 2 Dall. 344.

The circumstances must be very strong which will induce the court to bail one charged with high treason. Ibid.

An exoneretur will not be entered on the ground that defendant is a lunatic, and as such confined in the hospital, even where the derangement is shown to be a permanent malady. Bowerbank v. Payne, 2 Wash. C. C. 464.

By the principles of the English practice, which prevails in Maryland, where the principal dies after the return of the ca. sa., and before the return of the scire facias, the liability of the bail is considered fixed by the return of the ca. sa., and he is not entitled to an exoneretur. Dowlin v. Standifer, Hempst. 200.

Where bail are entitled to be discharged ex debito justitia, they may not only apply for an exoneretur by way of summary proceeding, but they may plead the matter as a bar to a suit in their defense; but where the discharge is a matter of indulgence of the court only, the application is to the discretion of the court, and an exoneretur cannot be insisted on except by the way of motion. Beers v. Haughton, 9 Pet. 329; affirming S. C. 1 McLean, 231; Lyons v. Auchincloss, 12 Pet. 284.

605*] [*Chancery.]

SCOTT et al., Appellants,
v.
SHREEVE et al., Respondents.

Relief in equity against a judgment of law, upon certain bonds given for the indemnity of the obligee, as endorser of notes drawn by the obligor, the consideration having failed.
The assignee of such bonds takes them subject to all equities existing between the original parties.

THIS cause was argued by Mr. Swann for the appellants, and by Mr. Taylor for the respondents.

Mr. Justice Thompson delivered the opinion of the court:

This case comes up by appeal from the Circuit Court of the District of Columbia for the county of Alexandria. The object of the bill filed in the court below, was to obtain relief against a judgment at law recovered against Shreeve, the appellee, upon certain bonds given by him to Elisha Janney, and which bonds had been assigned to the appellant, Scott, as his trustee, for the benefit of his creditors.

In the progress of the cause, it was deemed necessary by the court, that the Bank of Potomac should be made a party defendant. A supplemental bill for that purpose was according filed, and the bank made a party.

The first inquiry that seems naturally to arise is, how the case stood as between Shreeve and Janney, the original parties to the bonds. The material facts upon which the complainant in the court below relied for relief, are not denied by the answer of Scott. From the bill and answer, and exhibits in the cause, accompanied by a written agreement between the solicitors of the parties, before the cause was set down for argument, the leading facts in the case appear to be, that some time in the year 1808, Shreeve failed in business, being indebted to the Bank of Potomac in the sum of $6,300, upon a note discounted at the bank, 606*] *and upon which Janney was the indorser; for whose security Shreeve transferred to him, and John Roberts, who was also his indorser upon other notes, certain property at a valuation, but which, upon settlement of accounts between them, fell short of Janney's responsibility to the bank upon his indorsement, $1,980.88; for which, by agreement between the parties, Shreeve give to Janney five bonds, payable in five annual installments, and Janney was to pay the note to the bank, upon which he was the indorser. The note, however, was continued running in the bank in its original form, Janney appearing responsible as indorser only. This note was renewed from time to time until the 19th of May, 1809, when, by the payments which had been made by Janney out of the property assigned by Shreeve, it was reduced to the sum of $3,306; and Janney himself having failed about this time, no further payments were made upon this note until the month of June, 1818. when Shreeve, after a long absence, returned to Alexandria, and was called upon by the bank for payment of his note, upon which he paid the sum of $3,355.29, being the amount of principal and interest due upon the five bonds which he had given to Janney.

Upon this brief statement of the facts as between Shreeve and Janney, it will be seen that Shreeve was exposed to a double responsibility for the same debt. He was liable on his note held by the bank (unless the bank may be considered as having assented to the arrangement, and accepted Janney as solely responsible on the note, which will be hereafter considered), and he was also liable to Janney on the bonds which he had given him. For the purpose of indemnifying Shreeve against his responsibility to the bank, Janney gave him the instrument bearing date the first of March, 1809, acknowledging that Shreeve had satisfied him by his bonds of the 28th of February, 1809, for all demands against him as security at bank, and for all other accounts; and that the note above referred to, although originally discounted for the use of Shreeve, was continued in his name, but for the convenience of him, Janney, and engaging to save Shreeve harmless from the said note, and in due time to take it up.

*An objection is here made to sus- [*607
taining this bill in equity, because there was a complete and adequate remedy at law. But this objection cannot be sustained. The bonds given by Shreeve to Janney were simply for the payment of money, and although the consideration for which they were given had failed by Janney's neglect to pay up the note in the Bank of Potomac according to his engagement, this could not have been set up at law as a defense in the suit upon the bonds; nor could he, in that suit, have set out the amount paid to the bank upon his note. The engagement of Janney, on assuming the payment of the note to the bank, was a contract of indemnity only, and rested in damages, and could never form the subject of a set off at law; and although an action at law might be maintained against Janney upon this indemnity, it would be going too far, even if Janney was solvent, to say, that a court of equity could not interpose and stay a recovery upon the bonds, but that the party must be turned round to his remedy at law upon his indemnity. But, in the present case, it would be gross injustice, and a certain denial of all remedy, to refuse relief on this ground, Janney having become insolvent. There was, then, no defense at law which Shreeve could have set up against these bonds, nor had he any other remedy at law to which he was bound to resort.

Was there, then, any defense which he could have set up against a suit upon his note if he had permitted the bank to prosecute him? None is perceived by the court. He stood upon the note as maker, and was liable to the bank as such; and although, by the agreement between him and Janney, the note was continued in that form for the convenience of Janney, yet the bank was no party to that arrangement, and could not be bound by it. Even admitting the knowledge of that agreement by the bank, it certainly could not have been set up as a defense to the note, unless it could be shown that there was an express or implied agreement to accept Janney as the debtor, and to discharge Shreeve.

It has been argued, however, on the part of the appellants, that the statute of limitations had run against the note, and that Shreeve

might and ought to have availed himself of it. 608*] *If the statute of limitations had run against this note, and might have been pleaded, we should be very unwilling to say that Shreeve was bound to plead it. It is a defense which a party may often avail himself of with great justice and propriety. But whether he will or not, must be left to his own election. It is, however, unnecessary to inquire into the duty or obligation of Shreeve to have pleaded the statute, under the circumstances of the case, because we do not think it could have been set up as a defense to the action.

The letter of license given by the bank to Shreeve bears date on the 12th January, 1809, and was for the term of seven years, which, of course, expired in January, 1816. It certainly cannot be pretended that the statute ran during the continuance of this letter of license. Payment of the note was demanded by the bank, and made by Shreeve, in June, 1818, about two years and five months after the expiration of the letter of license, a period much within the time necessary to bar the action.

The next inquiry is, whether Scott, the assignee of Janney, has acquired any greater right or interest in these bonds than Janney himself had. So far as relates to the question, whether the consideration had failed, the assignee stands precisely in the situation of the original party. He took the bonds subject to all existing equities. This is the settled rule in chancery, and that which is recognized by the laws of Virginia which are in force in Alexandria. Nor has anything occurred, since the assignment, to give to Scott or the creditors of Janney any additional rights. These bonds were assigned by Janney as his own property, and for the benefit of his own creditors, which was a violation of the trust and confidence reposed in him by Shreeve. They were given expressly, according to the agreement of the parties, to provide for the payment of the note to the Bank of Potomac; and it is admitted that no part of this note has been paid out of the funds of Janney. The note had been reduced from $6,300 to $3,306, at the time Janney failed in the spring of 1809; but these payments were made out of Shreeve's funds, assigned by Janney to Roberts by the deed of the 11th of August, 1808. And it is also admitted that Scott, the assignee, 609*] *has made no payments upon this note since the assignment to him. The creditors of Janney have, therefore, been deprived of none of his funds, nor can they have any right to claim the benefit of those bonds, which must be deemed to have been held by Janney in trust for the bank, and not as his own property.

The only remaining inquiry is, whether the bank, by any express or implied agreement, accepted Janney as their debtor, and discharged Shreeve from his responsibility.

The answer of the appellant, Scott, alleges that Janney considered himself as having assumed the payment of the note in question, and that he was considered debtor to the bank for the same, and was solely relied upon by the bank for the payment of the note. That he believed the bank had full knowledge of the deed of the 11th of August, 1808, by which provision was made for the payment of the note, and were satisfied with it. And he further alleges that the bank was so well satisfied with this provision that it considered neither Janney nor Shreeve liable for it.

If these allegations were supported by proof, they would go far, if not conclusively, to show that the bank had adopted Janney as solely responsible for the note, and had discharged Shreeve. If so, the payment by Shreeve would be considered voluntary, and without any legal obligation, and would form no objection to the recovery on the bonds.

The bank, however, denies it was a party to the arrangement made by the deed of the 11th of August, 1808, or that it made any stipulation or agreement with Shreeve or Janney, in any manner connected with that deed, unless the order of the 12th of January, 1809 (the letter of license), be considered as connected with it. The answer further denies that the bank ever did release, or agree to release, Shreeve, or that it ever did look solely to Janney, or the trust estate created by the deed of the 11th of August, 1808. It admits that when this deed was executed, Janney and Roberts were both directors of the bank, but avers that no proposition in relation to it ever came before the board previous to the 12th of January, 1809, when the letter of license was granted to Shreeve, with the concurrence of Janney and Roberts, sitting and acting as directors of the bank.

*The answer of Scott is not evidence [*610 against the bank, and his allegations with respect to the bank's having accepted Janney as the sole debtor for this note are entirely unsupported by proofs, and must be laid out of view, as they are positively denied by the answer of the bank, and which answer is strongly supported by the order for the letter of license, which was granted subsequent to the arrangement between Shreeve and Janney. For, if the bank had considered Shreeve exonerated from the payment of the note, there could have been no necessity for, or propriety in, giving him a letter of license. Indeed, it would have been absurd to give a letter of license to a man who was not a debtor to the bank. The order for this purpose is cautiously drawn, so as to retain the responsibility of both maker and indorser. The indulgence is granted expressly upon the condition that it is sanctioned by Janney, and without lessening the right of the bank against him.

Nor is the bank chargeable with negligence that can in any manner prejudice its rights, or of which the appellant has any right to complain. The indulgence was granted with the concurrence of Janney, and under an impression, no doubt, by all parties, that the trust fund created by the deed of the 11th of August, 1808, would be sufficient to satisfy this note. And it was upon this supposition, no doubt, that the letter of license for seven years was granted to Shreeve. No steps would be taken against him until the expiration of that time, and demand of payment was made as soon thereafter as he returned to Alexandria.

The utmost, then, that can be alleged against the bank is, that it had full knowledge of the provision made by the deed of the 11th of August, 1808, for the payment of this note. And, admitting that provision to have been

amply sufficient, it would not bind the bank without its assent to resort to that fund alone, and discharge the parties to the note. The bank could have no objection to the provision made by that deed for the payment of the note, as it would add to its security if the maker and indorser were also held responsible. And the proceedings in relation to the letter of license are conclusive to show that it was the understanding of all parties that the bank had 611*] not, at that *time, relinquished its claims upon Janney and Shreeve, for the payment of the note.

We are accordingly of opinion that the decree of the court below, granting a perpetual injunction against the appellant, and a dismission of the bill as to the bank, be affirmed with costs.

[Admiralty Jurisdiction.]

RAMSAY v. ALLEGRE.

Quære, Whether a suit in personam in the admiralty may be maintained against the owner of a ship by material men furnishing supplies for the ship in her home port, where the local law gives no specific lien upon the ship which can be enforced by a proceeding in rem.

However this may be in general, such suit cannot be maintained where the owner has given a negotiable promissory note for the debt, which is not tendered to be given up, or actually surrendered, at the hearing.

APPEAL from the Circuit Court of Maryland.

This was a libel filed in the District Court by the appellant, Ramsay, against the respondent, Allegre, alleging that the appellant, at the special instance and request of the respondent, owner, ship's husband, or consignee of the schooner Dorothea, had performed various work and labor, and found and provided various materials for the use of the said schooner, to equip and prepare her for a voyage on the high seas, amounting to the sum of $2,428.84; that the appellant had often applied to the respondent for payment and been refused; and praying process according to the course of the admiralty, etc. A plea was filed by the respondent, alleging, among other things, that he had given the libelant his negotiable promissory note for the debt. It appeared, at the hearing, that the appellant had furnished the materials in question at the respondent's re- 612*] quest, and that *the latter had given his negotiable promissory note for the same, which the appellant accepted, giving the following receipt therefor: "Received a note, at four months, which, when paid, will be in full for the above amount." The note not having been paid, this suit was brought. The District Court dismissed the libel upon the ground that the jurisdiction of that court, as an instance court of admiralty, in the cause, was waived by the acceptance of the promissory note, and the decree having been affirmed in the Circuit Court upon the same ground, the cause was brought by appeal to this court.

The Attorney-General and Mr. Meredith, for the appellant, argued that the district courts, proceeding as courts of admiralty and maritime jurisdiction, might take cognizance of material suits by material men, either in personam or in rem.[1] The only question here was, whether the jurisdiction was waived by the appellant's taking the note as conditional payment. The note did not extinguish the debt, and consequently could not affect the jurisdiction which originally attached on account of the nature of the debt. Without some special agreement to consider the note as payment, it could not be so regarded. It only operated as a suspension of the remedy during the time allowed for its payment. If unpaid, the party might resort to his original right of action, as if no note had been given.[2] Such is the doctrine of the common law; and the civil law, which gave the rule to the admiralty, would be found in accordance. A novation is the substitution of a new for an old debt, by which the latter is extinguished. It may be made of a debt payable at a future day, or of a debt presently due, by a new engagement, allowing a term of credit. But the consent of the creditor must be positively declared, as the law will not presume that he means to abandon his rights under the first contract.[3] No authority or principle could be found to warrant *the asser- [*613 tion that, although the original contract in this case was not extinguished, the suspension of the right of action took away the jurisdiction of the admiralty so that it could not again be resorted to.

Mr. Hoffman and Mr. Meyer, contra, insisted that the promissory note given in this case was a personal security taken on land, and in all respects assimilated the case to that of the claim for the master's wages. Although, in general, locality might not be the test of admiralty jurisdiction, it might reasonably be contended that where the credit is personal, and the security of a kind exclusively cognizable at common law, the locality should fix the jurisdiction. In the case of contracts, the admiralty jurisdiction, in personam, ought to be merely co-extensive with the proceeding in rem; and as the domestic character of the vessel freed the thing from jurisdiction, the person of the owner ought also to be exonerated.[4] As a security had been accepted, which had the effect of extinguishing a common law lien during the term of the note, no process could have been instituted in the admiralty on the original contract; and the idea of reviving a jurisdiction which had been thus suspended was a novelty not countenanced by any legal analogy. Supposing the jurisdiction of the admiralty to be dependent upon the existence of a lien as defined by positive law, the authorities would show that such a lien was extinguished at common law by a new agreement.[5] It had been expressly determined that in cases of dealings or obligations naturally within the appropriate jurisdiction of the ad-

NOTE.—As to admiralty jurisdiction of contracts, see note to 66 L.R.A. 193.

1.—The General Smith, 4 Wheat. Rep. 438.

2.—Chitty on Bills, 5 ed. 123, 130; 6 Cranch, 253; 2 H. Black. 317; 5 Term Rep. 141; 1 Evans' Pothier, 380 (a).

3.—Evans' Pothier, 380, 386.

4.—4 Wheat. Rep. 438.

5.—Yelv. 66; Selw. N. P. 1163; 3 Burr. 1498.

miralty, if a special contract be entered into, or a special security be taken, the common law jurisdiction will attach as in ordinary cases, even though the new agreement does not operate technically by way of extinguishment.[1]

Mr. Chief Justice **Marshall** delivered the opinion of the court:

That, as it did not appear by the record that the note had been tendered to be given up, or 614*] actually surrendered, *at the hearing in the court below, the decree would be affirmed, it not being necessary to consider the general question of jurisdiction.

Mr. Justice **Johnson.** I concur with my brethren in sustaining the decree below, but cannot consent to place my decision upon the ground upon which they have placed theirs. I think it high time to check this silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions. Unfounded doctrines ought at once to be met and put down; and dicta, as well as decisions, that cannot bear examination, ought not to be evaded and permitted to remain on the books to be commented upon, and acquiesced in, by courts of justice, or to be read and respected by those whose opinions are to be formed upon books. It affords facilities for giving an undue bias to public opinion, and, I will add, of of interpolating doctrines which belong not to the law.

There need be no stronger illustration given than this case affords. Here is a libel, in personam, on a contract, in the admiralty, filed expressly upon the authority of the case of The General Smith. I had never read the report of that case, that I recollect, until the argument in this cause; or if I had, I attached so little importance to anything in it besides the point that it decides, as to have forgotten that such doctrines were to be found in the reports of our decisions. But, upon being examined, what does it amount to? A gentleman of the bar, whose knowledge, particularly in the admiralty, commanded the highest respect in this court, is reported to have laid down a doctrine in very explicit terms which, I will venture to say, has no authority in law; and the court, carried away probably by the influence of his concessions, echoes them in terms which are not only not called for by the case, but actually, as I conceive, contradicted by the decision which is rendered.

The correctness of the decision in the case of The General Smith cannot be questioned. It dismisses the libel upon the ground "that material men and mechanics, furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their 615*] demands." *But why have they no lien upon the ship? or, to speak more correctly, why are they precluded from a remedy in the admiralty for subjecting the ship to arrest and sale in order to satisfy their demands? It is because jurisdiction over the contract has been taken from the courts of admiralty, and the exercise of jurisdiction, in such a case, prohibited to them by the common law courts of Great Britain for hundreds of years. And it is a fact of the most positive certainty and notoriety, that so far from retaining jurisdiction over this contract in personam, after being driven from jurisdiction in rem, that the former was first surrendered, and that in the most unequivocal terms.

I refer to the resolutions of February, 1632, adopted by the King in council, and subscribed by all the judges in England, and to be found in the collection of the sea laws, and in various other books; by the second section of the second article of which it is declared that "if suit be in the Court of Admiralty for building, or mending, saving, or necessary victualing of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself party (i. e., a claimant), no prohibition is to be granted, though this be done within the realm."

This resolution implies an express recognition that if such suit be instituted against the person, a prohibition shall issue. And this I hold to be the test of admiralty jurisdiction; for wherever a prohibition will issue, the jurisdiction has been taken away from the admiralty, or it never possessed it. And, accordingly, for two hundred years has this jurisdiction been abandoned by the British courts, with the single exception of seamen's wages; an exception of which it may emphatically be said, "probat regulam." For, if anyone will take the trouble to refer to the language of Ch. J. Holt, in the case of Clay v. Snelgrave, he will there find it said "that it is an indulgence that the courts of Westminster permit mariners to sue for their wages in the Admiralty Court because they may all join in suit, and is grounded upon the principle that 'communis error facit jus.'" (Lord Raym., 576.)

This privilege is denied to the master, and even to a mate succeeding to the master, when he sues for his wages as *master, so [*616 rigid are the courts of Westminster in confining the admiralty to the few contracts over which it is permitted to retain jurisdiction. And when it is argued that this discrimination to the prejudice of the master is confined to his suit in rem, and that no case can be found in which his remedy in personam, in the admiralty, has been denied him, it becomes necessary to remind counsel that this may have proceeded from no one's ever having had the temerity to prefer such a suit—a consequence which would necessarily follow from what I hold to be undeniable, that, except on the contract for seamen's wages, the proceeding in personam upon contracts, is now unknown to the British admiralty tribunals.

I will sketch a brief history of the admiralty jurisdiction over contracts, and a view of its present state.

The study of the history of the admiralty jurisdiction in England, in common with that of all the courts of that kingdom, except the common law courts, presents an instructive lesson on the necessity of watching the advancement of judicial power, in common with all power; inasmuch as it shows in what small beginnings, and by what indirect and covert means, aided by perseverance and ingenuity, originated the mighty structures against which, ultimately, the legislative and judicial power

1.—4 Burr. 1950; 1 Peters' Ad. Dec. 238; 6 Term Rep. 320; 2 Bro. Civ. and Adm. Law, 88, 97; 1 Salk. 31.

of the country had to exert the full force of their united efforts.

The vast variety and importance of the subjects which the admiralty had appropriated to itself, will appear in a variety of authors; but I would refer the reader to Godolphin's "View of the Admiral Jurisdiction," as well for its antiquity as the great learning and respectability of the author. There it will be seen that the admiralty, before the time of Richard II., had arrogated to itself a scope of judicial, legislative, and ministerial power, which withdrew from the trial by jury and placed under the surveillance of the crown, of which the admiralty was only the representative, more than half the jurisprudence, and particularly the commercial jurisprudence of the kingdom.

The statutes of 13th and 15th Richard II. were passed to set limits to this power, but such was the stability it had already acquired that it was not until the act of 2 Henry IV., c. 617*] *11, which gave to the subject exactly the right which the constitution of the United States gives to its citizens, against unconstitutional laws, was passed, that this overgrown power could be effectually restrained. For it could then no longer prescribe its own limits in prejudice of the individual, and to the exclusion of his common law rights. Neither the King nor his proctor could any longer justify or secure the individual who resorted to the admiralty in a case in which the common law could give redress. 3 Levinz. 353.

The act of 13 Richard says, upon complaint of encroachments made by the admirals and their deputies, it is enacted, "that the admirals and their deputies shall meddle with nothing done within the realm, but only with things done upon the sea;" and the 15th Richard, c. 3, "that in all contracts, pleas and quarrels, and other things done within the bodies of counties, by land or water, the admiral shall have no cognizance, but they shall be tried by the law of the land." And the 2d Henry IV., c. 11, provides, "that he that finds himself aggrieved against the form of the statutes of Richard, shall have his action by writ grounded upon the case against him that so pursues in the admiralty, and recover double damages."

The check given by legislative provision was followed up by prohibitions from the common law courts, and suits under the statute of Henry, until, upon the murmurs of the Lord High Admiral at the checks imposed upon his power, the subject was taken up by the King in council in 1632, and a kind of compromise entered into, to which all the different tribunals appear to have at first conformed; but in which, after a time, the common law judges appear to have discovered that the crown and the admiralty had gained too decided an advantage over them to admit of its being adhered to as a correct exposition of the statutes of Richard. Hence in the 3d edition of Croke's Reports, at the end of the 2d volume, we find these resolutions declared to be of no authority, as undoubtedly they were not, since it was not a regular judicial act. But in this, it must be noticed, that the authority denied to those 618*] resolutions was not on the subject *of those powers which the admiralty renounced; but of those which they retained.

Upon this ground, it is well known that these resolutions, although printed in the 1st and 2d editions of Croke's Reports, were omitted from the 3d. The mantissa at the end of the edition of 1767, declares their rejection as authority. But, even before the adoption of those resolutions, a decision had taken place, which was conclusive, as well against their jurisdiction over the particular contract here under consideration, as against their right of proceeding upon it by process in personam.

I allude to Craddock's case, 2 Brownl. 37, which was decided in the 7th of James, or in the year 1608, twenty-four years before the date of these resolutions. This was distinctly the case of a material man; his purchases were of cordage, powder and shot, for a ship, and the party of whom they were bought sued Craddock in the Court of Admiralty. A prohibition was granted, and the reason assigned by the court is, that the statute 13 Richard II., "that the admiral shall not meddle with things made within the realm, but only of things made upon the sea, and here the contract was at St. Katharine's Stairs, in the body of a county." And thus we see, that in the resolutions alluded to, the claim to jurisdiction in personam, denied the admiralty by the effect of that adjudication, is abandoned by them, at the same time that they assert the right to exercise jurisdiction in rem upon the same class of contracts. It was not long after, however, that the exercise of jurisdiction in rem was also taken from them. And yet there is a semblance of authority for their having exercised it during the interval of time between the adoption of the resolutions of 1632, and when they were declared to be of no authority. I allude to that quotation from 1 Rolle's Abr. 533, which is copied into Bacon's Abridgment, p. 196, of the 1st vol., and there, together with the note which refers to Cro. Charles, 296, has remained the permanent source of many an error to those who have not taken the trouble to examine into the authority for the law there laid down.

This subject will be found learnedly examined in the cases of Clinton v. The Brig Hannah and Ship General Knox, decided *in [*619 the admiralty by Judge Hopkinson, of Pennsylvania, in the year 1781; and by Judge Bee in the admiralty of South Carolina, in the case of Shrewsbury v. The Sloop Two Friends, in 1786; in both which cases the authority of those quotations is rejected, and the lien of the shipwright to sue in rem in the admiralty denied. Bee's Adm. Rep. 419, 433.

Both those cases go to show the law of this subject at the adoption of our constitution, and they merit high respect, both for the known abilities of the judges who pronounced them, and the intrinsic learning they display. They show plainly that the quotations mentioned rest altogether on the authority of the resolutions of 1632, to which, certainly, no lawyer will attribute authority any farther than they go to show that the admiralty did not even then pretend to the jurisdiction in personam upon contracts at all, and upon very few even in rem.

It may seem surprising, that from the time of Richard II. down to the beginning of the 17th century, the jurisdiction of the admiralty court should have attracted so little of the attention of the common law courts. One principal cause will be found in the civil wars, and

the low state of commerce; and when the nation returned to a state of tranquility, the power and vigor of her monarch's left little scope for legislative or judicial action. Yet there are cases to show that the subject was not forgotten; and when the increase of commerce, and the weak reign of the Stewarts, presented a motive and an opportunity, that the attention of the nation was attracted to the usurpations and unconstitutional power exercised by that court.

It is obvious, also, from the cases and discussions of that day, that the common law courts were embarrassed by a technical difficulty, arising out of the necessity of laying a venue to every action. As soon as this was removed (and the advocates of the admiralty murmur very much at the supposed absurdity of removing this absurdity), the progress of the common law courts was rapid in wresting from the admiralty every species of contract, leaving them none to act upon, on which they could themselves render complete justice according to the established rights of the parties. 620*] *They are charged with absurdity and inconsistency, but I pronounce the charge utterly groundless; for the one principle runs through all their decisions, that of subjecting to the trial by jury every cause in which that form of trial could be applied without injury to the parties' rights. It is true, that where they found them in the exercise of a power analogous to that of a court of equity, they did not take from the admiralty a power which they should only have handed over to another civil law court; they had no motive, if they had the power, to make the transfer. And hence the admiralty is left in the exercise of jurisdiction in cases of hypothecation, bottomry, and a kind of specific execution between part owners of ships. Their jurisdiction of prize and salvage are royalties, and that over seamen's wages is a peculiarity, but perfectly reasonable and consistent, in whatever light it be viewed. In the sea laws it is called "a custom of the realm." Ch. J. Holt, we have seen, puts it on the ground of a positive concession and communis error. And the judges often say, "we permit them to exercise this jurisdiction, because they may sue together there, and must sue severally in the common law courts, and there they can have remedy upon the body of the vessel, which they cannot have here;" thus placing the exception in their favor upon the conceded ground of incapacity in the common law courts to do complete justice, and the equitable ground of preventing a multiplicity of suits.

My own opinion is, that it stands on a much higher ground, and has its basis in the same policy which makes their wages to depend on the safety of the ship they navigate, by giving them, in that event, every possible chance of getting compensated. To which we may add, that their thoughtless character and ignorance renders them emphatically the wards of the admiralty, while the law on which they earn or lose their wages is a system of the admiralty. The assertion of the general principle against the captain's contract, finds its solution in his right to receive the freight in perference even to his owner, and thus to pay himself; and in the perfect competence of the common law courts to do justice in his contract with the owner. In the case of ransom, he still may resort to the admiralty, and proceed in rem.

*But, right or wrong, it is not to be [*621 questioned at this day, that the admiralty have lost their jurisdiction over contracts, with the exceptions stated. The most animated advocates of the admiralty do not deny this. They mourn bitterly over its fall, but uniformly acknowledge that they are eulogizing the dead. In Godolphin, Sir Leoline Jenkins's Works, and the collection of the Sea Laws, will be found all in substance that ever was said on this subject. Yet they all unequivocally acknowledge that its jurisdiction has long since been at an end over contracts, and in personam, with the exceptions I have stated; while they dwell eloquently on the folly of plucking this "diamond from the crown;" and enlarge greatly on the inconvenience of leaving to a jury the decision of causes which could be so much more advantageously disposed of by a single judge, and by a system of laws peculiar to the admiralty courts; and arraign with severity the inconsistencies, absurdities, and unkindly feelings with which the common law courts have stripped the admiralty of its ancient and eminent power. Even Brown, the modern champion in Europe of the admiralty jurisdiction, but who obviously has only caught the feelings, and borrowed the arguments of those who have gone before him, is forced reluctantly to acknowledge that the admiralty has for ages been stripped of these powers, though he would spare no effort to restore them if he could. See appendix to his 2d vol., and note at the end, said to be omitted at p. 100.

It has sometimes been contended that the decisions of the common law courts, as exemplified by their granting prohibitions, is not conclusive against the admiralty jurisdiction—that it is a disputed jurisdiction, and therefore that the admiralty judges themselves should be heard in this "Litis Contestatio."

But this is obviously incorrect; for the Court of King's Bench, by its acknowledged jurisdiction, as exemplified in the very exercise of its power to prohibit, is the very source to which we are to look for lights to determine the respective powers of the inferior courts. And the decisions that have taken place on this subject, are nothing less than judicial expositions of the statutes which limit the powers of the admiralty. They amount to the construction and application *of the law of the realm, of [*622 the statute law, and are therefore conclusive. So every lawyer knows they are held to be in the British courts; and together, they make up that system of law which, by universal consent, was adopted in the admiralty courts in this country before the revolution, at least on the subject of jurisdiction over contracts, and in personam. I will now take a brief view of some of the leading decisions, in England and in this country, on the subject of contracts.

The quotations I shall first make have two objects in view: first, to show that the particular contracts under consideration, to wit, of material men, have been denied to their jurisdiction; and, second, that, in every instance in which they have been prohibited from the exercise of jurisdiction over contracts, it has been upon a ground that is fatal to the exercise of jurisdiction in this and similar causes.

On this latter subject it would be unneces-

sary to search further than that article in the 4th Inst., 138, 141, in which Sir Edward Coke gives a detailed account of his own answers to the complaints of the Lord High Admiral to the King, against the restraints then recently imposed by the common law courts upon his jurisdiction. This was early in the reign of James I. and notwithstanding the revival of the clamors against that learned judge on the same subject, I cannot but express the opinion that it is a calm, dignified, learned, and triumphant answer. The authorities which he cites are valuable for their antiquity, as they show that the courts in his time were only treading in the steps of those who had preceded them.

Thus, to prove that charter-parties were without their jurisdiction, he cites Hare v. Unton, 31 Hen. VI, and observes that there were an infinity of cases to the same point.

To prove that policies of insurance were not of admiralty jurisdiction, he cites Crane & Pell, 38 Hen. VIII.

To prove that maritime contracts, notwithstanding a foreign origin, are not to be taken from the common law courts, he cites 28th, 39th, and 40th Eliz.

And finally, it is important to advert to the manner in which he explains the rule by which it is to be determined whether any given contract is or is not of admiralty jurisdiction; 623*] *which is no other than by showing from adjudged cases, that the common law courts have exercised and can exercise jurisdiction over the same contract. p. 141.

Sir Matthew Hale, in his History of the Common Law, when sketching the jurisdiction of the admiralty, says, "the jurisdiction of the Admiral Court, as to the matter of it, is confined by the laws of this realm to things done upon the high sea only; as depredations and piracies upon the high sea; offenses of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprisal upon the high sea. But touching contracts or things made within the bodies of English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charter-parties, or contracts made even upon the high sea, touching things that are not in their connection maritime, as a bond or contract for payment of money, etc., these things belong not to the admiral's jurisdiction. And thus the common law and the statutes of 13 Rich. II. c. 15; 15 Rich. II. c. 3, confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea." C. 2, p. 35.

I have before cited the case of Craddock, from Brownlow, to show how early the admiralty was prohibited from exercising jurisdiction, and that in personam, on the contracts of material men. In the note to Abbott on Shipping, p. 136, it is asserted that the same is reported in Owen, under the title Leigh v. Burleigh. But I think it clearly a distinct case, as not only the parties but the facts are different (Owen, 122), but the principle of the decision is the same.

In Sheppard's Abridgment, Vol. I. p. 125, is to be found an excellent summary of the ancient admiralty law; and one article merits notice, as it serves very distinctly to show the true origin of the articles in Rolle and Bacon's Abridgment, which have been so often relied upon as authority for a contrary doctrine. He quotes 3 Cro. 296, 297, for the following doctrine, "that a suit may be in the Admiralty Court for building, saving, amending and victualing of a ship against the ship itself, not against the party, but such as make themselves for their interest parties." This is the very language *of the resolutions of 1632, [*624 and those are the pages in which they were inserted in the two first editions of Croke, before they were exploded.

Sir Leoline Jenkins, whose authority certainly no advocate of the admiralty will deny, acknowledges, in so many words, that the admiralty could not exercise jurisdiction over the contracts of material men. 1 Vol. 83.

That the remedy against the ship itself has long since been taken away, is established by many authorities. In the American edition of Abbott on Shipping, a work entitled to great respect, it is laid down, in very general terms, "that a shipwright, who has once parted with the possession of a ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not, by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands." P. 135.

That the author is here speaking of a "claim or lien" in the admiralty, is fully established by reference to the cases which he cites and comments upon. The authorities he cites fully bear him out in his doctrine. They are chiefly Hoare v. Clement, 2 Show., Justen v. Ballam, 2 Lord Raym. 305, Watkinson v. Barnardiston, 2 P. Wms. 367. And numerous other cases might be cited, both ancient and modern, to the same effect, upon which the doctrine seems fully established in England, that neither shipwrights nor material men can sue in the admiralty, either in personam or in rem, without express hypothecation, and all assigning the universal reason, that they have the common law courts open to them. See also Bushnel v. Suel, 1 Vesey, 155.

Some of those loose obiter dicta in which the most eminent and prudent judges sometimes indulge, have been attributed to an eminent English jurist, which have been thought to cast some doubt upon these doctrines in modern times. The facts stand thus: In the 17th Geo. III., Lord Mansfield is reported to have said, in the case of Rich v. Coe, Cowp. 636, "that a person who supplies a ship with necessaries, has not only the personal security of the master and owner, but also the security of the specific ship." And, again, *nine years [*625 after, he is reported to have repeated the same dictum in the case of Farmer v. Davis, 1 Term Rep. 108, in both instances, however, mere gratis dicta with regard to the points decided.

But, in opposition to this, we have the expression of Lord Kenyon in the case of Westerdell v. Dale, which occurred eleven years after, in which he is reported to have said, that he doubted whether the doctrine had not been too generally laid down by Lord Mansfield, and referred to the authority of some of the old decisions, which establish the contrary doctrine. Indeed, when we refer to the language of Lord Mansfield himself, in the case of Welkins v.

Carmichael, which occurred only two years after Rich v. Coe, it is difficult to imagine how the same judge could have held such inconsistent doctrines. For there (3 Dougl. 101) he is reported to have decided, "that a carpenter, in parting with his possession had lost his lien, if he ever had one;" "that creditors for stores and provisions had no lien," "and that work done for a ship in England is supposed to be on the personal credit of the employer, although, in foreign ports, the master might hypothecate." This is all consistent with the established doctrines of the English courts; and the truth is, that if this learned judge had had the subject fully before him, on a motion for a prohibition, he would never have confounded the law of other states, or other times, with the common law of England in his time. To do him justice, what he decides in the last case, should be received as what he meant in the two former.

In the third American edition of Abbott on Shipping, p. 160, I find a note in these words: "It does not appear that it has ever been held in the courts of the United States, that shipwrights and furnishers of supplies in the ports of the United States have not a lien on the ships, or a right to admiralty process, to recover the amounts due them. The question has not, to my knowledge, arisen in the Supreme Court of the United States. But in the District Court of Maryland, after a very learned discussion, Winchester, Justice, decided, that a shipwright, by the maritime laws, has a lien on the ship for repairs done, and materials found [*626] by *him while the ship is in a port of the United States. Stevens v. The Ship Sandwich, 1 Peters' Rep. 233, note. The same opinion was given by Peters, Justice, in Pennsylvania, in Gardner v. The Ship New Jersey, 1 Peters' Rep. 223; see also, 1 Roll. Abr. 533, l. 15; Cro. Car. 296."

From this note it appears that the learned editor, to whom, I presume, it is to be attributed, was not aware of the two decisions rendered by Judges Hopkinson and Bee, to which I have above alluded. Both of them will be found directly in point against the shipwright's lien, and the research and learning which they display will be found worthy of the high reputation of the judges who rendered them. These cases will also be found interesting, from the circumstance of their containing criticisms upon the authority of the law upon which both Judges Peters and Winchester appear to have been misled; I mean the standing quotation from 2 Bacon, with its usual accompaniments from Roll. and Cr. Ch., i. e., Roll. Abr. 533, and Cro. Ch. 296.

I cannot, however, admit, that the decision of Mr. Peters, in the case of The New Jersey, is a case in point on the proposed subject. For the question of the lien of material men or shipwrights did not there arise. It is only mentioned arguendo, as an apology for making an allowance to the captain out of funds in the registry, for wages paid, and supplies furnished the vessel from his own funds. An allowance, which he at last excuses in a note, by saying, "that it was not opposed," and for which he might also have plead the high authority of the case of Watkinson v. Barnardiston, 2 P. Wms. 367, in which the same thing was done, and that of The John, 3 Rob. 288. But the doctrine laid down as to material men and shipwrights by the learned judge, are gratis dicto, and, as is fully shown in the case of the The General Knox, cannot be sustained by the authority quoted.

With regard to Judge Winchester's decision in the case of The Sandwich, it cannot be denied that it is directly in point. But, it is equally true that it appeals to no authority that can sustain it. It is not by an exhibition of learning that decisions are to be tested, but by sound conclusions from unquestionable premises. To obstruct our inquiries by *a battery of cases, or learned and re- [*627 mote quotations, often obtain from faith concessions that ought to be yielded only to investigation. I admit that Judge Winchester's decision is characterized by learning, but certainly his premises cannot be conceded to him; they are founded in error. His course of reasoning is this:

"The constitution of the United States vests in the United States admiralty and maritime jurisdiction, and that jurisdiction is vested in the District Court." "In England (I now quote his words), where the jealousy of the civil law was most conspicuous, while its authority was openly denied, the principles of equity derived from that code influenced the decisions of their courts in as great a degree as in countries where it was adopted. In all of which, from the books within my power, I can obtain any legal information, every contest or dispute between the owners and mariners, and the owners and builders, or equippers of a ship for navigation on the sea, is of a maritime nature, and cognizable in the admiralty." He then goes on to observe, "that the statutes of 13th and 15th Richard II. have received a construction which must, at all times, prohibit their extension to this country;" and, finally, when he comes to state the proposition, "Has a shipwright a lien on the vessel by him repaired for the value of his materials, labor, etc.?" he says, "to decide this question, it is necessary to examine the nature of liens and privileged debts at the civil law;" and, accordingly, he proceeds to examine what is the law of various countries of the continent, which are subject to the civil law, and concludes with adopting two propositions thus: "I am, therefore, of opinion, that a ship-carpenter, by the maritime law, has a lien on the ship for repairs in port; and that the cause being a maritime cause, the court has a jurisdiction over the person as well as over the ship." The authorities which he quotes are, Zouch, Beawes, Valin, Rolle's Abr. 533, and 1st Bacon, 178.

Now, learned as this decision may be, it is obvious that it is but a tissue of errors, since it adopts the civil law as its guide, and the admiralty law, in the time of its most extravagant pretensions, positively denying the authority of *the statutes of Richard, and [*628 the modifications which they introduced into the law maritime.

The laws of the continent of Europe furnish no authority on this question. Every state has its own laws on these contracts, as have most of the states of this Union. The ordinance of Louis XIV. on which Valin comments, is the statute law of France, and expressly vests in its courts maritime jurisdiction over a variety of contracts which the common law court has

taken from the jurisdiction of the admiralty. The question is not what the civil law would give, but what remains to the admiralty of that jurisdiction, which no one denies that it had assumed under the authority of civil law principles.

The laws of Oleron, which may be called the statute law of Great Britain in maritime affairs, and which I am pleased to find published in Mr. Peters' first volume, together with Postlethwaite's Commentaries, give none of these powers over contracts to the admiralty.

I think it has been sufficiently shown, and, indeed, in denying authority to the British decisions under the statutes of Richard, Judge Winchester must be held to admit that the British decisions are contrary to his decision on the lien of the shipwright.

Mr. Brown (in his 2d vol. p. 80, 81) distinctly acknowledges it to be settled, "that no person can sue in the admiralty for work and labor done in the port before the voyage begins, or necessaries sold for the ship's use before she sails, nor even where supplied to a foreign ship lying in a British port." Where money is lying in the registry, as in the case decided by Judge Peters, there has been a disposition manifested recently, to get over the rigid rule, if there could be found an excuse for it; but none yet, I believe, has been found, except for money actually expended by the captain, and for which he might have hypothecated. There, perhaps, it may be considered as a quasi hypothecation. 3 Term Rep. 323; 2 P. Wms. 367; 2 Rob.

I will now show that Judge Winchester is equally unsustained in his other principle, to wit, that "on a maritime contract, as a general proposition, the Court of Admiralty has jurisdiction over the person as well as over the 629*] ship." *I will not refer to the instance of bottomry by the master, because I do not believe that he had in mind that case, but will confine myself to the distinct proposition, "that in no case of contracts, except that of seamen's wages, can the admiralty proceed in personam," which is the point now before this court.

I have referred to the celebrated resolutions of 1632, in which, when the admiralty were solemnly gathering up and consecrating, as they thought, the remains of their jurisdiction, this right is, in express terms, relinquished; to Sheppard's Abridgment, in which, at a period long subsequent, such is given as the purport and exposition of that document; and I have quoted Craddock's case, and Leigh and Burleigh's case, in which the Court of Admiralty was expressly prhibited from proceeding in personam in behalf of material men. I should think here I have a right to demand, if from the whole library of law books—and God knows we have enough of them already, "camel loads"—a single attempt to proceed in personam, upon a contract in the admiralty, except for seamen's wages, since the date of the resolutions of 1632, can be extracted. Adjudged cases cannot be found, because, since the antique cases to which I have referred, the right has been abandoned. Dicta enough can be produced, and some of those very modern.

Godbolt speaks of the process in rem, as the only process issuable in the first instance from the admiralty (260).

In the edition of Abbott, which I have quoted, in a note upon the case of Hoare v. Clement (p. 136), a case arising on a contract for necessaries, it is admitted, "that the court of admiralty had no jurisdiction over the person in that case."

In Johnson v. Shippen, 2 Salk. 938, in which a libel was filed against ship and owners, on an hypothecation for money borrowed abroad on her voyage, it was argued that, if suit lay against the owners at all, it lay at common law, and a prohibition was granted as to the suit against the owners, but refused as to the vessel.

In Bull v. Trelawney, 16 Ch. 1, Trelawney had sued in the admiralty on a foreign contract, in personam; obtained judgment, and Bull was in jail. The latter brought his action *under the stat. 2 Hen. VI. c. 11, re- [*630 covered double damages, and was discharged on habeas corpus, on the ground of being in confinement in a cause "coram non judice." Cro. Ch. 603, and 3 Lord Raym. 982.

Brown (2 vol. 100) lays down the rule in these terms: "The general rule, however, at present, is, that the admiralty acts only in rem, and that no person can be subject to that jurisdiction but by his consent, expressed by his entering into a stipulation."

And even this mode of subjecting the person, through the medium of a stipulation, it is well known, was itself resisted at first, and acquiesced in only on the ground of its being an indispensable incident to the exercise of the jurisdiction in rem.

In Keble's Reports (p. 500), quoted by Brown, it is expressly said, "that without a stipulation, the admiralty has no jurisdiction at all over the person."

In the case of Ousten v. Hebden, 1 Wils. 101, where one libeled in the admiralty, to compel his part owner in a ship to join in a sale, a prohibition was granted, upon the ground that this was in fact an attempt to exercise a jurisdiction in personam.

There is a class of cases which may appear, at first view, to maintain a contrary doctrine, but which, upon examination, will be found consistent with the general principle.

The case of Manro v. Almeida, decided in this court, was one of that description. They are cases in which the admiralty proceeds quasi in rem, when the subject of the suit is withdrawn from its jurisdiction. These cases proceed upon the supposed contempt in withdrawing the res subjecta from the process in rem. This was the case of Smart v. Wolf, 3 Term Rep. 323, in which the Prize Court had improvidently ordered the cargo of the captured vessel to be delivered to the captors, reserving the question of freight, but without taking a stipulation bond, in a sum equal to what afterwards appeared due for freight. A monition from the admiralty was sued out to the captor's agent, to respond to the captain's demand for freight, to the full amount decreed to him; and against this proceeding, the Court of King's Bench refused a prohibition.

*Here the Prize Court acted upon a [*631 quasi hypothecation of the goods for the freight, resulting from their reserving the question of freight; and considered the captors in the light either of their own bailee of the goods, or in his original relation of captor.

against whom, if the goods are not returned on monition, the court proceeds as on contempt.

In Manro v. Almeida, 10 Wheat. Rep. 472, the libelant claimed redress against a foreign captor, in a cause peculiarly of admiralty jurisdiction. The captain of a foreign privateer had, on the ocean, seized a sum of money in dollars, the property of the libelant, which the libelant alleged had been piratically taken; and finding property of the captor here, sued out process against the captor for the purpose of examining before the admiralty the correctness of the seizure, and obtaining indemnity for it. The principal question considered in that case, arose on the form of proceeding; but the object was the prosecution of a suit in rem, to wit, to obtain restitution of the $5,000 seized by Almeida on the ocean, as prize.

A case very similar to this is to be found in a note to the case of Smart v. Wolf, in which the admiralty proceeded against the agents of a captor to subject to its jurisdiction a sum of money that had been taken out of a prize, and passed into account between the agent and his principal.

On the cases of this class, two remarks will always hold good. 1st, They are instances in which the Court of Admiralty had jurisdiction of the principal question, not contracts, but maritime torts and prize causes, or their incidents; and, 2d, that the process in personam is only the means to get possession of the res subjecta; that is, of exercising an unquestionable jurisdiction in rem.

We sometimes hear of a concurrent jurisdiction between the admiralty and common law courts. But, on the subject of contracts, which is the subject now under consideration, I deny that, with the exception of seamen's wages, any such concurrent jurisdiction can exist. It is an absurdity in terms, for the rule which goes through all the cases, is in direct hostility with it. If the common law can try the cause, and give full redress, that alone takes away the admiralty jurisdiction. This is the principle 632*] on which the decisions rest *from the remotest periods. The contract of bottomry is sometimes cited as an instance of concurrent jurisdiction. But it is a mistake, and an instance cannot be cited, better to illustrate the true doctrine on this subject, than this species of contract. If executed by the master, jurisdiction of it is exclusive in the admiralty, because it gives remedy only in rem. But if executed by the owner, it becomes also a personal contract. Yet who ever heard of a remedy upon it as such, anywhere but in a common law court, or a court of equity? The contract of respondentia, which is as much a maritime contract as bottomry, gives no jurisdiction to the admiralty either in rem or in personam. 2 Brown, 196, 197, and 4 East. p. 319.

The case of Menetone v. Gibbons, 3 Term Rep. 267, has nothing new in it; it is a recognition of doctrines as old as the hills. The question was, whether an hypothecation was taken out of the admiralty jurisdiction, because it was, in that instance, a sealed instrument. The general jurisdiction of the admiralty to proceed in rem on a bottomry bond, was not denied. The court explicitly acknowledge the doctrine, "that if the common law can try the cause, the admiralty shall not, and affirm the jurisdiction of the admiralty merely on the ground that there was no action against the party at common law, and the common law courts could not proceed in rem under the hypothecation." As to the rule there laid down, "that the jurisdiction of the admiralty shall be adjudged secundum subjectam materiam, it is as ancient as Bridgam's case, in the time of Hobart. But this decision is of importance here in two points of view; since the court reason upon the principle throughout, that the admiralty jurisdiction is to be tested by the common law remedy, and the grant of prohibition.

There was a case decided in this court in the year 1824 which merits some attention. I mean the case of The St. Jago de Cuba; in which the court, at first view, would seem to have given a decision in favor of the claims of material men upon a foreign ship, in a case where no actual hypothecation had been executed. But there are several considerations from which it will appear that the court did not commit itself on that subject. The most material is, *that the question arose up- [*633 on the application of money in the registry of the court, arising from the sale of the vessel for another cause. And, in such instances, it will be seen from several cases, some of which have been noticed in the course of this discussion, that the court may act towards creditors as if that had been done which might lawfully have been done in their favor. And there is a peculiar propriety in doing this, when the court, by selling the vessel, has put it out of the power of the captain to give that security to creditors which it is reasonable to suppose would have been given, where the captain had no other means of getting advances made of money or materials. Several cases have been noticed of the captain himself having the benefits of an actual hypothecation extended to him when he expends his own money where he might have raised it on bottomry, and the proceeds of the vessel are in the registry of the court. Yet this has been severely questioned in the British courts. 9 East, 426. Attention to the language of the court, also, will show that they have been guarded on this subject.

The question which the court is examining, is not whether the lien of a material man attaches independently of an actual hypothecation, but whether, if the master has exercised this "power of pledging or subjecting the vessel to material men," the forfeiture to the government, without notice, would supersede their rights. And, although speaking of implied liens, whether the material man here retained his supposed lien on the money in the registry, was distinctly the question, and the language of the court ought not to have any other effect given to it.

Yet, I am free to confess, individually, that in a case in which an hypothecation would be so clearly valid and legal, if actually made, I should want nothing but authority to induce me to sustain such a claim against the vessel; with regard to money in the registry, I think this case is authority for sustaining it, and that it is sanctioned by other authorities. Vide case of The New Jersey and The John, 3 Rob. 288.

Mr. Brown (2d vol. p. 100) has thought prop-

634*] er to charge *the common law courts with having "involved the subject we are now upon in endless confusion."

To me it appears that the charge may more correctly be made upon those who have engaged, like himself, with so much zeal in an effort to shake the authority of a course of decisions that are uniform and consistent, and with one single exception (which exception is acknowledged as arbitrary, or positive law), reducible to a single principle—a principle altogether fatal to this action in its origin, since there can be no question that the party here had his common law remedy.

And I consider the effort particularly ungracious in an author who is driven to acknowledge its futility so often; one who confesses, in so many words,

"That if the parties have bound themselves to answer personally, the admiralty cannot take cognizance of the question." Vol. II. p. 101.

"That the admiralty has, in a great measure (he should have said, altogether), dropped its claim to taking cognizance of charter-party, freight, and suits by material men, and almost all other proceedings upon contract, except those for recovery of seamen's wages, or enforcing bottomry bonds." p. 103.

"That the admiralty is excluded from jurisdiction of contracts if personal, or sealed, or made on land." p. 107,

"That the jurisdiction of the Instance Court of admiralty, which is at present seemingly (he should have said actually) allowed by the law courts, is that it is confined, in matters of contract, to suits for seamen's wages, or those on hypothecations; in matters of tort, to actions for assault, collision and spoil; and in quasi contracts, to actions by part owners for security and actions of salvage." p. 122.

"That the contract of insurance is, in practice, uniformly and decidedly out of the cognizance of the admiralty." p. 188.

And, finally, to acknowledge in the last page of his book, among his errata et omissa,

"That personal contracts are held not to be cognizable in the admiralty."

It has sometimes been said that this is a 635*] disputed jurisdiction; *but by whom is it disputed? Not by the courts of Great Britain, for, in all their courts, as well of common as of civil law, when called distinctly to act upon the jurisdiction of the admiralty, there is no dispute, no contrariety of opinion; they all are governed by the same rules of decision. From time to time, some extravagant admirer of admiralty jurisdiction, or royal prerogative, has risen up in England, who has revived the ancient murmurs uttered by the friends of that court, when reluctantly putting off its usurped powers; but with that exception, I know of no part of the English law that seems more clearly fixed than that of the admiralty jurisdiction. 'The misfortune is, that people will not be content to leave it as they find it, but employ themselves in efforts to revive what they cannot but acknowledge has been long since extinct. If the learning upon this subject should appear remote and antiquated, let it be remembered that the law has been fixed in England for two centuries. And since the futile attempt of Sir L. Jenkins to revive it, no one, I believe, until Mr. Brown appeared before the public, had made any attempt to change the law of the admiralty in that kingdom.

I have felt it my duty to pay some attention to the subject for several reasons.

In the first place, I stand before the public as bearing my share of the responsibility incurred for certain opinions expressed in the case of The General Smith. For the just extent of my responsibility in that case, I must rely on the repeated decisions which I have made in my circuit in hostility with that doctrine. But I am willing to treat it as my own error, and shall, on that ground, claim the privilege of treating it with a greater freedom; at least I shall endeavor to administer the antidote if I have diffused the poison, and claim credit for an unequivocal proof of my repentance by a public acknowledgment that it was inexcusable.

I will now examine that case upon its authorities and its consistency with itself.

The case of The General Smith was a case of the most extravagant attempt ever made to enforce this supposed lien of material men. It serves to show to what embarrassments *the commercial world might be ex- [*636 posed by pushing these martime liens to excess. Since, upon the same principle on which the libel was there filed, however long the time that had elapsed, whatever number of voyages the vessel had made, and whatever changes of property she might have passed through, she would still have remained liable to material men. For, in that instance, the General Smith had made a voyage, and the property of her been changed before the libel was filed. She was admitted, too, to be an American ship, in her home port. The court below very properly dismissed the libel, and this court did not hesitate to affirm the dismission; and, confined to its just import, as an adjudication, it is most unquestionably correct.

No man will subscribe more implicitly than myself, to the authority of decisions in this court; and I am ready at all times to adhere to the principles necessarily deducible from, or conducing to such decisions. But farther than this no judge is bound to subscribe to authority, for no other subjects are considered and adjudicated.

But the report informs us that Mr. Pinkney, who argued against the material men, "admitted the general jurisdiction of the District Court as an instance court of admiralty over suits by material men in personam and in rem, but denied that a suit could be maintained in the present case, because the parties had no specific lien upon the ship for supplies furnished in the port to which she belonged. That in the case of materials furnished or repairs done to a foreign ship, the maritime law has given such a lien, which may be enforced by a suit in the admiralty. But in the case of a domestic ship, it was long since settled by the most solemn adjudications of the common law (which was the law of Maryland), that mechanics have no lien upon the ship itself for their demands, but must look to the personal security of the owner." 4 Wheat. Rep. 441, 442.

Now, I have too high an opinion of Mr. Pinkney's law reading, and of his talents as an advocate, not to be well convinced that in this, as

well as the residue of the argument attributed to him, he must have been misunderstood. And I find my sanction for this belief upon the face of the report itself; for, with the exception of 637*] the nullity of the *lien claimed against a domestic ship, the authority which he quotes to sustain his doctrine, contradicts it in so many words.

His quotations are Abbott on Ship. pt. 2, ch. 3, sec. 9 to 13, and the case of The Levi Dearborne, 4 Hall's Am. L. J. 97. The last quotation was a case of material men suing in rem in a home port, and was in point. But the quotation from Abbott was no other than the very passage on which I have before commented, and which, although commencing with stating the doctrines ascribed to Mr. Pinkney as prevailing on the continent of Europe, shows most distinctly that the law is otherwise in England. Mr. Pinkney never would have quoted, to support such doctrines, an author who has been shown to assert "that a shipwright, who has once parted with a ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for the ship (i. e., material men), are not by the law of England preferred to other creditors, nor have any particular claim or lien upon the ship itself, for the recovery of their demands."

Mr. Pinkney's quotation from Abbott comprises, and is limited to the sections that are occupied in maintaining the doctrine thus laid down by the author, and in showing, expressly, that it extends to a foreign as well as a domestic ship. In section 10, the author cites Justin v. Ballam, 3 Lord Raym. 805, which he considers as conclusive against the foreign ship. The distinction taken, is not between a domestic and foreign ship, but between a ship "on her voyage and absent from her owner, and one in her home port." And, even in that case, the law, as laid down by the learned annotator to Abbott, in a note to the 8th section, upon 9 East, 426, in the language of Lord Ellenborough, is, "that the master may hypothecate, not that the hypothecation attaches per se on the contract for necessaries." It is true, he cites Judge Peters' decision in the case of The New Jersey, for a contrary doctrine; but he seems not to have adverted to the distinction recently admitted between distributing money in the registry, which is Judge Peters' case, and that of arresting the vessel and subjecting her to sale. Nor has he adverted to the fact that Judge Peters places his decision on 638*] the authority *of the English cases, which the text of Abbott alone will show are directly hostile to it. To which may be added, that even Judge Peters does not countenance the doctrine of a right of proceeding in personam, attributed to Mr. Pinkney. But this, also, when we find the rest of his reported argument so clearly a mistake, we have good reason for hesitating to ascribe to him. And the rather, for that, so well read a lawyer would not have advanced so bold a doctrine, without attempting to find some shadow of authority for it. Even Mr. Winder, who argued against Mr. Pinkney, does not venture to put his case upon the law of England, but relies upon the law of the continent, and insists on a right arbitrarily to adopt it here.

Mr. Winder quotes Judge Winchester's decision, and the case of De Lovio v. Boit, from 2 Gallison, 400. But Judge Winchester affords no authority, since he decides on grounds which I have shown to be altogether heterodox or exploded.

With whom the idea originated, that the admiralty and maritime jurisdiction vested by the constitution in the United States, was that which the admiralty possessed or pretended to, before the time of Richard II., I am at a loss to conceive. Judges Hopkinson, Bee, and Peters, all distinguished revolutionary men, educated before the revolution, and deeply engaged in public life until long after the constitution, concurred in fixing the period of the revolution for the law of the jurisdiction of the admiralty. And who can doubt that the doctrine of that day was, that the jurisdiction anciently claimed by that court was founded in usurpation. The acts of Richard expressly declare it; that of Henry treated it as vain and void; and such all history proves it. Yet it is only by going back to those early times, that shadow of authority can be found for the pretensions which it seems disposed to put forth in our day.

Of the case in 2 Gallison, I will only remark, that it was a decision in the first circuit, in which the right to proceed in personam in the admiralty was asserted, in a suit upon a policy of insurance; and if the nisi prius decisions of the judges of this court are of any authority here, it is only necessary to observe, that a contrary decision has been rendered in the sixth circuit. Let them, therefore, fall together; and *let the question be tested upon princi- [*639 ple and authority, independent of those decisions.

I now come to the consistency of the opinion of the court in The General Smith, with itself.

That decision is, that the common law is the law of Maryland with regard to the rights of material men, and that it has long since been settled that they have no remedy in rem. But the opinion is introduced with a dictum purporting, that had they sued in the admiralty in personam, there would have been no doubt of their right to proceed.

And here the question is, whether there can be found anywhere in the books, a case in which an action in personam could be maintained in the admiralty, wherein the action in rem was denied to that court. No such case can be found; and the reason is obvious; that right alone would take away the admiralty jurisdiction altogether, since it would follow that the right might be pursued at the common law—the case of seamen's wages always excepted—which I regard as positive law, and which, indeed, has been supposed by some to be retained by the admiralty, under the authority given that court by a statute of one of the Henrys, to control mariners in regard to the amount of their wages.

Let the cases be searched from the remotest period down to the time of Menetone v. Gibbons, and the ground of prohibition, and of recovery, under the 2d of Henry IV., will uniformly be found to be the competency of the

common law to enforce the contract. This is the principle by which even their jurisdiction in rem is controlled, and hence it follows, that in no case in which they are prohibited from proceeding in rem, can they have the action in personam.

I consider the decision, therefore, in the case of The General Smith, as conclusive against the doctrine which asserts the right of material men to proceed in personam, and upon the authority of which the present suit is avowedly instituted. At least, as there is no authority given for it by the court, we may conclude that it has no better authority than that on which we are given to understand Mr. Pinkney relied for the same doctrine.

I have now said a great deal on this subject, and I could not have said less, and discharged 640*] the duty which I feel that *I owe to the community. I am fortifying a weak point in the wall of the constitution. Every advance of the admiralty is a victory over the common law; a conquest gained upon the trial by jury. The principles upon which alone this suit could have been maintained, are equally applicable to one-half the commercial contracts between citizen and citizen. Once established the rights here claimed, and it may bring back with it all the admiralty usurpations of the fifteenth century. In England there exists a controlling power, but here there is none. Congress has, indeed, given a power to issue prohibitions to a district court, when transcending the limits of the admiralty jurisdiction. But who is to issue a prohibition to us, if we should ever be affected with a partiality for that jurisdiction?

I, therefore, hold, that we are under a peculiar obligation to restrain the admiralty jurisdiction within its proper limits.

That in case of contracts it has no jurisdiction at all in personam, except as incident to the exercise of its jurisdiction in rem.

That with regard to the contracts of shipwrights and material men in her home port, the vessel cannot be subjected, unless by express hypothecation by the owner.

That on her voyage, and where the master is destitute of other means of raising the necessary funds, she may be so subjected by the master, but it must be by actual hypothecation.

But that when the ship has been sold for other claims, and the money in the registry, so that the master no longer has it in his power to raise money on her bottom to satisfy demands which have been legally incurred, cases may arise in which the claims of material men and shipwrights, and of the master himself, may be sustained, without actual hypothecation.

Decree affirmed.[1]

1.—The editor of these reports feels it to be a duty which he owes to self-respect, and to the independence of the bar, to take some notice of the comments made in the above opinion upon the ac-641*] count *given in the third volume of this work, of Mr. Pinkney's argument in the case of The General Smith. Whether the editor was so unfortunate as to misunderstand the argument of that truly learned person, he is willing should be determined by the test proposed in the above opinion. No other reason is there given for questioning the accuracy of the report, than that Mr. Pinkney was too well read a lawyer, and too able an advocate, to have urged an argument which is contradicted by the authorities he cites in its support.

This argument includes the following positions:

1. An admission of "the general jurisdiction of the admiralty over suits by material men in personam and in rem.

All that is necessary to remark upon this passage is, that it was superfluous for Mr. Pinckney to cite any authority for a concession voluntarily made by him, argumenti gratia, and it does not appear that the authorities subsequently referred to in the margin were intended for that purpose. On this occasion, as on many other occasions, he probably spoke from the fulness of his learning, and with a confidence inspired by his well-grounded reliance upon its accuracy.

2. That no "suit could be maintained in the present case, because the parties had no specific lien upon the ship for supplies furnished in the port to which she belonged."

This is admitted to be an exception to the sweeping denunciation against the applicability to the argument of the authorities cited in its support. The authorities cited are, "Abbott on Shipp. pt. 2, ch. 3, s. 9-13, and the cases there cited. Woodruff et al. v. The Levi Dearborne, 4 Hall's Am. Law Journ. 97."

3. "That in the case of materials furnished, or repairs done to a foreign ship, the maritime law has given such a lien, which may be enforced in the admiralty."

The passage cited from the text of Abbott (s. 9), shows, that by "the maritime law" of all Europe, England only excepted, material men have such a lien, which may be enforced in the admiralty. Such was the law of Rome, and such is the law of all the maritime countries of the European continent. Such, too, was the law of Scotland, until it was recently altered by a decision "founded principally, as it seems, upon a desire to render the law of Scotland conformable to the law of England upon this subject." Abbott, pt. 2, ch. 3, s. 14, p. 142. How far the limits prescribed to the jurisdiction of the admiralty in England over maritime contracts, by the decisions of the common law courts, after ages of controversy, had been adopted in this country before the revolution, and how far the grant of admiralty and maritime jurisdiction in the constitution of the United States is to be construed with reference to those decisions, are questions foreign to the purpose of this note. The only question here is whether Mr. Pinkney was warranted in quoting this passage, *"and [*642 the cases there cited," as an authority for the position that "the maritime law has given such a lien, which may be enforced in the admiralty." The question is not whether the authority is conclusive to support the position, but whether it is sufficiently pertinent to render it probable that it was actually referred to for that purpose. It may be that there is, as is contended in the above opinion, some discrepency among the decisions of the admiralty judges in this country on the subject; but still the cases collected in a note to the American edition of Abbott (p. 160), are believed to be sufficient to rescue the argument attributed to Mr. Pinkney from the imputation of being directly contradicted by the authorities quoted to sustain it. The case of The Levi Dearborne determined by Mr. Justice Johnson in the Circuit Court of Georgia, is also quoted by Mr. Pinkney for the same purpose. That "this quotation was in point," will appear by the following extract from the opinion of the learned judge, as we find it reported by Mr. Hall. "The lien on vessels for material men and shipwrights, exists only in a foreign port. Where the owner is present and resident, the common law principle must govern. In such case, no lien on the vessel is created. In the case of the owner, who, though present when the work and materials are furnished, is transient and non-resident, I am disposed to think otherwise, and that in such case the lien attaches. It is proper also to state, what shall be deemed a foreign, and what a domestic port, as to this question: the sea-ports of the different states ought, in this respect, to be considered as foreign ports in relation to each other. Charleston, for instance, is a foreign port, as to a claim of this nature made in Savannah." 4 Hall's Law Journ. 101.

4. That "in the case of a domestic ship, it was long since settled by the most solemn adjudications of the common law (which was the law of Maryland), that mechanics have no lien upon the ship itself for their demands, but must look to the personal security of the owner."

This position is not denied to be supported by the authorities said to have been quoted by Mr. Pinkney; but the error imputed to the report consists in the asserted liability of a foreign ship to such a lien, which (as it has been seen) is recognized and enforced by the general maritime law, and which appears also to have been maintained by several admiralty judges in this country, and especially by Mr. Justice Johnson, although it may not have been adopted by the peculiar law of England.

In making these remarks, the editor has certainly not been influenced by any feelings of disrespect towards the learned judge by whom the above opinion was delivered, nor even by a desire to controvert the peculiar doctrines maintained in that opinion. It is his own character for accuracy and integrity as the reporter of the decisions of this court which the editor feels to be assailed, and, therefore, *seeks to vindicate. It is a duty which [*643 he owes to the court, to the profession, and to his own reputation, to maintain the fidelity of the reports, which are received as authentic evidence of the proceedings and adjudications of this high tribunal. If they are not to be relied on in this respect, they are worthless. In closing his labors, the editor has the consolation of reflecting, that it has been his humble aim to do justice to the learning and talents of the bar, and to uphold the honor and dignity of the bench. How far he has succeeded in this attempt, it does not become him to speak; but he is willing to submit to the impartial judgment of his professional brethren, whether the above accusation is supported by evidence.

ROSE'S NOTES

COMPLETELY REVISED EDITION

1917

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NOTES

ON THE

UNITED STATES REPORTS.

XII WHEATON.

12 Wheat. 1-18, 6 L. Ed. 531, THE PALMYRA.

The Supreme Court has power to reinstate any cause dismissed by mistake.

Approved in Watts v. S. M. Hamilton Coal Co., 219 Fed. 1010, setting aside default entered on failure of defendant to appear at trial; City of Manning v. German Ins. Co., 107 Fed. 55, holding court cannot vacate or modify its judgment after expiration of term in the absence of motions or proceedings taken in the term; The Cleveland, 98 Fed. 632, holding when vessel has been seized upon libel and released on bonds, it cannot again be seized for same cause in absence of fraud or mistake; St. Paul Fire etc. Ins. Co. v. Peck, 40 Okl. 404, 139 Pac. 120, holding Supreme Court could recall mandate transmitted to and recorded by trial court to correct mistake improvidently made; dissenting opinion in Hendryx v. Perkins, 114 Fed. 822, majority holding neither bill for fraud or review can be maintained after nine years when complainant during all of the time knew of the decree; Alviso v. United States, 6 Wall. 458, 18 L. Ed. 721, where appeal was dismissed for apparent want of citation, and it was shown later that citation had been filed, but destroyed by fire; Snow v. Edwards, 2 Low. 275, Fed. Cas. 13,145, allowing summary rehearing on motion in admiralty cause during term at which decree made; The Brig Antelope, 1 Ben. 347, Fed. Cas. 480, applying principle in setting aside decree dismissing libel in admiralty; Lovett v. State, 29 Fla. 398, 11 South. 178, 16 L. R. A. 315, vacating entry reversing decree of lower court where transcript upon which judgment based was shown to be erroneous; Gibson v. Chouteau, 45 Mo. 173, 100 Am. Dec. 368, granting motion to correct judgment improperly entered; Legg v. Overbagh, 4 Wend. 192, 21 Am. Dec. 117, holding that where error occurs in remitting cause to court below, higher court still retains jurisdiction and may reinstate cause; Chambers v. Hodges, 3 Tex. 529, vacating order for rehearing entered by mistake; Aetna Life Ins. Co. v. McCormick, 20 Wis. 269, setting aside decree of

foreclosure obtained upon notice of five days instead of eight, as required by statute; Poole v. Nixon, 19 Fed. Cas. 993, arguendo.

Distinguished in Wetmore v. Karrick, 205 U. S. 154, **51 L. Ed. 750**, 27 Sup. Ct. 434, holding clerical mistake as to judgment could not be corrected after term without notice; State v. Marsh, 134 N. C. 200, 204, 205, **67 L. R. A. 179**, 47 S. E. 12, 13, 14, where on appeal from conviction judgment was reversed on ground that indictment as contained in record failed to show material allegation, which was in fact omitted by misprision of clerk, Supreme Court could after term grant certiorari for correction of record and reset case for hearing; Ex parte Sibbald v. United States, 12 Pet. 492, **9 L. Ed. 1169**, denying power of court to reverse or annul its own final decree for errors of fact or law, after term in which it was rendered; Bank of U. S. v. Moss, 6 How. 38, **12 L. Ed. 334**, denying power to annul such decree after term, even where want of jurisdiction shown, and holding judgment binding until reversed on error; Rice v. Railroad Co., 21 How. 85, **16 L. Ed. 32**, and Phillips v. Negley, 117 U. S. 674, **29 L. Ed. 1015**, 6 Sup. Ct. 905, holding that writ of error dismissed at one term cannot be reinstated on the docket at a later term, because writ, having expired by termination of that term, is functus officio; Jenkins v. Eldredge, 1 Wood. & M. 63, Fed. Cas. 7269, holding that terms of final judgment cannot be materially altered except on review, appeal, or error; Bissel etc. Co. v. Goshen etc. Co., 72 Fed. 553, 43 U. S. App. 47, ruling similarly; Mason v. Pearson, 118 Mass. 63, denying right of court to annul final decree in absence of mistake; King v. Ruckman, 22 N. J. Eq. 553, denying motion for rehearing on merits after final decree regularly entered.

Power of appellate court after remittitur. Note, **21 Am. Dec. 119.**

Practice and procedure governing transfer of causes to Federal Supreme Court for review. Note, **66 L. R. A. 851, 871.**

On stipulation for property subject to process, stipulators are subject to all powers which court could exercise if property were in its custody.

Approved in The Vigilant, 175 Fed. 228, holding surety on bond to release vessel from libel could not by taking assignment of claim keep it alive as lien on vessel as against prior mortgage; The Wanata, 95 U. S. 611, 615, **24 L. Ed. 464, 466**, holding stipulators liable only to amount stipulated; United States v. Ames, 99 U. S. 36, **25 L. Ed. 298**, holding that question as to whether case is made for recall of property must be determined before final decree is rendered on bond; Munks v. Jackson, 66 Fed. 574, 29 U. S. App. 482, holding that where process has been issued against vessel, decree and execution may be awarded against stipulators without separate suit; The Frank Vanderkerchen, 87 Fed. 765, holding rule applicable where stipulation for value given without issuance of monition or seizure of vessel; Richardson v. Cleaveland, 5 Port. 268, holding that where stipulation is entered into and vessel released, lien acquired by seizure is thereby discharged and condemnation of property cannot be decreed; Mitchell v. Chambers, 43 Mich. 159, 5 N. W. 63, holding that judgment

against vessel may include stipulators as part of general adjudication; Bartlett v. Spicer, 75 N. Y. 532, holding that where stipulation is given in action in rem, recovery on it cannot be in personam; Lovering v. Insurance Co., 12 Pick. 365, arguendo.

Distinguished in The Oregon, 158 U. S. 206, 211, 39 L. Ed. 952, 954, 15 Sup. Ct. 812, 814, holding that where stipulation is given for particular suit, sureties are not liable to intervenors.

Limited in Braithwaite v. Jordan, 5 N. D. 207, 212, 31 L. R. A. 244, 246, 65 N. W. 704, 705, bond not limited for enforcement to court having jurisdiction of res, but may be enforced in any court having jurisdiction of action of debt.

Proceedings for condemnation of captures made by public armed vessels are in name and authority of United States.

Modified in Proceeds of Prizes of War, Abb. Adm. 497, Fed. Cas. 11,440, holding that where United States district attorney authorizes libel for condemnation to be filed by individual captors, the court will allow proceedings to be so conducted.

It is sufficient if a libel in rem for a forfeiture allege the offense in the words of the statute.

Cited in Cross v. United States, 1 Gall. 31, Fed. Cas. 3434, holding that in action for debt for penalty under embargo act, it was not necessary to allege particular articles composing cargo, nor that owner was knowingly concerned in illegal voyage; The Cherokee, 5 Fed. Cas. 549, holding that forfeiture cannot be enforced when averments in libel do not bring offense within provisions of statute; United States v. Arms, 24 Fed. Cas. 863, under facts similar to those in principal case; United States v. Distilled Spirits, 28 Fed. Cas. 122, holding insufficient, a general averment that statute has been violated.

In libel in rem for piratical aggressions, it is not necessary to allege or prove conviction of person for criminal offense.

Approved in Scow No. 36, 144 Fed. 934, 935, under 30 Stat. 1152, 1153, vessel used in depositing refuse matter in navigable waters is liable to penalties though act was without knowledge or intent of owners; The Bulley, 138 Fed. 172, vessel is liable for tortious act of her master or member of crew on board in her service by which another vessel is injured, though committed without authority or knowledge of the owners; Stout v. State, 36 Okl. 762, 765, 45 L. R. A. (N. S.) 884, 893, 130 Pac. 560, 561, holding statute providing both imprisonment and penalty for its violation did not put one violating it twice in jeopardy; United States v. Brig Malek Adhel, 2 How. 234, 11 L. Ed. 249, decreeing forfeiture of vessel for piratical acts of master, although owners innocent, and vessel had originally sailed with lawful purpose; Jecker v. Montgomery, 18 How. 116, 15 L. Ed. 314, ruling similarly where vessel seized for trading with enemy under charter-party, although owner innocent; Dobbin's Distillery v.

United States, 96 U. S. 400, 24 L. Ed. 638, holding property leased for distillery liable to forfeiture for illegal acts of lessee, although owner ignorant of such acts; Friedenstein v. United States, 125 U. S. 231, 31 L. Ed. 740, 8 Sup. Ct. 842, and Origet v. United States, 125 U. S. 247, 31 L. Ed. 747, 8 Sup. Ct. 850, holding that in proceedings for forfeiture of property for violation of revenue laws judgment need not recite finding of jury that acts charged were done with intent to violate laws; The Three Friends, 166 U. S. 50, 41 L. Ed. 914, 17 Sup. Ct. 497 (affirming 78 Fed. 175), where forfeiture of vessel for violation of neutrality held not to be dependent upon conviction of persons charged with doing acts prohibited (and see dissenting opinion, p. 71, 41 L. Ed. 921, 17 Sup. Ct. 505); United States v. Coal, 6 Biss. 391, Fed. Cas. 16,515, holding proceeding in rem for violation of revenue law not to be criminal proceeding, and hence the revenue law is not a penal statute to be strictly construed; The Steamer Missouri, 3 Ben. 517, Fed. Cas. 9652, holding that in proceedings for forfeiture of vessel under statute providing penalty for entering goods without manifest, prior seizure need not be alleged; Virginia etc. Co. v. United States, Taney, 421, Fed. Cas. 16,973, holding forfeiture of vessel for violation of navigation laws not to be dependent upon proceedings against owners; The Ambrose Light, 25 Fed. 415, decreeing forfeiture of vessel sailing under rebel commission, although officers and crew discharged; United States v. Sills, 47 Fed. 497, 499, holding that conviction under revenue laws for illicit distilling, whereby person is fined and imprisoned, does not bar proceeding in rem for forfeiture of property; United States v. Olsen, 57 Fed. 584, holding forfeiture of vessel for landing of Chinese in violation of exclusion act, cannot be pleaded in bar to indictment against owner; The Meteor, 17 Fed. Cas. 182, holding that forfeiture of vessel seized for violation of neutrality is not dependent upon conviction of person accused of arming her; United States v. Hall, 26 Fed. Cas. 78, holding railroad property liable to forfeiture where company had notice that private persons were carrying letters over road in violation of postal laws; Our House v. State, 4 G. Greene, 176, holding that indictment against house as "dram-shop and nuisance," under code, need not aver that owner knew of illegal use of property; Williams v. Delano, 155 Mass. 14, 28 N. E. 1123, refusing to entertain action of conversion against officer seizing property while proceedings for forfeiture were pending; The John G. Stevens, 170 U. S. 121, 42 L. Ed. 973, 18 Sup. Ct. 547, arguendo.

Distinguished in Coffey v. United States, 116 U. S. 443, 29 L. Ed. 687, 6 Sup. Ct. 440, holding that where forfeiture of property has been decreed in action in rem under revenue laws, acquittal in criminal action is conclusive in favor of claimant in action to recover such property; United States v. Athens Armory, 2 Abb. (U. S.) 143, Fed. Cas. 14,473 (see 35 Ga. 357), holding that grant of "pardon and amnesty" to person, barred judgment of condemnation of property used for purpose of manufacturing arms for Confederate government; The Sidonian, 38 Fed. 441, 443, holding that until fine has been imposed on master under statute, for not providing certain equipment, a libel against vessel for such fine cannot be main-

tained; Norris v. Doniphan, 4 Met. (Ky.) 390, where statute in question comprehended forfeitures on account of offenses of owner of property without reference to use of property.

Judgment in criminal action as res judicata in civil action. Note, 11 L. R. A. (N. S.) 669.

Damages always rest in the sound discretion of the court, under all the circumstances.

Approved in The Barnstable, 181 U. S. 467, 45 L. Ed. 957, 21 Sup. Ct. 686, holding owner of vessel is not liable for damage caused by negligence of officers and crew who are appointed and paid by charterer; The Explorer, 20 Fed. 138, an action in marine tort for negligence resulting in injury of steamer; The Max Morris, 24 Fed. 863, a similar case; The Max Morris, 137 U. S. 13, 34 L. Ed. 589, 11 Sup. Ct. 32, arguendo.

Probable cause for seizure constitutes a bar to a subsequent claim for damages for illegal seizure.

Approved in United States v. Donaldson Shulz Co., 142 Fed. 301, judgment of acquittal in criminal prosecution for obstructing navigable stream bars suit in equity to compel removal of structure.

Distinguished in United States v. Reindeer, 27 Fed. Cas. 768, where seizure was made under municipal law providing that probable cause should constitute defense, but certificate of probable cause was refused.

Where testimony is admitted without objection in the lower court, it cannot be objected to on appeal.

Cited in Den v. Geiger, 9 N. J. L. 238, refusing to set aside verdict because hearsay evidence admitted at trial; dissenting opinion in Coles v. Kelsey, 2 Tex. 562, but application not apparent; dissenting opinion in Harrison v. Nixon, 9 Pet. 531, 535, 9 L. Ed. 219, 220, arguendo.

Criminal liability of master for servant's act. Note, 43 L. R. A. (N. S.) 24.

Miscellaneous. Cited in Illinois v. Illinois Cent. R. R. Co., 184 U. S. 91, 46 L. Ed. 446, 22 Sup. Ct. 305, holding every matter affirmed by Supreme Court on appeal from Circuit Court is conclusive, when case is reversed as to but one point; The Ben R., 134 Fed. 785, 67 C. C. A. 290, decreeing dismissal of libel in proceeding to enforce penalty for violation of Rev. Stats., § 4499; The Santo Domingo, 115 Fed. 447, holding in suit by United States for adjudication of prize of war, although monition has been in technical compliance with rules of government, a second publication will be ordered to bring notice to all parties entitled to be heard; The James Andrews, 2 Sprague, 123, Fed. Cas. 7189, but application doubtful; as also in United States v. Packages, 27 Fed. Cas. 286.

12 Wheat. 19–39, 6 L. Ed. 537, MARTIN v. MOTT.

Grant of discretionary power makes person sole judge of existence of facts.

Approved in The Japanese Immigrant Case, 189 U. S. 98, 47 L. Ed. 724, 23 Sup. Ct. 613, holding under provision of acts of October 19, 1888, c. 1210, March 3, 1891, c. 551, relating to immigrants, the executive officers of the United States are not invested with arbitrary power of deportation; Ex parte Chin Him, 227 Fed. 134, holding decision of Department of Labor that alien is unlawfully in this country was binding on court; Ex parte Orozco, 201 Fed. 110, holding discretion of President exercised in calling out army to prevent carrying on of military expedition against Mexico not controlled by courts; Chicago etc. R. Co. v. Board of Supervisors, 170 Fed. 670, holding findings of commissioners to classify lands in drainage district were conclusive; Looe Shee v. North, 170 Fed. 570, 95 C. C. A. 646, holding Congress had power to determine that alien woman practicing prostitution within three years after entry be deemed prostitute at time of entry; In re Moyer, 35 Colo. 165, 117 Am. St. Rep. 189, 12 L. R. A. (N. S.) 984, 85 Pac. 192, Ex parte McDonald, 49 Mont. 461, L. R. A. 1915B, 988, 143 Pac. 949, and Betty v. The State, 188 Ala. 216, all holding when military service is authorized by law on stated occasions at call of Governor, determination by Governor that occasion exists is conclusive; United States v. The Tropic Wind, 6 D. C. 356, Appx., holding President could proclaim blockade when in his judgment exigency therefor existed; Dauphin v. Key, McAr. & M. (D. C.) 227, upholding order of Postmaster-general denying use of mails to one determined by him to be operating fraudulent lottery; Belknap v. Township of Benton, 169 Mich. 64, 135 N. W. 103, holding determination of township supervisor that injured person was pauper requiring medical aid of township was conclusive; Coyle v. Smith, 28 Okl. 124, 113 Pac. 946, holding action of Governor in calling special session of legislature concurred in by legislature was conclusive; State v. Brown, 24 Okl. 445, 103 Pac. 767, holding legislature had discretion to determine what could be accomplished by general and by special legislation; Oklahoma City v. Shields, 22 Okl. 305, 100 Pac. 576, holding declaration in statute that emergency calling for statute exists was binding on courts; State v. Huston, 21 Okl. 801, 97 Pac. 990, holding Governor had power to determine that suit be brought in name of State; assenting opinion in Coyle v. Smith, 28 Okl. 219, 113 Pac. 983, to point that Congress alone has power to admit new states and determine form of government; Luther v. Borden, 7 How. 44, 77, 12 L. Ed. 600, 613, construing act empowering President to determine lawful government in a State, and denying right of courts to question his decision; Wilkes v. Dinsman, 7 How. 130, 131, 12 L. Ed. 636, 637, holding that naval officer inflicting punishment upon seaman is prima facie justified by showing case to be within his delegated power; Murray v. Hoboken etc. Co., 18 How. 280, 15 L. Ed. 376, citing principal case as instance where President exercised discretionary power; United States v. Speed, 8 Wall. 83, 19 L. Ed. 451, holding that where commission is vested with discretionary powers in making con-

tracts, validity of contracts so made does not depend upon degree of wisdom exercised; Mullan v. United States, 140 U. S. 245, 35 L. Ed. 491, 11 Sup. Ct. 790, holding, that where naval commander has power to convene court-martial, his act in doing so will be presumed to have been done within limits of his discretion; Nishimura Ekiu v. United States, 142 U. S. 660, 35 L. Ed. 1149, 12 Sup. Ct. 338, declaring decision of inspector of immigration within authority conferred by act of Congress, to be conclusive as to right of immigrant to land; Lem Moon Sing v. United States, 158 U. S. 544, 39 L. Ed. 1084, 15 Sup. Ct. 969, ruling similarly; Swaim v. United States, 165 U. S. 559, 560, 41 L. Ed. 825, 17 Sup. Ct. 450, 451, holding that where President is empowered to convene general court-martial, he is presumed to act in accordance with law, and its sentence cannot be attacked collaterally; Ex parte Field, 5 Blatchf. 77, 81 Fed. Cas. 4761, holding United States marshal liable to fine for not producing prisoner before military court, President having proclaimed martial law, and suspended writ of habeas corpus; Allen v. Blunt, 3 Story, 745, Fed. Cas. 216, holding decision of commissioner of patents conclusive as to facts and law arising under application for patent; Gould v. Hammond, McAll. 237, 239, Fed. Cas. 5638, affirming right of collector of port to determine conclusively when perishable goods are to be sold; United States v. Packages, 27 Fed. Cas. 288, 289, to point that where President has declared States to be in insurrection, courts are bound by his decision; and to the same effect are United States v. Cement, 27 Fed. Cas. 293, and United States v. Cotton, 27 Fed. Cas. 328; in United States v. Tropic Wind, 28 Fed. Cas. 221, affirming exclusive power of President to determine when blockade should be declared; In re Day, 27 Fed. 680, dismissing writ of habeas corpus to obtain release of person held by commissioner of immigration, pending inquiry as to right to land; Hamner v. Mason, 24 Ala. 485, holding that where existence of fact upon which jurisdiction depends is determinable by court, decision thereon is final; dissenting opinion in Ikelheimer v. Chapman, 32 Ala. 692, 694, 695, asserting plenary authority of administrator to sell property of estate; McTyer v. McDowell, 36 Ala. 46, ruling similarly as to acts of commissioner-general of land office in disposing of land; Brinster v. Compton, 68 Ala. 302, holding that where, under statute, probate judge had power to apprentice minor paupers, validity of act in doing so cannot be questioned in collateral proceeding; Echols v. Tate, 53 Ark. 16, 13 S. W. 254, holding President's act in expelling persons from territory not reviewable by courts; Franklin v. State Board of Examiners, 23 Cal. 176, under facts similar to those in principal case; People v. Pacheco, 27 Cal. 223, affirming exclusive power of legislature to determine when such state of war exists as will authorize it to create a debt to repel invasion; Porter v. Haight, 45 Cal. 639, holding that where prison directors are authorized to annul contracts made for convict labor, court cannot review their action in so doing; New York etc. R. R. Co.'s Appeal, 62 Conn. 540, 26 Atl. 126, construing statute giving railroad commissioners power to establish grades; Green v. Savannah, 9 Ga. 11, refus-

ing to review act of mayor in abating nuisance as authorized by city ordinance; Evansville etc. R. R. Co. v. Evansville, 15 Ind. 421, holding that where jurisdiction of inferior court depends upon existence of facts to be determined by court itself, its decision as to such facts is final; English v. Smock, 34 Ind. 134, is to the same effect; Perkins v. Rogers, 35 Ind. 156, 9 **Am. Rep.** 664, holding that date when peace formally declared by President, was to be taken in determining time during which statute of limitations suspended by Rebellion; Koehler v. Hill, 60 Iowa, 566, 14 N. W. 750, denying jurisdiction of courts to enjoin passage of act by legislature (and see dissenting opinion, p. 578, 14 N. W. 756, 627, 15 N. W. 621); dissenting opinion in Corbin v. Marsh, 2 Duv. 231, majority denying constitutionality of act of Congress emancipating wives and children of slaves volunteering as soldiers in Federal army; School District v. Aetna Ins. Co., 54 Me. 513, holding school district to be the exclusive and final judge as to necessity for sale of its schoolhouse; People ex rel. v. Wayne, 39 Mich. 20, denying power of court to review act of county clerk in approving bond, where such approval is discretionary under statute; State v. Town of Lime, 23 Minn. 526, where decision of town clerk that signers of request for bond election are freeholders, held to be conclusive; Reed v. Conway, 20 Mo. 47, 49, holding surveyor-general not liable to action for revoking commission of deputy and anulling surveying contract, where such power discretionary and exercised in good faith; dissenting opinion in People ex rel. v. Parker, 3 Neb. 432, arguing that where Governor has exercised discretion in calling extra session of legislature, members are bound to assemble and Governor cannot revoke call; Waldron v. Berry, 51 N. H. 142, holding conclusive, act of town surveyor in fixing grade of streets; Hart v. Albany, 9 Wend. 594, **24 Am. Dec. 183**, arguing in favor of right of private citizen to abate public nuisance; People v. Collins, 19 Wend. 61, refusing to review act of commissioners vested with discretionary powers in opening roads; dissenting opinion in Kneedler v. Lane, 45 Pa. St. 292, concurring with majority on point that United States conscript law was constitutional, but denying jurisdiction of court to consider question; In re Legislative Adjournment, 18 R. I. 834, **22 L. R. A.** 721, 27 Atl. 328, affirming power of Governor to judge as to facts calling for adjournment of legislature; Chapin v. Ferry, 3 Wash. 396, **15 L. R. A.** 120, 28 Pac. 758, construing statute empowering Governor to call out militia; Druecker v. Salomon, 21 Wis. 626, 628, **94 Am. Dec.** 574, 576, affirming constitutionality of act similar to that in principal case; Ex parte Vallandingham, 1 Wall. 254, **17 L. Ed.** 594, In re Meador, 1 Abb. 333, Fed. Cas. 9375, United States v. Kendall, 5 Cr. C. C. 276, Fed. Cas. 15,517, Schoettgen v. Wilson, 48 Mo. 257, People ex rel. v. Campbell, 40 N. Y. 136, arguendo.

Distinguished in In re Tom Yum, 64 Fed. 487, asserting jurisdiction of court to issue writ of habeas corpus to determine citizenship of Chinese refused permission to land by immigration commissioner; State ex rel. v. Clark, 61 Mo. 269, holding offer of reward by Governor for arrest of

fugitive accused of murder, not to be conclusive proof of fact that person arrested was a fugitive at time of arrest.

Whether State militia is subject to United States articles of war. Note, 40 L. R. A. (N. S.) 354.

Calling out militia. Note, 15 L. R. A. 116, 117.

Where superior officer is vested with discretionary powers, subordinates are not liable for acts done under orders in execution of such powers.

Cited in McCall v. McDowell, 1 Abb. 219, Deady, 245, Fed. Cas. 8673, holding subordinate officer not liable to action for false imprisonment, where arrest made by command of superior officer.

Limited in United States v. Doherty, 27 Fed. 732, holding officer liable for abuse of power in acting from malicious motive.

Requisition by President is an order, and it is not necessary in pleading to set out order; sufficient to aver that it was made.

Cited in Wilder v. McCormick, 2 Blatchf. 34, Fed. Cas. 17,650, holding that in declaration on patent, averment that patent and specification are "in the language of the import and to the effect following," is sufficient; Grant v. State, 62 Ala. 236, holding that order of presiding judge convening special term need not recite that such term was necessary, such order being, in itself, an affirmation of the necessity; Bruen v. Ogden, 11 N. J. L. 376, 383, 20 Am. Dec. 597, 604, where, in action of replevin brought by defendant in execution, it was held sufficient for officer to show judgment and execution; Stuyvesant v. New York, 7 Cow. 608, holding that where corporation is authorized to pass by-laws, wherever it was deemed necessary and proper, a by-law need not recite that it was necessary; Cronin v. People, 82 N. Y. 323, 37 Am. Rep. 568, holding that where city council is empowered by charter to prohibit certain acts when deemed necessary, prohibitory ordinance need not allege reasons for its enactment.

Disobedience to an order of the President calling forth the militia renders a citizen liable to trial by court-martial.

Cited in In re Spangler, 11 Mich. 321, 323, denying jurisdiction to State court to issue habeas corpus for release of person drafted for military duty under call of President, although such person not actually mustered in; dissenting opinion in McCafferty v. Guyer, 59 Pa. St. 123, arguing in favor of constitutionality of State law disfranchising deserters; Tyler v. Pomeroy, 8 Allen, 493, holding, however, that mere signing a paper in hands of municipal officer promising to serve a certain time after mustered into service, did not constitute a person a soldier, and liable to court-martial for refusal to serve; Howes v. Middleborough, 108 Mass. 127, holding that militia does not become part of national forces until mustered in.

Court-martial proceedings are to be conducted according to general usage of military service, or customary military law.

Approved in Kirkman v. McClaughry, 160 Fed. 438, 90 C. C. A. 86, following rule; Smith v. Whitney, 116 U. S. 179, 29 L. Ed. 605, 6 Sup. Ct. 576, holding that writ of prohibition does not lie from Supreme Court to court-martial to review its decision of questions within its jurisdicton; Ex parte Henderson, 11 Fed. Cas. 1072, construing act of Congress providing for organization of courts-martial to try contractors guilty of fraud.

Suspension of writ of habeas corpus. Note, 45 L. R. A. 833.

Miscellaneous. Cited in In re Wilson, 18 Fed. 36, but application doubtful; Kelley v. State, 25 Ark. 398, to point that judicial must follow decision of political department as to political status of State; Bright v. Cemetery Assn., 33 La. Ann. 61, arguendo.

12 Wheat. 40–63, 6 L. Ed. 544, CLARK v. CITY OF WASHINGTON.

Where municipal city is granted a power which by clear intendment is to be exercised by it exclusively, power cannot be delegated.

Approved in United States v. Ross, 5 App. D. C. 253, holding commissioners of district could not delegate to plumbing examiners power to pass finally on application for plumbing licenses; East Hartford v. Bridge Co., 10 How. 535, 13 L. Ed. 528, holding that where city has been empowered to construct bridge, it cannot assign right to private corporation so as to defeat right of legislature to revoke such power; Commonwealth v. Smith, 141 Mass. 140, 6 N. E. 91, denying right of inspector of milk to appoint agent, with right, in absence of inspector, to take by force and against will of owner, samples of milk for analysis; Maxwell v. Bridge Co., 41 Mich. 465, 2 N. W. 644, holding that where county supervisors are authorized to select site for bridge, authority cannot be delegated to other persons; Pierce v. Emery, 32 N. H. 508, holding that railroad corporation cannot mortgage its franchise to the impairment of its duty to the public, unless specially authorized by charter; State v. Hayes, 61 N. H. 324, denying power of legislature to submit to people question as to whether certain law shall be adopted, legislature having no right to delegate legislative power; Lufkin v. Galveston, 56 Tex. 533, denying power of city council to delegate to inferior officer its duty in regulating public works; Kyle v. Malin, 8 Ind. 37, arguendo.

Distinguished in Decorah v. Dunstan, 38 Iowa, 99, holding that where city was empowered to regulate and license auction sales an ordinance delegating such power to mayor was valid.

What municipal corporations are answerable for injuries due to defects in streets and other public places. Note, 108 Am. St. Rep. 165.

Delegation of powers by municipal corporation. Note, 29 Am. Rep. 108.

Delegation of municipal power as to license, franchise and buildings. Note, 20 L. R. A. 727.

Municipalities may legislate within prescribed limits, and are liable for all acts of agents within scope of authority.

Approved in Mayor etc. v. Town of Harrison, 71 N. J. L. 71, 58 Atl. 101, holding city bound by water contract made by authorized agent; Oklahoma City v. Hill Bros., 6 Okl. 139, 50 Pac. 250, determining damages for which city liable for trespass by its officers; Commercial Electric L. & P. Co. v. Tacoma, 20 Wash. 291, **72 Am. St. Rep. 105**, 55 Pac. 220, holding where during the carriage of stock the carrier's employees strike, an agent of the carrier may enter into another contract with shipper; Boone County v. Railroad Co., 139 U. S. 693, **35 L. Ed. 323**, 11 Sup. Ct. 690, holding that statute of limitations will run against county whose officers have been negligent in enforcing rights of county; Memphis v. Brown, 1 Flipp. 198, Fed. Cas. 9415, holding persons acting for city with knowledge of officials may recover for services; Coburn v. San Mateo County, 75 Fed. 540, holding that ratification by board of supervisors of act of trespass committed by one of its members renders county liable in tort; Gas Co. v. San Francisco, 9 Cal. 472, holding city liable on contract to furnish gas executed by its officers; Thorn v. Park Commissioners, 130 Ill. 607, 22 N. E. 523, holding that where commissioners seek confirmation of assessment made, burden of proof is on them to show authority to make assessment; McGraw v. Marion, 98 Ky. 683, 34 S. W. 21, holding city liable to action for false imprisonment arising from enforcement, by its police judge, of an unconstitutional ordinance; County Commrs. v. Duckett, 20 Md. 481, **83 Am. Dec. 563**, where county held liable to action for negligence of commissioners in allowing county road to remain out of repair; Thayer v. Boston, 19 Pick. 516, **31 Am. Dec. 161**, holding city liable for acts of officers in obstructing highway; Sheldon v. Kalamazoo, 24 Mich. 387, where city held liable for trespass committed by officers in condemning land for street; Leggett v. New Jersey etc. Co., 1 N. J. Eq. 553, **23 Am. Dec. 734**, holding private corporation bound by act of officers in executing mortgage; Bailey v. New York, 3 Hill, 540, **38 Am. Dec. 672**, where city held liable for injuries resulting from negligence of employees in constructing dam (affirmed on appeal, 2 Denio, 447, 448); De Voss v. Richmond, 18 Gratt. 346, **98 Am. Dec. 651**, holding that where city has authorized issue of bonds and prescribed form, it will be liable to bona fide holder of such bonds, although city officers failed to execute them properly; Bacon v. Robertson, 18 How. 485, **15 L. Ed. 502**, Ohio etc. Trust Co. v. Merchants' etc. Trust Co., 11 Humph. 30, **53 Am. Dec. 765**, dissenting opinions in United States v. Robertson, 5 Pet. 665, **8 L. Ed. 266**, People v. Hoge, 55 Cal. 623, Lucas v. Commissioners, 44 Ind. 572, arguendo.

Distinguished in Anthony v. Adams, 1 Met. 285, holding city not to be liable in tort for unauthorized act of officers in building embankment and flooding adjacent land; Eastman v. Meredith, 36 N. H. 293, **72 Am. Dec. 307**, denying liability of city where injury in question resulted from mere failure of city to provide safe place for public meeting; Maxmilian v. New

York, 62 N. Y. 164, 20 Am. Rep. 469, denying liability of city for acts done by officer whom it was required by statute to appoint and in whose duties it had no interest.

Clause in charter, empowering city to "authorize the drawing of lotteries," makes city liable to pay prize drawn.

Distinguished in Shankland v. Washington, 5 Pet. 391, 8 L. Ed. 166 (affirming 3 Cr. C. C. 328, Fed. Cas. 12,703), case involving the same lottery, holding, however, that where owner of ticket sold half interest before drawing without notice to city, city was not liable for prize, it having authorized no half tickets.

12 Wheat. 64–116, 6 L. Ed. 552, UNITED STATES BANK v. DANDRIDGE.

Corporations created by statute depend, both for their powers and the mode of their exercise, upon the acts creating them.

Approved in dissenting opinion in Marshall etc. Co. v. City of Nashville, 109 Tenn. 515, 71 S. W. 820, majority holding where city charter required goods furnished to be supplied by lowest bidder, an ordinance was invalid which required city printing to bear union label; Bank v. Earle, 13 Pet. 587, 10 L. Ed. 307, holding that bank authorized to deal in exchange, may purchase bills through agent in another State; Perrine v. Canal Co., 9 How. 184, 13 L. Ed. 97, denying power of canal company to exact tolls from passengers in absence of express authorization in charter; Market Bank v. Smith, 16 Fed. Cas. 758, decreeing repayment of interest collected above amount limited in bank charter; Jemison v. Bank, 17 Ala. 760, denying right of bank to sue after forfeiture of charter in absence of express authorization; City of Selma v. Mullen, 46 Ala. 414, holding valid a parol contract made by municipal officers within the scope of their powers, parol contracts not having been prohibited by charter; dissenting opinion in Southern Life Ins. etc. Co. v. Lanier, 5 Fla. 171, majority holding that provision in bank charter authorizing bank to sell surrendered stock for cash and invest proceeds in mortgages was merely directory and bank could receive bond and mortgage of an individual for stock issued to him directly; Breaux v. Iberville, 23 La. Ann. 236, denying power of city officers to issue bonds not provided for by charter, and holding city not liable to suit on bonds so issued; Weckler v. Bank, 42 Md. 590, 20 Am. Rep. 100, denying power of bank to engage in business of selling railroad bonds on commission, in absence of express authorization; Sanborn v. Insurance Co., 16 Gray, 454, 77 Am. Dec. 421, holding that grant of power to make contracts of insurance implies power to make parol contracts; Matthews v. Skinker, 62 Mo. 332, 21 Am. Rep. 427, denying power of national bank to take deed of trust to land as security for contemporaneous loan; Mt. V. Bk. v. Porter, 52 Mo. App. 250, holding that power granted bank in charter to negotiate and discount negotiable and non-negotiable paper, implied power to negotiate bonds; Moss v. Averell, 10 N. Y. 454, holding that corporation having power to purchase property could give promissory notes on such purchase; McDonald v. New York, 68 N. Y. 27, 28, 23 Am. Rep. 147, 148, where city

held not to be bound by act of officers in contracting for materials, where such act prohibited by charter; Crocker v. Whitney, 71 N. Y. 166, and Fowler v. Scully, 72 Pa. St. 461, **13 Am. Rep. 701**, denying power of bank to take mortgage as security for future indebtedness, charter having only empowered it to so secure past debts; State v. Wilmington R. R. Co., Busb. 236, holding that indictment charging railroad company as owner of public ferry for not keeping it in repair, must show such duty to be imposed by charter; Madison etc. Co. v. Watertown etc. Co., 7 Wis. 80, holding that grant of power to construct plank road does not include power to loan money; Planters' Bank v. Sharp, 6 How. 322, 337, **12 L. Ed. 456, 462**, Hartford etc. R. R. Co. v. Kennedy, 12 Conn. 508, Safford v. Wyckoff, 4 Hill, 448, arguendo.

Distinguished in Barnes v. Ontario Bank, 19 N. Y. 163, holding that where bank is vested with general power its abuse cannot prejudice innocent third persons.

Common-law rule that corporations aggregate can do nothing but by deed under seal, is inapplicable to acts at corporate meetings.

Approved in Waters-Pierce Oil Co. v. Texas, 177 U. S. 44, **44 L. Ed. 664**, 20 Sup. Ct. 524, holding forfeiture of permission of foreign corporation to do business in Texas for violation of act of 1899 does not violate obligation of contract; International Seal Co. v. Beyer, 33 App. D. C. 177, holding seal need not be attached to answer under oath of officers of corporation; Savings Bank v. Davis, 8 Conn. 202, and Board of Education v. Greenebaum, 39 Ill. 612, holding that appointment of agent may be evidenced by record of proceedings alone; Garrison v. Combs, 7 J. J. Marsh. 85, **22 Am. Dec. 121**, holding seal unnecessary to pass corporation's interest in promissory note; Lee v. Trustees, 7 Dana, 29, holding town trustees bound by act of agent in offering reward, although authority of agent not recognized by instrument under seal; Maine Stage Co. v. Longley, 14 Me. 449, holding parol evidence admissible to show authority of baggage agent, in action against company for baggage lost; Turnpike Co. v. McCarson, 1 Dev. & B. 312, affirming appointment of manager, evidenced only by corporation records; Butts v. Cuthbertson, 6 Ga. 171, arguendo.

It is not necessary to the validity of corporate acts that they be reduced to writing, unless so provided by statute.

Approved in Flakne v. Minnesota etc. Ins. Co., 105 Minn. 481, 117 N. W. 786, following rule; Denver etc. R. Co. v. Arizona etc. R. Co., 233 U. S. 603, **58 L. Ed. 1115**, 34 Sup. Ct. 691, holding where no record of action of corporate directors was made secondary evidence thereof was admissible; Riverside Tp. v. Stewart, 211 Fed. 876, 128 C. C. A. 251, holding rights of third person dealing with municipality not affected by failure to record corporate action; Board of Commrs. v. Tollman, 145 Fed. 771, in action on county bonds, parol evidence is admissible to establish facts concerning their execution; Rondot v. Rogers Tp., 99 Fed. 210, holding failure of clerk of municipal corporation to make record of proceedings relating to bond

issue cannot defeat bond issue; City of Denver v. Spencer, 34 Colo. 274, 2 L. R. A. (N. S.) 147, 82 Pac. 591, where city charter silent as to manner in which park commissioners should act, parol evidence admissible to show board authorized erection of stand, where secretary failed to make record; Alton Mfg. Co. v. Garrett Biblical Institute, 243 Ill. 308, 90 N. E. 708, holding authority conferred on agent to borrow money not void because not entered on minutes; State v. Farrier, 114 La. 586, 38 South. 462, witness present at meeting held for election of officers of association may testify as to who were elected; Beach v. Stouffer, 84 Mo. App. 398, holding action of board of directors fixing salary of officer may be proved by parol when there was no writing; Rhode Island Hospital Trust Co. v. Thorndike, 24 R. I. 120, 52 Atl. 878, holding marriage may be proved without producing registry of marriages; Arizona etc. R. Co. v. Denver etc. R. Co., 16 N. M. 293, 117 Pac. 733, arguendo; United States v. Fillebrown, 7 Pet. 47, 8 L. Ed. 603, holding that where commissioner of navy hospital was not required to record proceedings, parol evidence was admissible to show employment of secretary; Bridgford v. Tuscumbia, 4 Woods, 613, 16 Fed. 913, holding that rights of creditors of city cannot be impaired because of neglect of city council to record proceedings; Allis v. Jones, 45 Fed. 149, where parol evidence held admissible to show action of directors in authorizing execution of mortgage; Carey v. Philadelphia etc. Co., 33 Cal. 696, holding parol employment of agent by corporation valid in absence of express requirement that such act shall be done by deed or resolution; Gordon v. San Diego, 108 Cal. 269, 41 Pac. 302, holding parol evidence of proceedings of council ordering sale of pueblo lands, admissible to prove facts omitted from record; Richardson v. St. Joseph etc. Co., 5 Blackf. 148, 33 Am. Dec. 462, holding parol evidence admissible to show appointment of agent by corporation; Tubbs v. Ogden, 46 Iowa, 137, where it was held that adjudication of "fence-viewers" as to sufficiency of partition fence need not be in writing in absence of statute to that effect; Zalesky v. Insurance Co., 102 Iowa, 515, 70 N. W. 188, holding parol evidence admissible to show action taken by insurance company in regard to loss, and of its decision to rebuild; Troy v. Railroad Co., 11 Kan. 530, ruling similarly where records of city council failed to show a resolution calling bond election; Holland v. Duluth etc. Co., 65 Minn. 334, 60 Am. St. Rep. 486, 68 N. W. 53, holding parol evidence admissible to show persons to be stockholders in corporation, records having been destroyed by fire; Gilbert v. Boyd, 25 Mo. 29, ruling similarly as to act of corporation appointing trustees; Kane v. School District, 48 Mo. App. 414, and State ex rel. v. Lockett, 54 Mo. App. 208, holding that proceedings of school directors can be shown only by record where statute directs that record shall be kept; Taylor v. Griswold, 14 N. J. L. 241, 27 Am. Dec. 49, refusing to declare by-laws inoperative because not in writing; Bohan v. Avoca, 154 Pa. St. 410, 26 Atl. 606, holding parol evidence admissible to prove order of city council providing for street improvements; Pickett v. Abney, 84 Tex. 647, 19 S. W. 859, holding parol evidence admissible to prove election of person as officer

of private corporation; Hutchinson v. Pratt, 11 Vt. 421, holding parol evidence admissible to prove proceeding of council in voting tax; Kelly v. Board of Public Works, 75 Va. 271, to prove agreement by board to reimburse agent for advances made in carrying on work; Mandel v. Swan Land Co., 154 Ill. 189, 45 Am. St. Rep. 132, 27 L. R. A. 321, 40 N. E. 466, O'Mally v. McGinn, 53 Wis. 358, 10 N. W. 517, arguendo.

Criticised in Savings Bank v. Davis, 8 Conn. 204, denying that vote of corporation may be taken by parol (and see dissenting opinion, p. 210).

Distinguished in Parker v. Doe, 20 Ala. 259, holding tax sale void where proceedings of city council sanctioning assessment not recorded as required by statute; Courtnay v. Insurance Co., 12 La. 239, holding parol evidence inadmissible to show contract of insurance made by insurance company in its corporate capacity.

Law presumes that person acting publicly as officer of corporation is rightfully in office and that he does his duty, until contrary proven.

Approved in La Clair v. United States, 184 Fed. 134, holding land patent carried presumption of verity, and could be set aside only on clear and convincing proof; United States v. Mitchell, 136 Fed. 906, where United States district attorney was appointed by court having authority to make valid appointment, he is de facto officer and it is no objection to indictment that he was not permanent resident of district; United States v. Greene, 113 Fed. 693, holding plea to indictment averring that clerk did not place names of grand jurors in box, but were placed there by jury commissioner and deputy clerk, not in clerk's presence, or that impartial jury was not selected, is not sufficient; Commercial Wharf Corp. v. Boston, 194 Mass. 467, 80 N. E. 646, holding power of officers of city to pay rent for boat landing was presumed; Beacon Trust Co. v. Souther, 183 Mass. 416, 67 N. E. 346, holding where money was borrowed by member of a firm, and indorsed in name of a corporation by payee, who was president, and money was used by the corporation and directors thereof who knew of transaction afterward ratified all prior notes, the indorsement was ratified; Graefe v. St. Louis Transit Co., 224 Mo. 258, 123 S. W. 843, and Chlanda v. St. Louis Transit Co., 213 Mo. 261, 112 S. W. 253, both holding municipal assent presumed to have been given to lease of street railway by one company to another; St. Louis Police etc. Assn. v. Tierney, 116 Mo. App. 462, 91 S. W. 972, 973, construing constitutional provisions of mutual benefit society as to designation of third day for calling by applicant to designate beneficiary as merely directory; State v. Ely, 23 N. D. 626, 137 N. W. 838, holding election presumed held in accordance with law; Pine Tree Lumber Co. v. Fargo, 12 N. D. 376, 96 N. W. 363, applying rule to acts of city officers; Board of Education v. Boyer, 5 Okl. 231, 233, 47 Pac. 1092, 1093, where petition recited that signers, electors of adjacent territory, presented to city board of education, and board orders territory annexed to city for school purposes, and entry made on journal, presumption arises that petition signed by majority; Houseman v. International Navigation Co., 214

Pa. 563, 64 Atl. 383, under act of 1806, relating to patent for island, plaintiff in ejectment need not show, by evidence other than warrant, survey and patent, that island was natural and capable of cultivation; State v. Woolfenden, 26 Utah, 173, 72 Pac. 692, holding where at county election but one candidate was nominated for two offices and his name appeared on ballot for such offices, and ballots were voted and canvassed without objection, presumed that offices were consolidated; Grand Rapids Furniture Co. v. Grand Hotel etc. Co., 11 Wyo. 149, 72 Pac. 687, on mere proof that three persons were only stockholders of corporation, no presumption arose that they were trustees thereof; Randolph County v. Hutchins, 46 Ala. 401, refusing to set aside default judgment founded upon process, return of which did not show upon whom service was made; Stewart v. Houston, 25 Ark. 315, refusing to set aside execution sale where sheriff's return failed to set forth manner of advertising; Chrisman v. Jones, 31 Ark. 610, holding recitals in patent to swamp-land, executed by Governor, to be prima facie evidence of facts recited; State v. Gleason, 12 Fla. 233, asserting the general rule that right to hold office will not be inquired into collaterally; Doe v. Peeples, 1 Ga. 5, holding that the acknowledgment of a deed was made where and when it purports to be, in absence of proof to contrary; Justices v. Woods, 1 Ga. 88, holding that in suit against discharged surety on guardian's bond, plaintiff must prove affirmatively some default or misfeasance on part of guardian prior to discharge; Clements v. Henderson, 4 Ga. 155, 48 **Am. Dec. 219**, holding recitals in administrator's deed to be prima facie evidence of facts recited; Nicholson v. Spencer, 11 Ga. 611, holding guardian to be judge as to what is necessary for ward, and in suit by tradesman, to recover for articles furnished ward, burden is on plaintiff to show that they were in fact necessaries; State v. Nield, 4 Kan. App. 634, 635, 45 Pac. 625, holding that authority of attorney general to appoint assistant to prosecute violations of prohibitory liquor law, cannot be questioned in action brought by such assistant under the law; Kane v. State, 70 Md. 551, 17 Atl. 558, refusing to set aside judgment because of failure of justice to set forth that arrest of party accused was warranted; Commonwealth v. Kane, 108 Mass. 425, 11 **Am. Rep. 374**, holding, on trial of indictment for assaulting police officer, evidence that he was acting as such at the time of assault was sufficient to sustain indictment; Commonwealth v. Carr, 143 Mass. 88, 9 N. E. 30, where action of town council in laying out road, held to warrant inference that required notice had been given; State v. Holcomb, 86 Mo. 377, holding that where person acting as policeman makes arrest it is unnecessary, in order to hold prisoner, to show regular appointment of officer; Mercer v. Harris, 4 Neb. 83, where certificate of approval by supervising architect held to be conclusive as to right of contractor to payment for work done; Seward v. Didier, 16 Neb. 61, 20 N. W. 13, holding that sale of ward's property by guardian carried presumption that statutory requirements had been observed; State v. Graham, 21 Neb. 355, 32 N. W. 153, holding that resale of school lands for default in payments carried presumption that required

notice had been given; Bissell v. Fletcher, 27 Neb. 585, 43 N. W. 351, where survey and sale of public land held to be presumptive evidence of right of United States to sell land; Hughes v. Parker, 19 N. H. 188, holding acts of directors irregularly elected, valid and binding until right to hold office determined in direct proceeding; Cross v. Brown, 41 N. H. 289, holding attaching officer not liable for death of animals attached and in his keeping in absence of positive proof of negligence; Mandeville v. Reynolds, 68 N. Y. 534, holding that where it is duty of county clerk to keep judgment-roll on deposit in his office, fact that it cannot be found there raises presumption that it has been destroyed; Demings v. Knights of Pythias, 131 N. Y. 527, 30 N. E. 573, holding that report of proper officer that assessment was necessary was conclusive, and not to be questioned by person suspended for nonpayment of assessment; Swarthout v. Ranier, 143 N. Y. 504, 38 N. E. 727, holding that where under will widow was empowered to mortgage estate whenever necessary for her support, her act in doing so was prima facie evidence of necessity; Gregg v. Mallett, 111 N. C. 76, 15 S. E. 937, holding that commissioner appointed to take depositions was to be presumed as properly qualified until contrary shown; Ward v. Barrows, 2 Ohio St. 247, refusing to set aside tax sale, because it did not appear affirmatively in auditor's record that delinquent list had been sworn to by collector; Coombs v. Lane, 4 Ohio St. 148, holding entry in records of land office that certain lands are "school lands," to be prima facie evidence that they were duly selected as such; Davis v. Davis, 11 Ohio St. 389, holding that entry of election by widow to take under will of deceased husband need not show affirmatively that judge had explained to her provisions of will; Reynolds v. Schweinfus, 27 Ohio St. 319, holding that where city council has acted upon recommendation of board of city improvements it will be presumed that such recommendation was properly made; Commonwealth ex rel. v. Claghorn, 13 Pa. St. 139, 53 Am. Dec. 453, holding formal acceptance of corporate charter carries presumption that it was made at regularly convened meeting after due notice given; Goldberg v. Kidd, 5 S. D. 175, 58 N. W. 575, where deed executed by county judge under statute, and regular on its face, held to be prima facie evidence of authority to convey; Olcott v. Gabert, 86 Tex. 126, 23 S. W. 987, applying principle to act of private officer, holding deed by bishop to be presumptive evidence of his authority to convey; Harris v. Chipman, 9 Utah, 104, 33 Pac. 242, holding letters of administration not attackable collaterally on ground that bond had not been approved; Willard v. Pike, 59 Vt. 207, 9 Atl. 910, holding certificate of president of board of equalization prima facie evidence of facts recited therein; Morse v. Bruce, 70 Vt. 380, 40 Atl. 1034, holding fact that administrator's inventory does not show debt alleged is presumptive evidence that it has been paid; Budd v. Walla Walla etc. Co., 2 Wash. Ter. 353, 7 Pac. 898, holding that fact that special meeting of corporation was held carries presumption that requisite notice was given; Sibley v. Maria, 2 Fla. 564, Tecumseh Town Site Case, 3 Neb. 284, State v. Holmes, 12 Wash. 174, 40 Pac. 737, Langworthy v. Garding, 77 N. W. 208, arguendo.

regularly made; Clements v. Macheboeuf, 92 U. S. 425, **23 L. Ed. 507**, holding that where party alleges that deed executed by attorney under power to convey is invalid for matters not apparent on its face, burden of proving them is on such party; Keely v. Sanders, 99 U. S. 447, **25 L. Ed. 329**, holding deed given by commissioners of land office to be prima facie evidence of regularity of sale; Railway Cos. v. Bridge Co., 131 U. S. 381, 382, **33 L. Ed. 160, 161**, 9 Sup. Ct. 773, 774, affirming validity of contract executed by president of corporation in its behalf and within corporate powers, such contract being known to directors and not disapproved; so also in Mammoth etc. Co. v. Salt Lake etc. Co., 151 U. S. 450, **38 L. Ed. 230**, 14 Sup. Ct. 385, where contract for materials to be furnished corporation was executed by agents and not disaffirmed by corporation; Jacksonville etc. Ry. Co. v. Hooper, 160 U. S. 522, **40 L. Ed. 522**, 16 Sup. Ct. 382, holding power of president to execute lease was inferable from fact that corporation entered into possession under lease; Memphis v. Brown, 1 Flipp. 197, Fed. Cas. 9415, allowing recovery for services performed for city with knowledge; Oregon Ry. Co. v. Oregon Ry. & Nav. Co., 12 Sawy. 114, 28 Fed. 508, holding, where act of president in executing lease was not disaffirmed by directors of corporation, burden of proof to show want of authority was on person disputing it; Casey v. La Société, 2 Woods, 86, Fed. Cas. 2496, holding corporation estopped from denying authority of officers to contract loan, benefit of which is received; Union Pacific Ry. Co. v. Chicago etc. Ry. Co., 51 Fed. 327, 10 U. S. App. 98, applying rule where contract for joint use of tracks executed by president of company was not disaffirmed by directors; National etc. Co. v. American etc. Co., 55 Fed. 490, holding assignment of patent in name of corporation signed by "A B, Treasurer," and duly recorded, to be prima facie valid; City of Lincoln v. Sun etc. Co., 59 Fed. 760, 19 U. S. App. 431, holding contract for lighting made by proper city officers and not beyond scope of city powers to be prima facie valid; Leroy etc. Ry. Co. v. Sidell, 66 Fed. 31, where company held bound on contract for construction executed by president and not disapproved by directors; Barber etc. Co. v. Denver, 72 Fed. 341, 36 U. S. App. 499, ruling similarly as to contract for paving, executed by proper city officers; Butler v. Cockrill, 73 Fed. 950, 36 U. S. App. 702, holding that deed regularly executed by trustees of national bank carried presumption that it was executed by order of directors; Louisville Trust Co. v. Railway Co., 75 Fed. 460, holding that bank whose president had learned that stockholders of guaranteeing corporation had repudiated a contract of guaranty, was charged with notice thereof; American etc. Bank v. First National Bank, 82 Fed. 972, 48 U. S. App. 652, holding corporation liable upon contract made by unauthorized agent, where corporation, with knowledge of facts, received benefit; Bates v. Bank, 2 Ala. 462, 463, where loan contracted by agent of bank was not repudiated by directors; Alabama etc. R. R. Co. v. Kidd, 29 Ala. 225, holding that appointment of agent by corporation may be inferred from adoption by corporation of agent's acts; Thorington v. Gould, 59 Ala. 467, holding that where official seal of corporation is affixed to deed by proper officers, it

will be presumed that deed was executed by authority of corporation; Arlington v. Railroad Co., 45 Ala. 437, 11 South. 8, holding that ratification of officer's act in executing contract need not be alleged in action upon contract; Pennington v. Yell, 11 Ark. 228, 52 Am. Dec. 267, applying principle in holding attorney's actions in behalf of client to be prima facie authorized; Gas Co. v. San Francisco, 9 Cal. 473, holding city liable upon gas contract executed by its officers; Argenti v. San Francisco, 16 Cal. 270, collecting authorities and holding city liable upon contracts for opening streets, executed by city council; Pixley v. Railroad Co., 33 Cal. 191, 192, 91 Am. Dec. 628, 629, sustaining act of president employing attorney, such act having been done with knowledge of directors of corporation; Miners' Ditch Co. v. Zellerbach, 37 Cal. 588, 99 Am. Dec. 315, holding deed executed by trustees of corporation, with corporate seal affixed, admissible in evidence as deed of corporation; Crowley v. Genesee Mining Co., 55 Cal. 277, holding it unnecessary to show vote of corporation giving agent authority to execute contract from which corporation received benefit; Western Union Tel. Co. v. Eyser, 2 Colo. 168, charging jury to effect that evidence that poles were put up by direction of person acting as superintendent of company, and were afterward used by company, would support finding that work was done by company; West School District v. Merrills, 12 Conn. 440, where act of school district in voting for laying of a tax was held to be presumptive evidence of existence of legal object; Merchants' Bank v. Central Bank, 1 Ga. 431, 44 Am. Dec. 669, holding corporation to be estopped from denying authority of agent to execute contract from which it derived benefit; McDougald v. Bellamy, 18 Ga. 432, holding banking corporation bound by stipulation of its directors for redemption of bills; Chicago etc. Ry. Co. v. Koleman, 18 Ill. 299, 68 Am. Dec. 546, holding admissions of president, made in execution of his ordinary duties, to be evidence against corporation in assumpsit; Foss v. Chicago, 34 Ill. 490, where fact that deposits were made in certain bank from time to time, held to raise presumption that city council approved such bank as place of deposit; Dubuque etc. College v. Dubuque, 13 Iowa, 561, where contract executed by agent inured to benefit of corporation and was not disaffirmed; City of Davenport v. Insurance Co., 17 Iowa, 283, holding insurance company bound under policy issued by agent, although when loss occurred company had received no notice of insurance issued; Blackshire v. Iowa Homestead Co., 39 Iowa, 628, holding deed signed by officers and sealed with corporate seal admissible in evidence as deed of corporation; Warren v. Insurance Co., 16 Me. 450, 33 Am. Dec. 679, where authority of agent to waive provisions in policy of insurance held to be presumable from fact that similar acts had been previously sanctioned; Elysville etc. Co. v. Okisko, 5 Md. 159, holding that authority of agent of corporation to hold stock in another corporation may be presumed from circumstances; Santa Clara etc. Co. v. Meredith, 49 Md. 400, 33 Am. Rep. 265, affirming act of president of corporation in contracting loan; Melledge v. Boston Iron Co., 5 Cush. 175, 51 Am. Dec. 67, enforcing note executed by general agents of corporation; Detroit v. Jackson, 1 Doug.

(Mich.) 113, holding corporation bound by act of officer in executing agreement to submit dispute to arbitration; Taymouth v. Koehler, 35 Mich. 26, holding township liable on contract for construction of bridge executed by township officers; Hirschmann v. Railroad Co., 97 Mich. 396, 56 N. W. 846, holding corporation liable for supplies furnished upon order of regularly appointed agent; Robins v. Embry, 1 Smedes & M. Ch. 270, where stockholders of corporation held bound by act of directors in making assignment of which they had knowledge; Edwards v. Thomas, 66 Mo. 483, holding valid an indorsement made by cashier, upon proof that corporation had recognized previous similar acts; Despatch Line etc. v. Bellamy etc. Co., 12 N. H. 237, **37 Am. Dec. 218**, sustaining mortgage executed by officer and acquiesced in by directors of corporation; Flint v. Clinton Co., 12 N. H. 434, upholding assignment executed by treasurer of corporation; Hilliard v. Goold, 34 N. H. 239, **66 Am. Dec. 767**, holding that act of president in posting rates of fare, implied authority from corporation and conductor was not liable for ejecting person refusing to pay such fare; Goodwin v. Union Screw Co., 34 N. H. 380, holding company liable upon contract for work and labor entered into by general managers; Nicholas v. Oliver, 36 N. H. 224, holding authority of assistant secretary to indorse paper to be inferable from ratification of prior similar acts by directors; Petersborough etc. R. R. Co. v. Nashua etc. R. R. Co., 59 N. H. 389, holding corporation estopped from denying validity of lease executed by officers, where corporation accepted benefits arising under lease; Leggett v. New Jersey etc. Co., 1 N. J. Eq. 553, 558, **23 Am. Dec. 734, 738**, holding, however, mortgage executed by president and secretary of bank under corporate seal to be only prima facie valid and showing that it was executed without concurrence of directors, renders it void; Wood v. Auburn etc. R. R. Co., 8 N. Y. 167, where agreement by president of corporation to submit dispute to arbitration held binding upon corporation where acquiescence in similar acts shown; Curtis v. Leavitt, 15 N. Y. 194, where act of officers in effecting loan held binding upon bank (but see dissenting opinion, p. 270, citing principal case in denying power of bank to execute contract in question); Peterson v. New York, 17 N. Y. 453, holding act of officers in authorizing drawing of plans binding upon city when approved by city council; Olcott v. Railroad Co., 27 N. Y. 559, **84 Am. Dec. 304**, holding corporation liable upon promissory notes given by president in payment of purchase price of rolling stock; Phillips v. Campbell, 43 N. Y. 272, affirming sale made by treasurer of corporation; Trustees v. McKetchnie, 90 N. Y. 629, holding corporation bound under mortgage executed by president and sealed with corporate seal; Dougherty v. Hunter, 54 Pa. St. 382, holding debt due corporation extinguished by note taken by president in "full satisfaction of debt"; Townsend v. McIver, 2 S. C. 44, affirming transfer of stock made by president upon showing custom; Memphis v. Memphis Gas Co., 9 Heisk. 542, holding city liable on contract to purchase corporate stock executed by mayor and acquiesced in by council; Selma etc. R. R. Co. v. Tipton, 5 Ala. 804, **39 Am. Dec. 353**, Holleman v. De Nyse, 51 Ala. 101, Savings Bank v. Davis,

8 Conn. 202, Bryan v. Walton, 14 Ga. 192, State v. Louisiana Bank, 20 La. Ann. 474, Nelson v. Eaton, 26 N. Y. 415, arguendo.

Distinguished in United States v. Loeb, 99 Fed. 732, holding under Act 1890, § 13, providing that act of single appraiser of merchandise is conclusive unless collector shall deem appraisement too low, the duty of determining whether appraisement is too low is on collector; People's Bank v. St. Anthony's Church, 109 N. Y. 523, 17 N. E. 410, where act of president in contracting loan was held void, as being an act which under charter could be done only by corporate vote; Thew v. Porcelain Co., 5 S. C. 421, denying power of president to confess judgment so as to bind corporation; Isham v. Bennington Iron Co., 19 Vt. 251, under statute providing that private corporations might by vote authorize president to convey land and as holding void a deed executed by president without such authorization; Pennsylvania etc. Co. v. Board of Education, 20 W. Va. 365, where contract in question was ultra vires.

Who are officers de facto. Note, **19 Am. Dec. 66.**

Declarations of agents of corporations. Note, **8 Am. Dec. 718.**

Validity of contract entered into by corporate directors. Note, **22 E. R. C. 142.**

When acceptance of cashier's bond presumed.

Approved in Rankin v. Tygard, 198 Fed. 805, 119 C. C. A. 591, holding evidence showed approval of bond of president of bank; Martin v. Zellerbach, 1 Cal. Unrep. 340, holding corporation impliedly ratified contract made in its name and for its benefit by one not having authority; Broome v. United States, 15 How. 155, **14 L. Ed. 641**, where estate of surety upon collector's bond held to be bound, although bond not actually approved by controller of treasury until after surety's death; Davis v. Gray, 16 Wall. 217, **21 L. Ed. 452**, holding where receiver is empowered by court to sue and a bill is actually filed in such a suit, it will be presumed to have been filed by the receiver; Jones v. United States, 18 Wall. 663, **21 L. Ed. 868**, but holding sureties upon postmaster's bond not discharged because government, knowing of postmaster's defalcation, allowed him to retain office; Steam Engine Co. v. Hubbard, 101 U. S. 192, **25 L. Ed. 788**, holding president of corporation bound by statute to performance of certain duties not exempt because of irregularity in election, if, in fact, he acted as president; Baltimore etc. R. R. Co. v. Church, 137 U. S. 572, **34 L. Ed. 786**, 11 Sup. Ct. 186, sustaining power of corporation to sue where it had long acted as corporation, although under a defective certificate of incorporation; Knox County v. Bank, 147 U. S. 97, **37 L. Ed. 96**, 13 Sup. Ct. 270, holding where an election is held which can be held only after due notice, proof of the election carries presumption of notice; Nofire v. United States, 164 U. S. 660, **41 L. Ed. 590**, 17 Sup. Ct. 213, holding fact that marriage license was regularly issued carries presumption that all statutory prerequisites have been observed; Atlas Bank v. F. B. Gardner Co., 8 Biss. 543, Fed. Cas. 635, where person acting as president of bank

was held to be such de facto, although insolvent and acting contrary to statute requiring officers to be stockholders; McClaskey v. Barr, 47 Fed. 169, holding that where record of will has been ordered made and every act done except writing record, it will be considered as recorded; McClure v. Colclough, 5 Ala. 72, applying rule where official bond of sheriff, although not formally approved, had been filed and sheriff had for long period executed duties of office; Ex parte Mitchell, 39 Ala. 447, holding that right of exemption from military service in Confederate army on ground that person was bonded agriculturist was presumable from fact that bond was filed with government and not disapproved; Woodall v. Oden, 62 Ala. 128, holding that where statute provides for acceptance of bond within certain time, filing of bond and failure to disapprove it carry presumption of acceptance; Quimby v. Boyd, 8 Colo. 206, 6 Pac. 469, holding issuance of commission to public officer is conclusive evidence that all prerequisites have been observed; Greeley v. Hamman, 17 Colo. 33, 28 Pac. 461, holding that records of proceedings of special meeting showing that business was transacted for which meeting called, and that all members of council were present, are presumptive evidence of regularity of call; Pickering v. Day, 2 Del. Ch. 382, s. c., 3 Del. Ch. 295, ruling similarly where collector of revenue allowed to perform duties without formal approval of official bond as provided in statute; State v. Fredericks, 8 Iowa, 558, where school fund commission filed bond and entered upon duties but bond was never approved; State ex rel. v. Commissioners, 42 Kan. 646, 22 Pac. 724, refusing to declare election void because of mere failure of county clerk to properly sign resolution of county board calling election; Graves v. Bank, 10 Bush, 27, 19 Am. Rep. 51, and Badger v. Bank, 26 Me. 435, both involving facts identical with those in principal case; Amherst Bank v. Root, 2 Met. 534, holding sureties on cashier's bond liable, although bond never formally accepted by directors, they having merely expressed themselves as satisfied with it; Howes v. Maxwell, 157 Mass. 335, 32 N. E. 153, ruling similarly respecting bond required from person licensed to sell liquor; People v. Johr, 22 Mich. 463, 466, holding that approval of county treasurer's bond was presumable from fact that he was allowed to act; Concord v. Concord Bank, 16 N. H. 30, where parol evidence held admissible to show appointment and authority of cashier; Commercial Bank v. Kortwright, 22 Wend. 364, 34 Am. Dec. 324, holding bank bound by transfer of stock by cashier permitted to act as such under irregular appointment; Board of Supervisors v. Otis, 62 N. Y. 95, but holding sureties upon official bond not discharged by reason of neglect of board of supervisors to dismiss officer after default; Pringle v. Woolworth, 90 N. Y. 510, holding where foreign corporation has been allowed to do business in State for long period it will be presumed that stipulation has been filed as required by statute; Bostwick v. Van Voorhis, 91 N. Y. 360, where sureties on cashier's bond held liable, although never notified of formal acceptance of bond; McLean v. State, 8 Heisk. 242, where bond was accepted by unauthorized body and officer was allowed to perform duties of office; Wright v. Leath, 24 Tex. 28, 32, holding delivery of sheriff's bond to proper officer

for approval renders it binding and proof of actual approval is unnecessary; Lyttle v. Cozad, 21 W. Va. 205, where bond of special commissioner filed but not formally approved; Dedham Bank v. Chickering, 3 Pick. 340, opinion of Marshall, C. J., in Circuit Court, to effect that acceptance of bond should be proved by record, was disregarded and same ruling made as was made later in principal case.

Distinguished in Swinhart v. St. Louis etc. Ry. Co., 207 Mo. 435, 105 S. W. 1047, in action to enjoin operation of railway in highway, plaintiff need not prove negative allegation that County Court having control of street had not consented to construction of railway; Minor v. Bank, 1 Pet. 70, 7 L. Ed. 57, denying right of sureties on cashier's bond to plead in defense to action on bond, that wrongful acts complained of were done with acquiescence of directors; National Bank v. Drake, 29 Kan. 325, 44 Am. Rep. 654, holding, in action to recover money misappropriated by cashier, rule that directors are presumed to know financial condition of bank cannot be invoked to uphold wrongful act of officer.

Proceedings beneficial to corporation presumed accepted, and slight acts, accountable only on supposition of acceptance, are admissible as presumptive of fact.

Approved in Board of Water Commrs. v. Manchester, 89 Conn. 677, 96 Atl. 185, holding where city was granted power to condemn land for reservoir, formal acceptance of grant was not necessary to enable it to exercise power; Boatmen's Bank v. Gillespie, 209 Mo. 257, 108 S. W. 84, holding acceptance of charter shown by corporate acts under it; Pannebaker v. Tuscarora Valley R. Co., 219 Pa. 64, 67 Atl. 925, holding unauthorized contract ratified by acceptance of benefits; Adam v. New England Inv. Co., 33 R. I. 204, 80 Atl. 430, holding corporation accepting benefits bound by unauthorized contract of president to sell and repurchase stock; Wood v. City of Montpelier, 85 Vt. 474, Ann. Cas. 1914D, 500, 82 Atl. 673, holding acceptance by city of conveyance of lands to be used for school purposes not presumed, grant not being necessarily beneficial; dissenting opinion in Lankford v. Menefee, 45 Okl. 252, 145 Pac. 383, majority holding liability of stockholders of bank organized under trust company act not changed because bank was also doing banking business subject to regulation under another statute; City Railway Co. v. Citizens' R. R. Co., 166 U. S. 568, 41 L. Ed. 1118, 17 Sup. Ct. 657, holding acquiescence of corporation in city ordinance to be presumed from fact that it was passed for benefit of corporation and at its request; Philadelphia etc. R. R. Co. v. Kent etc. R. R. Co., 5 Houst. 132, but holding where corporation has been chartered to construct railroad, but does nothing, it cannot be considered as a corporation exempt from attachment; Palfrey v. Paulding, 7 La. Ann. 365, where acceptance of charter was presumed from acts of officers in accordance with it; Penobscot Boom Co. v. Lamson, 16 Me. 230, 232, 33 Am. Dec. 660, 661, holding that acceptance of franchise to construct boom in river may be presumed from act of corporation in constructing boom; Bangor etc. R. R. Co. v. Smith, 47 Me. 45,

holding acceptance of grant of power to lay tracks, presumable from acts of corporation in doing so; Society etc. v. Davis, 3 Met. 137, where acceptance of charter by agricultural society held to be presumable from exercise of corporate powers therein granted; Commonwealth v. Bakeman, 105 Mass. 60, holding act granting charter to be prima facie evidence of existence of corporation; Rotch etc. Co. v. Judd, 108 Mass. 228, holding acceptance of deed by corporation to be presumable from occupation of land contemplated by deed; Sumrall v. Insurance Co., 40 Mo. 32, and Insurance Co. v. Beckmann, 47 Mo. 97, holding acceptance of amendment to charter provable by acts of officers pursuant to such amendment; Long v. Joplin etc. Co., 68 Mo. 431, 432, holding acceptance of administrator's deed presumable from acts of parties and circumstances; Fertilizer Co. v. Clute, 112 N. C. 446, 447, 17 S. C. 421, 422, holding that resolution declaring intention to do acts contemplated by charter was evidence of its acceptance; Bank v. Lumber Co., 32 W. Va. 362, 3 L. R. A. 586, 9 S. E. 244, affirming deed of land; Charles River Bridge Co. v, Warren Bridge Co., 7 Pick. 470, State v. Newark etc. R. R. Co., 34 N. J. L. 305, Commonwealth ex rel. v. Cullen, 13 Pa. St. 140, 53 Am. Dec. 454, arguendo.

Acceptance of legislative amendments to corporate charters. Note, 53 Am. Dec. 468.

Grant of charter presumed from lapse of time, accompanied by continued exercise of corporate powers.

Approved in State v. City of Harper, 94 Kan. 484, 146 Pac. 1171, holding in quo warranto proceedings against municipality, common-law rule did not prevail and burden of proof was on defendant to show its authority over certain annexed territory; Blackburn v. Selma etc. R. R. Co., 2 Flipp. 529, 531, Fed. Cas. 1467, holding corporation, acting as such, estopped to deny its legal existence when sued on its contracts; Jameson v. People, 16 Ill. 259, 63 Am. Dec. 306, holding that where municipal corporation has been recognized by acts of legislature empowering it to act, inquiry into original organization of corporation is precluded; so also in Chicago etc. Ry. Co. v. Commissioners, 151 Ill. 213, 25 L. R. A. 303, 37 N. E. 1082; Hammond v. Strauss, 53 Md. 12, holding de facto corporation liable to stockholders on stock issued although organization never perfected under charter; Narragansett Bank v. Atlantic Silk Co., 3 Met. 287, 288, where it was held that in order to enforce claim against corporation, claimant need not allege regular organization of corporation; Packard v. Railroad Co., 168 Mass. 98, 46 N. E. 435, holding mere failure to elect officers does not dissolve corporation, and render void acts of corporation while not acting in conformity with charter; Attorney-General v. Bank, Harr. (Mich.) 326, applying principle in holding that forfeiture of charter rights cannot be presumed, but cause for forfeiture must be shown in pleadings; Ameriscoggin Bridge v. Bragg, 11 N. H. 108, where owners of bridge acted as corporation for long period, and acts were not disputed; United States etc. Co. v. Schlegel, 143 N. Y. 544, 38 N. E. 731, holding corporation estopped from denying its corporate existence when it had contracted

debts as corporation, although in violation of State laws; Sasser v. State, 13 Ohio, 485, holding on indictment for having in possession counterfeit bank bills, State was not obliged to prove incorporation of bank by production of charter; Woods v. Banks, 14 N. H. 110, arguendo.

Presumption as to incorporation. Note, 22 L. R. A. 277.

If provision in charter or by-law be directory merely, deviation from it cannot be taken advantage of by third person.

Cited in Woolridge v. McKenna, 8 Fed. 662, holding that act prescribing time in which transcript of record of State court is to be filed in Federal court is not mandatory, but directory only as mode of practice; National Bank v. Grenada, 41 Fed. 91, holding statute requiring city ordinances to be recorded, directory merely, and failure to observe it does not impair validity of bonds issued under unrecorded ordinance; Lay v. Lawson, 23 Ala. 390, refusing to set aside administrator's sale because of failure of purchaser to give bond with approved security; New Orleans v. De St. Romes, 9 La. Ann. 579, 580, where statute providing that city shall furnish election commissioners with names of qualified voters, held directory only, and election not invalidated by failure to do so; Eustis v. Kidder, 26 Me. 100, construing statute requiring constable to file bond before serving writ, and holding that constable did not incur penalty where bond filed, but without approval of selectmen, as provided in statute; Stebbins v. Merritt, 10 Cush. 32, construing clause in charter providing that clerk recording proceedings should be sworn; Converse v. Porter, 45 N. H. 399, holding acts of selectmen in locating schoolhouse, not to be invalidated by failure of clerk to record proceedings as provided by statute; In re Mohawk etc. R. R. Co., 19 Wend. 143, refusing to set aside election of directors of corporation, because inspectors not sworn in form prescribed by statute; State ex rel. v. McKee, 20 Or. 126, 25 Pac. 294, applying rule to statute declaring who shall act as secretary at meetings of school directors. Cited approvingly, but without particular application of rule, in Cayce v. Curtis, Dall. (Tex.) 405.

Distinguished in Driftwood etc. Co. v. Commissioners, 72 Ind. 241, where rule held inapplicable to statute prescribing strictly mode in which county is to provide for repairs to bridges and roads.

What are merely directory provisions in corporate charter must depend upon sound construction of the nature and object of each regulation, and of public convenience and apparent legislative intention.

This rule has been applied in New Orleans v. De St. Romes, 9 La. Ann. 579, 580, construing statute providing that city shall furnish election commissioners with names of qualified voters, and holding it to be merely directory; Middle Bridge etc. v. Brooks, 13 Me. 395, 29 Am. Dec. 511, holding requirement that rates of toll be posted in conspicuous place on bridge, mandatory, and unless complied with, no action can be maintained against person forcibly passing bridge; Hayes v. Hanson, 12 N. H. 290,

construing act requiring oath of assessors to be filed in clerk's office, and holding it to be directory only, and assessment not invalid if act not complied with; McCloud v. Columbus, 54 Ohio St. 454, 44 N. E. 97, construing statute prescribing method for advertising for bids for city improvements, and holding it to be mandatory.

Miscellaneous. Cited in Boatmen's Bank v. Gillespie, 209 Mo. 251, 108 S. W. 82, citing dissenting opinion of Marshall, to point that corporation being entity distinct from individuals composing it can speak only through its officers; erroneously in dissenting opinion in United States v. Robertson, 5 Pet. 665, 8 L. Ed. 266; Ex parte Christy, 3 How. 332, 11 L. Ed. 622; United States v. Potter, 27 Fed. Cas. 604, to point that laches are not imputable to Federal government; State v. Stebbins, 1 Stew. 307, cites dissenting opinion of Marshall, C. J., as to distinction between acts of corporation as such as of individual members, and McLure v. Colclough, 17 Ala. 92, same opinion to point that acceptance is essential to complete delivery of deed, dissenting opinion in Savings Bank v. Davis, 8 Conn. 207, to point that directors of corporation, when they act, do so in corporate capacity, and also following reasoning of Marshall, C. J., in arguing that appointment of agent to sell real property should be by deed under seal (see 8 Conn. 211); Pickering v. Day, 3 Houst. 532, 95 Am. Dec. 305, but not in point; Gifford v. Livingston, 2 Denio, 395, as defining corporation; Tracy v. Talmage, 14 N. Y. 191, 67 Am. Dec. 152, but application doubtful; State v. Shirley, 1 Ired. 604, refers to dissenting opinion of Marshall, C. J., as arguing that bond should be formally accepted in order to bind sureties; dissenting opinion in Guthrie v. Imbrie, 12 Or. 194, 53 Am. Rep. 340, 6 Pac. 671, as to purpose of seal; Dana v. Bank, 5 Watts & S. 246, cites dissenting opinion of Marshall, J. C., to point that president and directors of corporation are agents of corporation.

12 Wheat. 117–129, 6 L. Ed. 571, WILLIAMS v. NORRIS.

Opinion of State court is not part of record and cannot be examined under judiciary act to ascertain questions decided.

Approved in Land & Water Co. v. San Jose Ranch Co., 189 U. S. 180, 47 L. Ed. 768, 23 Sup. Ct. 489, holding Federal right is "specially set up or claimed in a State court" within meaning of United States Rev. Stats., § 709 (U. S. Comp. Stats. 1901, p. 575), where claim of right appears in motion for new trial, and was fully considered in opinion of lower court; Davis v. Packard, 6 Pet. 48, 8 L. Ed. 315, refusing to consider matters embraced only in opinion of court; Rector v. Ashley, 6 Wall. 148, 18 L. Ed. 734, refusing to take cognizance of jurisdictional facts which appeared only in opinion; Gibson v. Chouteau, 8 Wall. 317, 19 L. Ed. 318, applying principle in denying jurisdiction where jurisdictional facts appeared only in argument of counsel; Moore v. Mississippi, 21 Wall. 639, 22 L. Ed. 654, refusing to examine opinion to determine whether validity of State law was disputed on ground that it impaired obligation of contract; dissenting opinion in Insurance Co. v. Boon, 95 U. S. 140, 24 L. Ed.

402, majority holding that where issues are tried by court, its findings constitute part of record; Fleming v. Clark, 12 Allen, 198, Bryan v. Bates, 12 Allen, 205, arguendo.

Distinguished in Loeb v. Columbia Township Trustees, 179 U. S. 483, 45 L. Ed. 287, 21 Sup. Ct. 179, holding the opinion of the Circuit Court, filed and transmitted to Supreme Court in accordance with rule 8, may be examined on question of jurisdiction to ascertain whether either party claimed that State statute was unconsitutional; Gross v. United States Mortgage Co., 108 U. S. 484, 27 L. Ed. 797, 2 Sup. Ct. 944, where State statute provided that opinions of Supreme Court should constitute part of record; Murdock v. Memphis, 20 Wall. 633, 22 L. Ed. 443, and United States v. Taylor, 147 U. S. 700, 37 L. Ed. 337, 13 Sup. Ct. 481, show tendency towards modification of rule in those cases where opinions of lower court are required to be incorporated in transcript.

Opinion of court below as part of record. Note, 15 L. R. A. 798.

Order by State court after removal of record by writ of error, not made by way of amendment, but introducing new matter, is not part of record.

Cited in Suydam v. Williamson, 20 How. 440, 15 L. Ed. 983, holding statement of case by judge of State court not admissible as part of record upon writ of error; Snell v. Dwight, 121 Mass. 349, 350, where State court recognized rule in refusing to order amendment of record after final decree in order that jurisdictional facts might appear therein upon writ of error from United States Supreme Court.

To give Supreme Court jurisdiction, record must show Federal question decided adversely to constitutional right.

Approved in Willson v. Blackbird Creek Marsh Co., 2 Pet. 251, 7 L. Ed. 414, asserting jurisdiction, where record showed that right of State to authorize construction of dam across navigable river was disputed on ground that it conflicted with commerce power of Congress; Satterlee v. Matthewson, 2 Pet. 409, 7 L. Ed. 468, where record presented question as to whether State law impaired obligation of contracts; Harris v. Dennie, 3 Pet. 302, 7 L. Ed. 687, where State court asserted right of State officer to attach goods of importer in hands of revenue officers, previous to entry; Craig v. Missouri, 4 Pet. 429, 7 L. Ed. 910, where validity of State law was disputed on ground that it provided for emission of "bills of credit"; Crowell v. Randell, 10 Pet. 395, 396, 9 L. Ed. 468, 469, denying jurisdiction where decision of court involved no construction of Federal Constitution or laws; Scott v. Jones, 5 How. 374, 376, 12 L. Ed. 196, 197, denying jurisdiction, however, on other grounds; Smith v. Adsit, 16 Wall. 189, 21 L. Ed. 311, refusing to review decision of State court dismissing cause for want of jurisdiction, a Federal question thus not having arisen in lower court; Murdock v. Memphis, 20 Wall. 633, 22 L. Ed. 443, asserting jurisdiction under similar act of 1867, where it appeared that title of United States was drawn in question; McCullough v. Virginia, 172 U. S. 118, 43 L. Ed. 388, asserting jurisdiction where defeated party had alleged

an impairment of obligation of contract; opinion of Judge Davis, 44 Me. 592, holding that if State court upon claim of colored person to be admitted to privileges granted by State Constitution, sustain such claim, case is not within Federal appellate jurisdiction; State v. Batchelder, 5 Minn. 237, 80 Am. Dec. 414, holding where case involves question as to validity of Federal patent, Federal court does not acquire appellate jurisdiction unless decision is against right claimed under such patent; Cooke v. Bank, 52 N. Y. 108, 11 Am. Rep. 674, holding that jurisdiction of State court to try cause involving national bank is not ousted by mere possibility that Federal questions may arise during proceedings; dissenting opinion in Tennessee v. Davis, 100 U. S. 285, 25 L. Ed. 658, arguendo.

Questions considered by Federal Supreme Court in reviewing judgments of State courts. Note, 63 L. R. A. 574.

What adjudications of State courts reviewable in Federal Supreme Court. Note, 62 L. R. A. 543.

Record for showing Federal Supreme Court's jurisdiction to review State court's decision. Note, 63 L. R. A. 330, 331.

Time and manner of raising and deciding questions in State court to obtain review in Federal Supreme Court. Note, 63 L. R. A. 45, 54.

Special legislation is not repugnant to the Constitution of the United States.

Cited in Williamson v. Williamson, 3 Smedes & M. 745, 41 Am. Dec. 638, affirming sale of intestate's lands made under special act of legislature; Langdon v. Strong, 2 Vt. 257, holding valid, a statute authorizing an administrator in a particular case, to convey lands to creditors in payment of debts of estate.

Distinguished in Jones v. Perry, 10 Yerg. 78, 30 Am. Dec. 440, holding special act authorizing guardian to sell lands of ward judicial in its nature, and void under clause in State Constitution prohibiting legislature from exercising judicial power.

Miscellaneous. Cited also in Young v. Martin, 8 Wall. 357, 19 L. Ed. 419, as to bill of exceptions; dissenting opinion in Ex parte Crane, 5 Pet. 202, 8 L. Ed. 97, to point that Federal courts derive jurisdiction solely from Constitution and acts of Congress.

12 Wheat. 129–134, 6 L. Ed. 575, MONTGOMERY v. HERNANDEZ.

Under judiciary act, decision must have been against right claimed under act of Congress.

Approved in Tyler v. Judges of Court of Registration, 179 U. S. 408, 45 L. Ed. 254, 21 Sup. Ct. 207, holding objection that persons may be deprived of rights without due process of law under Massachusetts Torrens act for land registration cannot be raised so as to give Supreme Court of United States jurisdiction by one having requisite notice; dissenting opinion in St. Louis etc. Ry. Co. v. McWhirter, 229 U. S. 286, 57 L. Ed. 1190,

33 Sup. Ct. 858, majority holding where in controversy of Federal character in State court ruling was against claim that there was no evidence to show liability under Federal statute, such ruling was reviewable as involving operation of Federal law; Smith v. Hunter, 7 How. 743, 12 L. Ed. 896, denying jurisdiction, where on trial no right was set up under act of Congress, State court having dismissed bill upon construction of one of its own statutes; Doe v. Eslava, 9 How. 444, 13 L. Ed. 209, refusing to review final decree in favor of person claiming under Spanish grant confirmed by Congress; Dower v. Richards, 151 U. S. 666, 38 L. Ed. 308, 14 Sup. Ct. 455, ruling similarly where judgment of State court was upon a matter of fact only; Whitten v. Tomlinson, 160 U. S. 238, 40 L. Ed. 411, 16 Sup. Ct. 300, denying jurisdiction to issue writ of error until final judgment against right claimed. The following cases apply rule in denying jurisdiction where right was not claimed for party against whom decision was rendered, but for third person under whom he did not claim; Henderson v. Tennessee, 10 How. 323, 13 L. Ed. 439, Hale v. Gaines, 22 How. 160, 16 L. Ed. 269, Long v. Converse, 91 U. S. 113, 23 L. Ed. 235, Miller v. Bank, 106 U. S. 544, 27 L. Ed. 290, 1 Sup. Ct. 538, Giles v. Little, 134 U. S. 650, 30 L. Ed. 1064, 10 Sup. Ct. 625, Lee v. Kaufman, 3 Hughes, 133, Fed. Cas. 8191, arguendo.

Distinguished in Irvine v. Bankard, 181 Fed. 212, holding in creditor's suit to recover on stockholder's liability, limitations do not run in favor of stockholder in another State pending appeal from decree appointing receiver to collect from stockholders.

What adjudications of State courts reviewable in Federal Supreme Court. Note, 62 L. R. A. 539.

Questions considered by Federal Supreme Court in reviewing judgments of State courts. Note, 63 L. R. A. 572, 573.

Cause of action on marshal's bond for failure to pay over moneys collected in admiralty cause, does not accrue until final judgment.

Approved in Hanger v. Abbott, 6 Wall. 542, 18 L. Ed. 943, holding that time during which courts in rebellious States were closed to loyal citizens was to be deducted from time fixed by statute of limitations; Devereaux v. Brownsville, 29 Fed. 751, holding that repeal of municipal charter, whereby there is no organization to be sued and creditor is disabled from proceeding, will arrest the statute of limitations; In re Waties, 39 Fed. 265, holding that in computing time under statute giving priority to wages for "labor performed within six months next preceding first publication of notice of proceedings in bankruptcy," period intervening between institution of proceedings and final decree is to be disregarded; Mercantile Trust Co. v. St. Louis etc. Ry. Co., 69 Fed. 196, holding that stay of execution in record entry of judgment, stays running of statute limiting duration of judgment lien; Brown v. Merrick, 16 Ark. 615, but holding where statute began to run in lifetime of creditor it did not stop at his death until administration was granted on his estate; Sanderson v. Sander-

son, 17 Fla. 848, holding statute to be suspended during period within which creditor is unable to sue debtor's estate; Morrison v. St. Gemme, 23 Mo. 346, holding that statute will not run in favor of administrator until claim against estate is established as provided by statute; Taylor v. Thorn, 29 Ohio St. 574, holding that allowance by administrator of claim against estate, arrests statute; State v. Pratte, 8 Mo. 287, 40 Am. Dec. 142, arguendo.

Distinguished in Ten Eyck v. Wing, 1 Mich. 53, where disability of creditor to sue was caused by creditor himself; Treasurer v. Martin, 50 Ohio St. 204, 33 N. E. 1114, holding that where creditor has fraudulently allowed debtor to obtain injunction restraining suit, he will not be allowed upon dissolution of injunction to set up such disability against plea of statute of limitations.

The maxim, "Nullum tempus occurrit regi." Note, 101 Am. St. Rep. 173.

Absence as exception to statute of limitations. Note, 13 Am. Dec. 371.

Miscellaneous. Cited in Baker v. Biddle, 1 Bald. 403, 406, Fed. Cas. 764, to point that jurisdiction of Federal courts is confined to enumerated case. See also dissenting opinion in Exparte Crane, 5 Pet. 204, 206, 8 L. Ed. 98; Muse v. Arlington Hotel Co., 68 Fed. 649, to point that statute of limitations can be suspended only for causes provided in the act itself.

12 Wheat. 135–136, 6 L. Ed. 577, WINN'S HEIRS v. JACKSON.

Supreme Court has no jurisdiction to review State court judgment remanding cause for further proceedings.

Approved in Schuyler Nat. Bank v. Gadsden, 179 U. S. 681, 45 L. Ed. 384, 21 Sup. Ct. 918, following rule; Hart v. Burnett, 20 Cal. 172, denying application for citation, upon issuance of writ of error by clerk of Federal court, where judgment in Supreme Court in action of ejectment remanded cause for further proceedings; dissenting opinion in Ex parte Crane, 5 Pet. 206, 8 L. Ed. 98, majority upholding power to issue mandamus to compel Circuit Court to sign bill of exceptions.

Final and interlocutory judgments and decrees. Note, 60 Am. Dec. 431.

What adjudications of State courts reviewable in Federal Supreme Court. Note, 62 L. R. A. 517.

12 Wheat. 136–152, 6 L. Ed. 577, POSTMASTER-GENERAL v. EARLY.

Construction of statutes is exclusive function of judiciary, and mistaken opinion of legislature as to law cannot bind courts.

Approved in Pryor v. Murphy, 80 Ark. 157, 96 S. W. 447, construing statute dividing county into judicial districts; In re Taylor's Estate, 5 Ind. Ter. 225, 5 Ann. Cas. 226, 82 S. W. 729, construing statute relating to dower of wife on divorce; dissenting opinion in Lott v. Lott, 146 Mich.

591, 8 L. R. A. (N. S.) 748, 109 N. W. 1130, construing statute relating to bar of dower; Territory v. Albright, 12 N. M. 306, 78 Pac. 208, assessor appointed pursuant to Laws 1903, p. 80, amending Laws 1903, p. 38, relating to division of Bernalillo county, before act dividing county went into effect, not entitled to office; United States v. Claflin, 97 U. S. 549, 24 L. Ed. 1084, construing an act amending an act "to prevent smuggling"; District of Columbia v. Hutton, 143 U. S. 27, 36 L. Ed. 62, 12 Sup. Ct. 372, holding act prescribing qualifications of police officers in district to have been repealed by later act providing permanent form of government for district, notwithstanding subsequent recognition by Congress of the first act as still subsisting; Powell v. State, 17 Tex. App. 361, refusing to recognize in criminal proceeding, legislative construction of term "jeopardy," as employed in State Constitution.

Legislature may pass declaratory statute which, although inoperative in past, may act in future.

Approved in Hamilton v. David C. Beggs Co., 171 Fed. 160, following rule; Home Mutual Ins. Co. v. Stockdale, 12 Fed. Cas. 456, denying retroactive effect of statute construing a statute taxing dividends of corporations; United States v. The Ohio, 27 Fed. Cas. 229, denying retroactive effect of act of Congress providing for licensing and enrollment of coasting vessels; Wood v. Wood, 54 Ark. 178, 15 S. W. 460, giving effect to statute limiting jurisdiction in matters of divorce and alimony (see also s. c., on rehearing, 59 Ark. 451, 43 Am. St. Rep. 48, 18 L. R. A. 160, 27 S. W. 643); Rhoades v. Davis, 51 Mich. 311, 16 N. W. 662, construing statute relating to property rights of married women; State v. Slover, 126 Mo. 664, 29 S. W. 721, construing statute regulating proceedings in contested election cases; Farmers' Bank v. Hale, 59 N. Y. 62, construing act declaring intention of legislature with regard to previous act regulating rate of interest.

Including in official bond other things which are separable from subjects for which it may lawfully be taken, does not vitiate it.

Cited in United States v. Bradley, 10 Pet. 363, 9 L. Ed. 456, holding act prescribing form of paymaster's bond directory merely, and bond not void if in purport it conforms to act; Greathouse v. Dunlap, 3 McLean, 311, Fed. Cas. 5742, holding voluntary bond valid although surety binds himself to greater extent than required by law; Bates v. Bank, 2 Ala. 487, holding contract executed by bank not entirly void because embracing matters ultra vires; Cleaves v. Dockray, 67 Me. 123, where executor's bond held valid as common-law bond, although containing conditions not required by statute; State v. Findley, 10 Ohio, 57, holding bond of county treasurer valid for so much as was prescribed by statute, although void as to residue; State v. Bowman, 10 Ohio, 449, arguendo.

Distinguished in State v. Heisey, 56 Iowa, 406, 9 N. W. 327, holding that where bond is not required of public officer, voluntary bond is void for want of consideration; Fain v. Headerick, 4 Cold. 338, setting aside

award where no part of contract in dispute was founded upon legal consideration.

Postmaster-general may take bonds to secure payment of money due, or which may become due, to general postoffice.

Cited in United States v. Bradley, 10 Pet. 360, 9 L. Ed. 455, asserting power of Congress to require paymasters to file bond to secure funds in their hands; Postmaster-General v. Rice, Gilp. 561, Fed. Cas. 11,312, in charge to jury under facts similar to those in principal case; Postmaster-General v. Reeder, 4 Wash. C. C. 679, Fed. Cas. 11,311, holding that omission of postmaster-general to sue principal does not release surety; State ex rel. v. Augert, 127 Mo. 464, 30 S. W. 120, citing principal case as instance where court recognized power as existing by implication.

Under act of March 3, 1815, Circuit Courts have jurisdiction of suits by postmaster-general upon official bonds of postmasters.

Cited in Dax v. Postmaster-General, 1 Pet. 323, 7 L. Ed. 162, following rule; Wetmore v. Rice, 1 Biss. 239, Fed. Cas. 17,468, as instance where Supreme Court asserted original jurisdiction of Circuit Courts in suits upon official bonds; Postmaster-General v. Furber, 4 Mason, 334, Fed. Cas. 11,308, asserting jurisdiction over matters of account generally between postmaster-general and deputy postmasters; Henry v. Sowles, 28 Fed. 482, asserting jurisdiction over suit to protect money in hands of United States marshal; Dundas v. Bowler, 3 McLean, 206, Fed. Cas. 4140, discussing general subject of jurisdiction.

In ascertaining intent of legislature one part of statute may be interpreted by any other which may indicate the meaning given by the legislature itself to ambiguous phrases.

Approved in United States v. Allen, 179 Fed. 18, 103 C. C. A. 1, holding act of Congress providing for instituting suits to retain possession of restricted Indian lands implied grant of power to maintain suits; Hasson v. City of Chester, 67 W. Va. 283, 67 S. E. 733, construing statute providing for presence of party representatives at elections; Layne v. Chesapeake etc. Ry. Co., 66 W. Va. 613, 67 S. E. 1105, construing statutes relating to settling bills of exception in vacation; State v. Harden, 62 W. Va. 357, 358, 360, 58 S. E. 733, 734, construing statute providing system of town government; Baring v. Erdman, 2 Fed. Cas. 787, interpreting term "material" in statute authorizing taking of materials from neighboring lands for construction and repair of railroad; State v. Corbett, 61 Ark. 241, 32 S. W. 690, construing act providing punishment for prize-fighting; Blanchard v. Railroad Co., 31 Mich. 49, 18 Am. Rep. 146, applying principle in construing clause in deed.

Miscellaneous. Cited in Bank of United States v. McKenzie, 2 Brock. 401, Fed. Cas. 927, and United States v. Kendal, 5 Cr. C. C. 251, Fed. Cas. 15,517, as instance where original jurisdiction of Circuit Court was sustained as being given by statute; United States v. Green, 4 Mason, 434,

Fed. Cas. 15,258, as authority for holding that Circuit Court has jurisdiction over all suits brought in name of a Federal officer under authority of act of Congress, regardless of amount; In re Metzger, 17 Fed. Cas. 234, but not in point; United States v. Mooney, 11 Fed. 477, to point that recognition of concurrent jurisdiction is grant of it, though it may not have before existed; Bishop v. State ex rel., 149 Ind. 228, **63 Am. St. Rep. 283, 39 L. R. A. 279**, 48 N. E. 1040, construing "deputy postmaster"; dissenting opinion in Galveston etc. Ry. Co. v. Gonzales, 151 U. S. 516, **38 L. Ed. 255**, 14 Sup. Ct. 408, but application not apparent.

12 Wheat. 153–169, 6 L. Ed. 583, JACKSON v. CHEW.

Supreme Court will adopt decisions of highest court of State settling rule of construction regarding titles to land.

Approved in Kuhn v. Fairmont Coal Co., 215 U. S. 359, 363, **54 L. Ed. 234–235**, 30 Sup. Ct. 140, holding where there is no State decision, Federal court would exercise its own judgment in suit between citizens of different States in determining effect of conveyances; Highland Park Mfg. Co. v. Steele, 232 Fed. 29, applying rule in case of deed; Messinger v. Anderson, 171 Fed. 792, 96 C. C. A. 445, holding rule did not apply in construing will; Kuhn v. Fairmont Coal Co., 66 W. Va. 711, 717, 720, 179 Fed. 191, 195, 196, 102 C. C. A. 457, and Kuhn v. Fairmont Coal Co., 152 Fed. 1014, both applying rule in case implied covenants of deed to coal land; Southern Pac. Co. v. Western Pac. Ry. Co., 144 Fed. 179, construing grant of Oakland waterfront; Treat v. City of Chicago, 130 Fed. 444, 64 C. C. A. 645, applying rule where State court upheld validity of Illinois local improvement act; Russell v. United States Trust Co., 127 Fed. 446, holding when testator left property to wife and daughter, requesting wife to support his mother, and will recited that he expected wife when making will disposing of property left her by him that she would remember children of deceased brother, no trust created in favor of such children; Keene Five Cent Sav. Bank v. Reid, 123 Fed. 226, holding provision in note that "this note is to be construed by the laws of Kansas" means statutory law of negotiable instruments; Sanders v. Village of Riverside, 118 Fed. 724, holding conveyance of strip of land is not defeated by showing uniform width of coloring on plat, for purpose of showing dedication to public purposes; Parker v. Moore, 115 Fed. 802, holding decisions on contracts for future delivery by State court will be followed by Federal courts in respect to what law governs; Henderson v. Griffin, 5 Pet. 155, **8 L. Ed. 80**, affirming decision of State court in its application of statute of uses to a devise; Green v. Neal, 6 Pet. 297, **8 L. Ed. 405**, overruling a previous case upon showing that State construction of statute of limitations had been changed; Van Rensselaer v. Kearney, 11 How. 318, **13 L. Ed. 712**, following State court in holding that statute abolishing entails included estates tail in remainder and vest in remainderman an estate in fee simple; Beauregard v. New Orleans, 18 How. 502, **15 L. Ed. 472**, applying principle in holding that Supreme Court will follow decisions of State court settling jurisdiction

of its probate courts; Suydam v. Williamson, 24 How. 433, 16 L. Ed. 745, following rule; Barrett v. Holmes, 102 U. S. 655, 26 L. Ed. 292, construing State statute limiting time for entering upon State lands; Bondurant v. Watson, 103 U. S. 289, 26 L. Ed. 450, enforcing decision of State court that mortgage is inoperative as to third person, unless property recorded; Mitchell v. Lippincott, 2 Woods, 471, Fed. Cas. 9665, reviewing authorities, and following State court in holding invalid, under "married woman's law," a mortgage executed by wife to secure husband's debts; Myers v. Reed, 9 Sawy. 137, 17 Fed. 404, following State court in holding that conveyance to husband and wife made them tenants by entirety; Barney v. Keokuk, 4 Dill. 598, Fed. Cas. 1032, affirming right of railway under State law to lay tracks upon streets of city with consent of city authorities, regardless of question as to where fee to street rests; Rhinehart v. Harrison, 1 Bald. 187, Fed. Cas. 11,840, affirming rule laid down by State courts, that by direction in will to convert real property into money, it is thereby made personal property and vests in representatives of legatee upon his death; Thompson v. Phillips, 1 Bald. 284, Fed. Cas. 13,974, charging jury as to effect of State decisions construing statute limiting lien of judgments; Boyle v. Arledge, Hempst. 623, Fed. Cas. 1758, applying principle to construction of statute limiting actions generally by nonresidents; Derby v. Jacques, 1 Cliff. 438, Fed. Cas. 3817, construing State statute abolishing writ of right, Hiller v. Shattuck, 1 Flipp. 274, Fed. Cas. 6504, following State statute in allowing defendant in ejectment a new trial on payment of costs; In re Zug, 30 Fed. Cas. 948, holding that in determining what were distributable assets in bankruptcy proceedings under a national act, Federal courts would be governed by decisions of courts in State where property was situated; Fidelity etc. Co. v. Shenandoah Iron Co., 42 Fed. 376, following decisions of State courts in declaring unconstitutional a law giving materialmen priority over mortgage bonds; McClaskey v. Barr, 62 Fed. 211, adopting State law relating to compensation for improvements on land made in good faith; Cockrill v. Woodson, 70 Fed. 754, following State decisions to effect that transfer by husband to wife created in her an equitable estate in the land to her separate use; Independent District v. Beard, 83 Fed. 14, 15, following State courts in determining what constitutes special trust; Buford v. Kerr, 90 Fed. 514, in determining nature of estate taken by will; Hempstead v. Reed, 6 Conn. 487, applying principle in holding certificate of discharge in insolvency, legally obtained in one State, available as discharge in any other State; McClure v. Owen, 26 Iowa, 254, refusing to follow Federal decision which disregarded settled construction placed by State courts upon State statute; Hammond v. Coleman, 4 Mo. App. 318, as instance where Supreme Court recognized right of States to regulate descents; Shirley v. Sugar Refinery, 2 Edw. Ch. 513, as instance where Federal court followed rule established by State courts; Smith v. Power, 23 Tex. 33, applying doctrine of stare decisis in case involving validity of public grants; dissenting opinion in Williamson v. Berry, 8 How. 559, 12 L. Ed. 1197, attempting to apply rule in construing private statute; Strother v. Lucas, 12 Pet. 437, 9 L. Ed. 1147,

Burgess v. Seligman, 107 U. S. 34, 27 L. Ed. 365, 2 Sup Ct. 22, Hart v. Burnett, 15 Cal. 603, 605, arguendo.

Distinguished in Marlatt v. Silk, 11 Pet. 22, 9 L. Ed. 617, holding rule inapplicable to construction of compact between two States regarding public lands; Lane v. Vick, 3 How. 476, 11 L. Ed. 687, refusing to follow single construction of will under State statute not sufficiently acquiesced in to have become rule of property (but see dissenting opinion, p. 482, 11 L. Ed. 690); Foxcroft v. Mallett, 4 How. 379, 11 L. Ed. 1020, where decision of State court construing deed by rules of common law held not binding upon Supreme Court, Railroad Co. v. National Bank, 102 U. S. 53, 26 L. Ed. 75, refusing to be bound by decisions of State court upon question of general commercial law; Barber v. Pittsburg etc. R. R. Co., 166 U. S. 99, 41 L. Ed. 933, 17 Sup. Ct. 491, where State decision relied upon was the only adjudication upon point at issue; Edwards v. Davenport, 4 McCrary, 43, 20 Fed. 762, holding decision of State court as to effect of contract entered into by person of unsound mind not to constitute rule of property, and so not binding upon Federal court; Lauriat v. Stratton, 6 Sawy. 347, 11 Fed. 114, declining to follow single decision of State court evidently made upon misapprehension of statute; Ryan v. Staples, 76 Fed. 727, 40 U. S. App. 427, refusing to be guided by single decision rendered after right in question had become vested; Franklin v. Twogood, 25 Iowa, 533, 96 Am. Dec. 82, refusing to construe contract according to lex loci contractus, where question at issue involved application of common-law rules.

Questions of State law as to which State court decisions must be followed in actions originating in, or removal to, Federal courts. Note, 40 L. R. A. (N. S.) 388, 430.

New York rule as to devise over on failure of issue as valid executory devise.

Approved in Waring v. Jackson, 1 Pet. 571, 7 L. Ed. 267, following rule; Abbott v. Essex Co., 2 Curt. 134, 140, Fed. Cas. 11, holding such to be rule in Massachusetts; Crane v. Cowell, 2 Curt. 186, Fed. Cas. 3353, in Rhode Island; Summers v. Smith, 127 Ill. 650, 21 N. E. 192, showing application of rule in Illinois; Moody v. Walker, 3 Ark. 203, discussing subject of executory devises; Russ v. Russ, 9 Fla. 142, on subject of executory devises.

Criticised in Chester v. Greer, 5 Humph. 32, and contrary rule held to obtain in Tennessee; to the same effect is Bramlet v. Bates, 1 Sneed, 574.

12 Wheat. 169-176, 6 L. Ed. 589, ARMSTRONG v. LEAR.

Testamentary paper executed in foreign country cannot be made foundation of suit for legacy here, until probated.

Approved in Stratton's Independence v. Dines, 126 Fed. 979, holding under Mill's Ann. Stats., § 4687 (Colo.), an action cannot be maintained against an executor until he has received letters testamentary; Wahl v.

Franz, 100 Fed. 689, holding no appeal may be taken to United States Circuit Court from an order admitting will to probate in probate court of Kansas; Armstrong v. Lear, 8 Pet. 71, 8 L. Ed. 870, where same cause, upon coming later to Supreme Court, was remanded, bill not having alleged that document in question was a valid will according to law of place where executed; Tompkins v. Tompkins, 1 Story, 553, Fed. Cas. 14,091, holding probate of will by proper court conclusive upon validity of will to pass real estate involved in action of ejectment; Langdon v. Goddard, 2 Story, 276, Fed. Cas. 8060, dismissing bill setting out will, but relying for title upon codicil not alluded to in bill as having been proved; Mellus v. Thompson, 1 Cliff. 128 Fed. Cas. 9405, holding that executor deriving authority solely from one State cannot sue in another, without appointment in latter; Bartlett v. Rodgers, 3 Sawy. 63, 64, Fed. Cas. 1079, denying right of executor to maintain suit to collect assets without probate of will in State where suit brought; Baldwin v. Wylie, 30 Fed. Cas. 958, holding unprobated will made in Mexico inoperative to control funds here; Shepherd v. Nabors, 6 Ala. 637, refusing to entertain action for recovery of legacy where will not shown to have been probated; Moore v. Lewis, 21 Ala. 581, affirming decree dismissing bill for recovery of legacy where foreign will, though proved where made, had not been proved where suit brought; also in Wood v. Mathews, 53 Ala. 4, 5, dismissing bill to compel distribution of estate under similar acts; McDaniel v. Pattison, 98 Cal. 97, 27 Pac. 653, reserving judgment vesting title under will alleged to have been destroyed and never admitted to probate; Belton v. Sumner, 31 Fla. 146, 21 L. R. A. 15, 12 South. 373, probate by proper court prima facie evidence of executor's title to land under will; Davis v. Smith, 5 Ga. 296, 48 Am. Dec. 295, denying liability of administrator to suit for failure to defend suit in jurisdiction where will had not been probated nor administration granted; Sneed v. Ewing, 5 J. J. Marsh. 467, 22 Am. Dec. 48, and Van Gieson v. Banta, 40 N. J. Eq. 19, holding foreign will inoperative to pass title unless recorded as provided by statute; Pettit v. Black, 13 Neb. 152, 12 N. W. 845, holding will not admissible as evidence of title unless probated; Pelletreau v. Rathbone, 1 N. J. Eq. 334, 336, dismissing bill filed by executor under foreign will in absence of express averment that will had been probated; Olney v. Angell, 5 R. I. 204, 73 Am. Dec. 65, dismissing bill for account of assets of estate where will not filed for record as prescribed by statute; Gause v. Gause, 4 McCord, 386, extending rule and holding will not admissible to probate if not made in conformity with State statute, although valid where executed; Missionary Society v. Eells, 68 Vt. 511, 35 Atl. 468, denying jurisdiction of equity to establish destroyed or spoliated will, statute having vested Probate Courts with exclusive jurisdiction in probate matters; Campbell v. Porter, 162 U. S. 484, 40 L. Ed. 1046, 16 Sup Ct. 873, Southworth v. Adams, 9 Biss. 523, 4 Fed. 3, In re Foley, 80 Fed. 951, Corrie's Case, 2 Bland Ch. 499, Randal v. Hodges, 3 Bland Ch. 481, Williams v. Saunders, 5 Cold. 78, arguendo.

Distinguished in Tarver v. Tarver, 9 Pet. 179, 9 L. Ed. 93, holding that where complainant sets out in bill an instrument purporting to be a foreign

will, and denies its validity because it is executed conditionally, defendant is not bound to prove probate; United States v. Union Pacific R. R. Co., 11 Blatchf. 390, Fed. Cas. 16,598, under statute; Melvin v. Lyons, 10 Smedes & M. 80, holding it error to refuse to admit copy of will duly probated in another State.

Modified in Gaines v. Chew, 2 How. 646, 11 L. Ed. 413, holding that although will must be proved before title can be set up under it, equity may compel defendants to answer touching will alleged to have been spoliated.

Conclusiveness in domestic courts of foreign will duly probated abroad. Note, 9 Ann. Cas. 422.

Foreign judgments against an executor or administrator. Note, 27 L. R. A. 102, 103.

Conclusiveness of judgment in rem. Note, 11 E. R. C. 46.

Miscellaneous. Cited in Brendel v. Church, 82 Fed. 262, to point that equity has jurisdiction over suit to recover a legacy; Latine v. Clements, 3 Ga. 432, to point that will properly made and solemnized according to law of testator's domicile is sufficient to pass personal property in whatever county it is situated; Bonati v. Welsch, 24 N. Y. 164, to point that law of testator's domicile at time of death controls testamentary disposition of his property.

12 Wheat. 177–180, 6 L. Ed. 592, RANKIN v. SCOTT.

Prior judgment lien, during time fixed by law for its existence, cannot be displaced by delay in execution and levy under subsequent judgment.

Approved in In re Pilcher & Son, 228 Fed. 141, holding judgment recorded four months before bankruptcy of creditors was prior to claims of receiver in bankruptcy; Baumgartner v. McKinnon, 10 Ga. App. 226, 73 S. E. 522, holding oldest item of account paid first in applying payments; Parker-Washington Co. v. Corcoran, 150 Mo. App. 194, 129 S. W. 1032, holding lien of tax bill for earlier street improvement was prior to lien for later improvement; Mayer v. Morgan, 26 Wash. 78, 66 Pac. 130, holding under Ballinger's Ann. Code and Stats., §§ 5132, 5191, 5195, relating to executions when sheriff has balance in his hands after sale of property, a senior judgment creditor has lien on it in preference to junior judgment creditor who first levied execution; The N. W. Thomas, 1 Biss. 218, Fed. Cas. 10,386, and The Henrietta, Newb. Adm. 287, Fed. Cas. 6121, holding that sale of vessel under State statute cannot divest prior admiralty lien; Rockhill v. Hanna, 4 McLean, 559, Fed. Cas. 11,980, holding that where several judgments are rendered upon the same day, the liens thus created are equal, and sale under one does not affect the others; White v. Keller, 68 Fed. 801, 30 U. S. App. 275, citing principal case as authority for holding that subsequent probate of unregistered will will not be effective as against innocent purchaser from heir; Dudley's Case, 7 Fed. Cas. 1155, holding that property of petitioner in bankruptcy is not divested until decree rendered and property is subject to execution until

that time; Darrington v. Borland, 3 Port. 35, applying principle in holding charge upon property by will for payment of testator's debts not defeasible by devastavit on part of executor; McMahan v. Green, 12 Ala. 74, **46 Am. Dec. 244**, holding where lien has attached on personal property which is, during continuance of lien, removed from State and sold, it may be levied upon under alias execution if again brought into State; De Vendell v. Hamilton, 27 Ala. 165, holding that lien cannot be lost or impaired by laches in issuing execution, provided judgment has not become dormant; Trapnall v. Richardson, 13 Ark. 551, **58 Am. Dec. 344**, setting aside decree of foreclosure where land mortgaged was subject to prior judgment lien; Watkins v. Wassell, 15 Ark. 88, holding that judgment lien cannot be displaced in favor of subsequent liens, by mere delay in levying execution; Shall v. Biscoe, 18 Ark. 156, applying principle in holding that vendor's lien for purchase price cannot be displaced by purchase from vendee; Lawson v. Jordan, 19 Ark. 305, **70 Am. Dec. 601**, holding judgment lien not waived by return of process thereon by order of judgment creditor; Littlefield v. Nichols, 42 Cal. 374, affirming sale under mortgage as against subsequently acquired judgment lien; Lick v. Ray, 43 Cal. 90, and Porter v. Pico, 55 Cal. 173, holding attachment lien to be superior to subsequent judgment lien, although such judgment was obtained before the judgment in proceedings in which attachment issued; Moseley v. Edwards, 2 Fla. 434, 438, holding real property levied upon and sold under junior judgment, still subject to lien of older judgment; Kimball v. Jenkins, 11 Fla. 123, **89 Am. Dec. 240**, holding lien of judgment obtained during lifetime of defendant not impaired by his death, and entitled to proper rank in administration of estate; Forsyth v. Marbury, Charlt. 327, enforcing judgment lien against property in hands of vendee of judgment debtor; Newton v. Nunnally, 4 Ga. 357, denying right of plaintiff, having two liens on money in hands of sheriff, to apply fund to either lien at option, and holding that older lien must be first satisfied; Harrison v. McHenry, 9 Ga. 170, **52 Am. Dec. 441**, reversing judgment holding that sale under junior fi. fa. defeated lien of older judgment on same property; McNair v. Bateman, 27 Ga. 184, holding that lien of execution issued from Federal court attaches to money in hands of State court; Rogers v. Dickey, 1 Gilm. 645, **41 Am. Dec. 210**, and Whitney v. Rightclaim, 6 Blackf. 325, setting aside execution sale under junior judgment; Hopping v. Burnham, 2 G. Greene, 53, holding judgment lien superior to prior unrecorded deed, in absence of actual notice; Duvall v. Speed, 1 Md. Ch. 236, holding judgment creditor not bound to seek payment out of proceeds of sale of property subject to lien, but may enforce lien against property in hands of purchaser; Denison v. Shuler, 47 Mich. 602, **41 Am. Rep. 736**, 11 N. W. 402, giving vendor's lien preference over mechanic's lien for repairs subsequently made at purchaser's request; Andrews v. Wilkes, 6 How. (Miss.) 565, **38 Am. Dec. 453**, holding that docketing of judgment first rendered is notice to all junior judgment creditors of lien created by older judgment; Fonte v. Campbell, 7 How. (Miss.) 383, holding that stay of execution which expires before recovery of subsequent judgment against same defendant does

not impair lien of older judgment; Halyburton v. Greenlee, 72 N. C. 320, holding that purchaser under junior judgment buys only an equity of redemption and gets legal title only upon satisfying prior lien; dissenting opinion in Bank v. Anderson, 14 Iowa, 560, majority holding that second mortgagee has superior equity over assignee of first mortgage, which has been satisfied by payment to wrong party; The Alida, Abb. Adm. 172, Fed. Cas. 199, Love v. Williams, 4 Fla. 136, Sellers v. Corwin, 5 Ohio, 403, 24 Am. Dec. 304, Wells, Fargo & Co. v. Smith, 2 Utah, 50, arguendo; dissenting opinion in Ex parte Christy, 3 How. 332, 11 L. Ed. 622, where rule is approved in general discussion.

Distinguished in Thompson v. Phillips, 1 Bald. 278, 281, 284, 285, Fed. Cas. 13,974, adopting rule as settled by courts of State, and holding that sale by sheriff under judgment passed title to purchaser discharged from prior judgment; Branch Bank v. Broughton, 15 Ala. 132, Lancaster v. Jordan, 78 Ala. 199, and Caldwell v. Houser, 108 Ala. 129, 19 South. 797, under statute; Scrivener v. Dietz, 68 Cal. 4, 8 Pac. 611, allowing holder of attachment lien to show facts rendering his lien superior to lien of prior mortgage; Coombs v. Jordan, 3 Bland Ch. 323, 324, 22 Am. Dec. 270, 271, and Cape Sable Co.'s Case, 3 Bland Ch. 655, holding that where lien is barred by lapse of time under statute, it cannot be revived so as to defeat intermediate lien; Gould v. Luckett, 47 Miss. 114, holding that lien of judgment rendered against husband cannot defeat widow's right of dower. Criticised in Presbyterian Corporation v. Wallace, 3 Rawle, 158, holding rule inapplicable under settled practice in Pennsylvania.

Miscellaneous. Cited in Mansony v. Bank, 4 Ala. 749, on point that judgment creates lien upon lands of debtor; Landes v. Perkins, 12 Mo. 261, as instance where execution issued on property of estate of deceased judgment debtor.

12 Wheat. 180–183, 6 L. Ed. 594, UNITED STATES v. TILLOTSON.

Where fact necessary to defense is controverted, it is error to direct jury that matters produced in evidence are sufficient to bar action.

Approved in Weller v. Hilderbrandt, 19 S. D. 49, 101 N. W. 1109, instruction considered and held to be on weight of evidence; State v. Van Winkle, 6 Nev. 352, holding it to be error to charge jury in a criminal cause that "circumstantial evidence is more satisfactory than the testimony of a single individual who swears he has seen an act committed"; Adams v. Smith, 19 Nev. 271, 9 Pac. 341, citing principal case on point that where facts are not controverted it is not error to take them from consideration of jury; Robinson v. Schly, 6 Ga. 525, condemning practice in courts of assuming any fact to be established by proof in charge to jury.

Miscellaneous. Erroneously cited in Smith v. Winston, 2 How. (Miss.) 609, and Wiggins v. McGimpsey, 13 Smedes & M. 541; Darden v. Lines, 2 Fla. 575, cites principal case as instance where Supreme Court rendered an opinion upon an agreed case, but refused to follow the practice in an

equity cause entered in court below by consent of parties (but see dissenting opinion, 2 Fla. 586).

12 Wheat. 183–193, 6 L. Ed. 595, THORNTON v. WYNN.

Indorser not duly notified of dishonor who, knowing this, promises to pay note, waives demand and notice.

Approved in Harmon v. Moffitt, 6 D. C. 299, holding indorser who was party to original contract for which indorsed note was given was liable on promise made after dishonor to pay same, though demand and notice not shown; Nevins v. Moore, 221 Mo. 354, 120 S. W. 50, holding request of indorsee to forbear, made by indorser after maturity of note but without knowledge of presentment, did not waive demand and notice; Jordan v. Reed, 77 N. J. L. 594, 71 Atl. 284, holding admission of liability by indorser after maturity of note not waiver of demand and notice; Ashland Coal & Coke Co. v. Hull Coal & Coke Corp., 67 W. Va. 513, 68 S. E. 128, holding partial interruption of continuous duty imposed by contract, amounting to breach of condition precedent, was unavoidable when such partial performance had not been accepted until after interruption ceased; Reynolds v. Douglas, 12 Pet. 505, 9 L. Ed. 1174, but holding that promise by guarantor to pay note qualified with condition which was not accepted does not amount to such waiver; Hyde v. Stone, 20 How. 176, 15 L. Ed. 876, holding that insertion of bill amongst debts of insolvent upon his schedule is evidence of liability to pay, which should go to jury; Sigerson v. Mathews, 20 How. 500, 15 L. Ed. 991, denying right of indorser to set up want of demand and notice upon proof that after maturity he promised to pay note, knowing it had not been presented for payment; Bank v. Johnson, 9 Ala. 624, holding that where creditor extends time of payment and surety with knowledge of fact agrees to waive his rights, he is liable to suit for payment without proof of consideration for waiver; Bolling v. McKenzie, 89 Ala. 475, 7 South. 659, following rule; Hazard v. White, 26 Ark. 159, holding parol evidence admissible to show waiver at time of indorsement; State v. Churchill, 48 Ark. 445, 3 S. W. 361, applying principle in holding that surety on bond does not waive objection to alteration of bond unless he have knowledge of all material facts; Breed v. Hillhouse, 7 Conn. 528, holding demand and notice unnecessary where guaranty is absolute; Camp v. Bates, 11 Conn. 494, holding in action on note that plaintiff, although he has alleged demand and notice, need not prove it if he proves waiver; Lockwood v. Crawford, 18 Conn. 374, holding that waiver will not be presumed without satisfactory proof of facts; Whitaker v. Morrison, 1 Fla. 34, 44 Am. Dec. 632, holding waiver to be presumable from part payment of note by indorser; Spann v. Baltzell, 1 Fla. 326, 46 Am. Dec. 366, holding promise to pay after notice receivable as evidence of notice; Gove v. Vining, 7 Met. 214, 39 Am. Dec. 772, holding demand and notice waived where indorser promised to pay knowing that presentment had been attempted during maker's absence; Wilson v. Huston, 13 Mo. 149, 53 Am. Dec. 141, holding waiver of demand and notice

to be inferable from actions of indorser having knowledge of facts; Jaccard v. Anderson, 37 Mo. 101, but holding that waiver of notice does not imply waiver of demand; Salisbury v. Renick, 44 Mo. 559, holding proper a charge to jury that promise to pay after maturity, with knowledge of failure to demand payment, fixes liability of indorser; Bank v. Colcord, 15 N. H. 125, 41 **Am. Dec.** 689, holding where surety has paid interest in advance upon note, it is evidence of his assent to extension of time; Barkalow v. Johnson, 16 N. J. L. 400, holding indorser entitled to strict notice unless such notice has been clearly and unconditionally waived; Bank v. Southard, 17 N. J. L. 474, 35 **Am. Dec.** 522, holding void an indorser's promise to pay note after maturity, made without knowledge of his discharge by reason of failure to demand payment; Bank v. Baldwin, 17 N. J. L. 496, holding indorser entitled to notice of presentment and demand, although at time of indorsement he knew of insolvency of maker; Tebbetts v. Dowd, 23 Wend. 384, 404, holding evidence admissible to show promise by indorser after maturity to pay note and statement that he knew note had been dishonored; Glaser v. Rounds, 16 R. I. 237, 14 Atl. 864, holding that, in order to charge indorser upon such promise, it must be affirmatively alleged that he knew of failure to demand payment; Ford v. Dallam, 3 Cold. 71, holding it error to charge jury that waiver might be inferred from unqualified acknowledgment of debt; Williams v. Bank, 9 Heisk. 445, holding indorser liable where he promised absolutely to pay after expressing doubt as to his legal liability to do so; Bogart v. McClung, 11 Heisk. 119, 27 **Am. Rep.** 741, reviewing authorities and holding mere acknowledgment of liability made with knowledge of facts sufficient to charge indorser; Schierl v. Baumel, 75 Wis. 74, 43 N. W. 726, holding burden of proof to be on person relying upon promise to show that it was made with knowledge of material facts; Meyer v. Hibsher, 47 N. Y. 272, arguendo.

Distinguished in Shirley v. Fellows, 9 Port. 302, under facts; Rittenhouse v. Kemp, 37 Ind. 261, holding surety on note discharged by extension of time given to principal without his knowledge.

Part payment of check as waiver of presentment, demand and notice. Note, 11 **Am. Dec.** 682.

Promise to pay after maturity as waiver of notice. Note, 8 **Am. Dec.** 304, 305.

Excusing demand and notice. Note, 1 **Am. Dec.** 99.

Necessity for new consideration to support waiver of lack of notice of dishonor, or subsequent promise by indorser. Note, 29 **L. R. A.** 307.

Breach of warranty without offer to return property and rescind contract is no defense to action on purchase money note.

Approved in Williams Transp. Line v. Cole Transp. Co., 129 Mich. 216, 88 N. W. 475, holding on warranty that steamer would make fifteen miles

an hour, vendee having insisted and relied on warranty could not ask relief against the alleged false representations; McCormick Harvesting Machine Co. v. Knoll, 57 Neb. 793, 78 N. W. 395, holding on executing sale of personalty with warranty of quality, and if not satisfactory may be returned, there may be a rescission for breach of warranty; Elminger v. Drew, 4 McLean, 393, 394, Fed. Cas. 4416, denying right of indorser of note to set up partial failure of consideration as defense to action on note; McMillion v. Pigg, 3 Stew. 167, denying jurisdiction of equity to enjoin execution of judgment in such case; Pulsifer v. Hotchkiss, 12 Conn. 240, denying right of maker of note to defend upon ground of partial failure of consideration, where damage sustained by such failure is unliquidated; Pottle v. Thomas, 12 Conn. 574, denying right of maker to so defend in action on note given conditionally when he himself had not complied with conditions; Marsh v. Low, 55 Ind. 274, denying right of acceptor of bill to so defend against action by payee; Gillespie v. Torrance, 25 N. Y. 310, 82 Am. Dec. 358, denying right of accommodation indorser to avail himself of breach of warranty by way of counterclaim; Vaughan v. Porter, 16 Vt. 271, holding, in action for price of patent right, that evidence was inadmissible to reduce damages by showing worthlessness of patent; Duff v. Ivy, 3 Stew. 144, Kellogg v. Denslow, 14 Conn. 424, Coyle v. Baum, 3 Okl. 706, 41 Pac. 393, Brown v. Sayles, 27 Vt. 232, arguendo.

Modified in Withers v. Greene, 9 How. 225, 13 L. Ed. 114, holding in action upon bill under seal that defendant could show partial failure of consideration in mitigation of damages; Dushane v. Benedict, 120 U. S. 639, 30 L. Ed. 811, 7 Sup. Ct. 698, and Morse v. Moore, 83 Me. 485, 23 Am. St. Rep. 790, 13 L. R. A. 227, 22 Atl. 366, in action for goods sold and delivered, defendant could prove damages resulting from breach of warranty of quality; Wade v. Scott, 7 Mo. 512, holding evidence of true value of article sold to be admissible in diminution of purchase price sued for; Carter v. Walker, 2 Rich. 45, under statute providing for discount in case of partial failure of consideration.

Distinguished in Morehead v. Gayle, 2 Stew. & P. 229, 232, where, in action on note for price of slave, defendant was allowed to show breach of warranty, slave having died before offer of return could be made; Hancock v. Tucker, 8 Fla. 443, holding rule inapplicable to case of sale of property of no value; Harrington v. Stratton, 22 Pick. 514, and Reab v. McAlister, 8 Wend. 117, asserting right of defendant in assumpsit on promissory note to prove fraud in mitigation of damages.

Criticised in dissenting opinion in Jones v. Streeter, 8 Fla. 93, arguendo.

Limited in dissenting opinion in Ferguson v. Huston, 6 Mo. 418, majority applying rule to state of facts similar to those in principal case.

If sale be absolute and there be no agreement or consent of vendor to take back goods, vendee is confined to action upon warranty unless it be proved

that vendor knew of unsoundness and vendee tendered return within reasonable time.

Approved in McRae v. Lonsby, 130 Fed. 20, 64 C. C. A. 385, where defendants claim right to rescind contract by reason of falsity of representations made by plaintiff concerning property purchased, it was immaterial whether defendants relied on representations per se, or on express warranty of their truth; Gay Oil Co. v. Roach, 93 Ark. 456, **137 Am. St. Rep. 95, 27 L. R. A. (N. S.) 914**, 125 S. W. 123, holding guaranty against leakage in sale of oil in barrels was warranty giving purchaser right of damages only on breach; Lyon v. Bertram, 20 How. 154, 155, **15 L. Ed. 850**, denying right of vendee to rescind contract for purchase of flour on ground that it was not brand called for in contract, part of flour having been delivered and used; Callanan v. Brown, 31 Iowa, 339, affirming right of purchaser of municipal bonds to sue upon warranty contained therein; Lightburn v. Cooper, 1 Dana, 275, holding vendee to be confined to action upon warranty where offer to return has been refused by vendor; Junkins v. Simpson, 14 Me. 369, holding that where exchange is tainted with fraud upon one side, party injured cannot maintain replevin for property given by him unless he has wholly repudiated contract; Taymon v. Mitchell, 1 Md. Ch. 503, where offer to return negroes found to be unsound, made within month after sale, and as soon as unsoundness was discovered, was held to be within reasonable time; Walls v. Gates, 6 Mo. App. 246, holding that offer to return in order to work rescission must be such that vendor has only to signify acceptance in order to make property vest in him; Voorhees v. Earl, 2 Hill, 291, **38 Am. Dec. 590**, and Scranton v. Mechanics' Trading Co., 37 Conn. 133, 134, denying right of vendee to recover back price paid, in action of assumpsit; Day v. Pool, 52 N. Y. 419, **11 Am. Rep. 721**, affirming judgment for plaintiff in action on warranty as to quality; Turnpike Co. v. Commonwealth, 2 Watts, 434, refusing to entertain suit to recover money paid for stock until stock transferred to company; Kase v. John, 10 Watts, 109, **36 Am. Dec. 149**, refusing to entertain action for money had and received where vendor refused to take back property sold absolutely; Dailey v. Green, 15 Pa. St. 126, affirming right of vendor of timber to recover contract price where vendee on discovering its defects did not offer to return it and it was destroyed; Hull v. Caldwell, 3 S. D. 454, 54 N. W. 101, under statute adopting rule; Allen v. Anderson, 3 Humph. 583, **39 Am. Dec. 198**, where facts were similar to those in principal case; Rosson v. Hancock, 3 Sneed, 436, holding vendee entitled to bring action on case for fraud in concealing defects in property sold where offer to return was made within reasonable time; Harrington v. Wells, 12 Vt. 509, denying right of vendee to rescind because price paid was exorbitant; West v. Cutting, 19 Vt. 539, applying principle in holding that where vendee returned goods to vendor as being of inferior quality and vendor agreed to replace them, in order to charge vendor on account goods should have been called for by vendee; Lattin v. Davis, Lalor's Supp. to Hill & D. 16, arguendo.

Distinguished in Coyle v. Baum, 3 Okl. 706, 41 Pac. 393, where one bought oats for horse feed and found they contained castor beans, and returned unused portion, receiving money back therefor, there was neither compromise nor accord and satisfaction for breach of warranty; Pope v. Allis, 115 U. S. 373, **29 L. Ed. 398**, 6 Sup. Ct. 73, asserting right of vendee to reject goods upon delivery if not of quality stipulated in contract; Cozzins v. Whitaker, 3 Stew. & P. 329, holding offer to return unnecessary where vendee merely seeks to recover for damage sustained by breach of warranty.

Right of rescission on sale by sample. Note, **7 Am. Dec. 131.**

Right to reject goods for breach of warranty. Note, **27 L. R. A. (N. S.) 920, 921.**

Implied warranty on sale of goods by description. Note, **23 E. R. C. 463.**

Where sale is conditional and vendee is at liberty to return goods if not satisfactory, offer to return is presumed accepted.

Cited in Sycamore Co. v. Grundrad, 16 Neb. 537, 20 N. W. 835, where vendor's refusal to receive property back was held to relieve vendee from necessity of returning it and to establish his right to recover purchase price already paid; Colville v. Besly, 2 Denio, 143, holding that where article delivered is not article contracted for, vendee may recover back purchase price without offer to return; Johnston v. Trask, 116 N. Y. 141, **15 Am. St. Rep. 395, 5 L. R. A. 632**, 22 N. E. 378, citing as instance where court recognized validity of such contract; Williams v. Hurt, 2 Humph. 70, affirming judgment for plaintiff in assumpsit for money had and received where defendant accepted return of property.

Distinguished in Litchfield v. Irvin, 51 N. Y. 58, denying right of vendor to rescind contract where option was solely with vendee to determine whether transaction should be absolute sale or loan.

Miscellaneous. Cited erroneously in De Armas v. New Orleans, 5 La. 176, and dissenting opinion in State v. Cumberland etc. R. R. Co., 40 Md. 71; Garr v. Stokes, 16 N. J. L. 408, as instance where Supreme Court directed lower court to award venire facias de novo; Dawes v. Peebles, 6 Fed. 860, and Getty v. Rountree, 2 Pinn. 391, **54 Am. Dec. 144**, as authority for holding that vendee may set up breach of express warranty as defense to action for price.

12 Wheat. 193–199, 6 L. Ed. 599, MALLOW v. HINDE.

Equity will not act where court can make no decree between parties before it without affecting rights of those not before it.

Approved in Bogart v. Southern Pacific Co., 228 U. S. 146, **57 L. Ed. 772**, 33 Sup. Ct. 497, holding suit properly dismissed by Circuit Court for lack of indispensable party; Hyams v. Old Dominion Co., 113 Me. 345,

93 Atl. 902, and Hyams v. Old Dominion Co., 204 Fed. 684, both holding in action by minority stockholder against another corporation, which held control of stock of first corporation, to enjoin voting of stock, first corporation was indispensable party; Mannington v. Hocking Valley Ry. Co., 183 Fed. 148, holding in action to enjoin combination of railroads as unlawful, right of one corporation not party to suit, to hold stock of other would not be adjudicated; United States Telephone Co. v. Central Union Tel. Co., 171 Fed. 134, holding in suit by telephone company to enjoin another company from connecting with local companies, with whom plaintiff had contract for exclusive connections, such local companies were necessary parties; Shingleur v. Jenkins, 111 Fed. 453, holding when complainant sues defendant for an accounting for proceeds of drafts drawn by complainant's agent in conspiracy with defendant, the agent is a necessary party; Gillespie v. Gibbs, 147 Ala. 454, 41 South. 869, holding in action by taxpayer to enjoin ultra vires acts of town officers, corporation itself was indispensable party; Willis v. Lauridson, 161 Cal. 117, 118 Pac. 535, holding in action by stockholder of co-operative business association to enjoin adoption of by-laws and payment of certain disputed dividends by directors, all stockholders should be represented; Archuleta v. Archuleta, 52 Colo. 608, 123 Pac. 823, holding present holders of stock certificates sought to be subjected to payment of alimony were indispensable parties to suit; Weightman v. Washington Critic Co., 4 App. D. C. 154, refusing to reverse decree for want of parties when objection was first made on appeal and party was not indispensable; First Nat. Bank v. Henry, 156 Ind. 7, 58 N. E. 1059, holding where holder of note sued maker, making payee party by publication, alleging that plaintiff held note as security and payee intended to indorse it, but through inadvertence note was not indorsed, an order requiring indorsement against payee could not be made on publication of summons; Atkins v. Atkins, 195 Mass. 131, **122 Am. St. Rep. 221, 11 L. R. A. (N. S.)** 277, 80 N. E. 808, holding in action to enforce contract of sale under foreclosure, neither administrator nor heirs of purchaser were necessary parties when master found defendant did not become bound by contract; Moore v. Maryland Casualty Co., 73 N. H. 519, **111 Am. St. Rep. 649**, 63 Atl. 491, where street railway employer obtained judgment, and on railroad's insolvency sued indemnity company to compel payment of indebtedness on policy to railroad, latter's receiver indispensable party; Brown v. Trent, 36 Okl. 250, 128 Pac. 900, holding void, probate sale of minor's lands made without notice to guardian; Lynch v. United States, 13 Okl. 158, 73 Pac. 1100, applying rule in suit to cancel town-site patent; State v. Gormley, 40 Wash. 604, **3 L. R. A. (N. S.)** 256, 82 Pac. 930, action to restrain payment of county warrants cannot be maintained where holders of warrants are not made defendants; Findlay v. Hinde, 1 Pet. 246, **7 L. Ed. 130**, holding vendor necessary party to bill for specific performance to convey land, though he has parted with all title and his grantees are made parties; Shields v. Barrow, 17 How. 140, 141, **15 L. Ed. 160, 161**, denying jurisdiction of equity to rescind contract affecting rights of persons not before

court; Barney v. Baltimore, 6 Wall. 285, **18 L. Ed. 826**, ordering dismissal of bill for partition where some of necessary parties were beyond jurisdiction of court; California v. Southern Pacific Co., 157 U. S. 249, 250, **39 L. Ed. 690, 691**, 15 Sup. Ct. 599, 600, dismissing bill where joinder of necessary party would oust jurisdiction of Supreme Court; Gray v. Larrimore, 4 Sawy. 650, 2 Abb. (U. S.) 556 (and note, 2 Abb. (U. S.) 554), Fed. Cas. 5721, holding invalid a decree against partner not made party to proceedings for dissolution and account; Stenchfield v. Robinson, 2 Hask. 386, Fed. Cas. 13,359a, and Walker v. Cambern, 5 Kan. App. 548, 47 Pac. 982, refusing injunction where necessary parties not subject to process of court; Bank v. Skelton, 2 Blatchf. 19, Fed. Cas. 2739, applying principle in enjoining prosecution of suit in Federal court until necessary suit adjudicated in State court; Bank v. Skelton, 2 Blatchf. 28 Fed. Cas. 2740, affirming 2 Blatchf. 19, Fed. Cas. 2739 in refusing to dissolve injunction; Florence etc. Co. v. Singer etc. Co., 8 Blatchf. 127, Fed. Cas. 4884, dismissing suit arising under assignment of patent where joinder of necessary parties would have ousted jurisdiction; Land Co. v. Elkins, 22 Blatchf. 204, 20 Fed. 546, refusing injunction where necessary party was beyond jurisdiction; Tobin v. Walkinshaw, McAll. 29, 32, 37, Fed. Cas. 14,068, reviewing authorities and denying motion for injunction and appointment of receiver where parties jointly interested were not all subject to process; Litchfield v. Register, Woolw. 306, Fed. Cas. 8388, refusing to enjoin officers from allowing settlers to enter lands under pre-emption laws, where settlers were not made parties; Davis v. Davis, 89 Fed. 538, refusing to set aside agreement made by parties not before court; Winter v. Ludlow, 30 Fed. Cas. 332, allowing supplemental bill to admit party whose interest accrued after suit commenced; Chester v. Chester, 7 Fed. 4, holding mortgagee necessary party to bill to establish resulting trust in land possessed by mortgagor; Crane v. Chicago etc. Ry. Co., 20 Fed. 405, refusing to allow removal of suit for specific performance, where necessary party not subject to Federal process; Connolly v. Wells, 33 Fed. 208, sustaining demurrer to bill against executors for accounting, where one executor not subject to Federal jurisdiction; Gregory v. Swift, 39 Fed. 711, sustaining demurrer to bill to recover proceeds of note where all of joint owners not made parties; Miller v. Merine, 43 Fed. 269, applying principle in holding person not bound by judgment on ejectment, he having had no notice of proceedings; Chadbourne v. Coe, 45 Fed. 826, dismissing bill in equity against trustee to subject property alleged to have been fraudulently conveyed to him, debtor not having been made party; Porter v. Clements, 3 Ark. 382, refusing decree of foreclosure where all parties interested were not joined; Spear v. Campbell, 4 Scam. 427, dismissing creditor's bill filed to set aside fraudulent conveyance, debtor not having been made party; State v. Anderson, 5 Kan. 116, dismissing bill to enjoin State treasury from paying over to corporation proceeds of sales of land granted to them, corporations not having been made parties; Adler v. Wolff, 36 La. Ann. 175, refusing to enforce lien against one not notified

of proceeding; Greiner v. Klein, 28 Mich. 18, holding sale under decree in partition proceedings did not bar widow's right of dower, she not having been joined with husband; McPike v. Wells, 54 Miss. 155, holding decree of court ordering sale of lands of intestate not binding as to necessary parties who had no notice; Erickson v. Nesmith, 46 N. H. 375, dismissing bill against stockholders to charge them individually for debts due from corporation, all stockholders not having been joined; Hallett v. Hallett, 2 Paige Ch. 19, holding all legatees to be necessary parties to bill for distribution of estate; Stallcup v. Tacoma, 13 Wash. 153, 52 Am. St. Rep. 33, 42 Pac. 545, holding decree declaring municipal bonds invalid is inoperative as to bona fide holders who had no notice of proceeding; State ex rel. v. Superior Court, 14 Wash. 695, 45 Pac. 673, holding assignee of insurance policy to be necessary party to suit to have proceeds subjected to creditors' claims against insured; dissenting opinion in Paine v. French, 4 Ohio, 327, Cookingham v. Ferguson, 8 Blatchf. 495, 4 Bank. Reg. 642, Fed. Cas. 3182, Schuyler v. Pelissier, 3 Edw. Ch. 193, arguendo.

Distinguished in United States v. Parrott, McAll. 281, 284, Fed. Cas. 15,998, granting motion to enjoin waste, where agents of nonresidents interested were within jurisdiction.

Fact that interest exists in another person beyond jurisdiction of court will not prevent decree upon merits.

Approved in Minnesota v. Northern Securities Co., 184 U. S. 237, 46 L. Ed. 516, 22 Sup. Ct. 322, holding in action by State against corporation of another State, to enjoin that corporation from interfering with management or control, and from holding any stock of two corporations of complainant State, the domestic corporations are necessary parties; Camp v. Bonsal, 203 Fed. 918, 122 C. C. A. 207, refusing to dismiss suit for nonjoinder of necessary party, when decree could be rendered without affecting his rights; Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 828, 83 C. C. A. 536, holding specific performance of agreement to sell land could be given though defendant had made prior agreement to sell to another not party to suit; Talbot J. Taylor etc. Co. v. Southern Pac. Co., 122 Fed. 152, holding stockholder is indispensable party to suit to enjoin voting of his stock at meeting of shareholders for election of directors; Einstein v. Georgia Southern & F. Ry. Co., 120 Fed. 1010, holding in action by two of three trustees against corporation residing in another State, the fact that one of the trustees refusing to join was made defendant resided in same State as corporation did not deprive Federal court of jurisdiction, as trustee was not really party to controversy; Eldred v. American Palace Car Co., 105 Fed. 459, holding in action by minority stockholders to set aside transfer of corporation property, the corporation is indispensable party; Consolidated Water Co. v. City of San Diego, 93 Fed. 852, holding in suit by mortgagee of property of water company to restrain enforcement of city ordinance fixing rates, the company is necessary party complainant; Story v. Livingston, 13 Pet. 375, 376, 10 L. Ed. 208, holding it to be too late to take objection for first time at hearing,

because of nonjoinder of party, where decision can be made between parties before court; Goldsmith v. Gilliland, 10 Sawy. 618, 24 Fed. 157, asserting jurisdiction of equity to quiet title upon suit of person in possession, although all adverse claimants not made parties to bill; Society etc. v. Hartland, 2 Paine, 543, 544, Fed. Cas. 13,155, affirming decree where third person not necessary to decision on merits; Harrison v. Urann, 1 Story, 66, Fed. Cas. 6146, holding that Circuit Court may dispense with parties who, if joined, would oust jurisdiction, provided decision on merits will not prejudice their rights; Union etc. Co. v. Daugberg, 81 Fed. 90, holding that one tenant in common may maintain suit in equity to restrain infringement of water rights, without joining cotenant; Lucas v. Bank, 2 Stew. 291, 326, reversing decree dismissing bill where case could have been decided without prejudice to rights of third parties; to same effect also in Marr v. Southwick, 2 Port. 370; Heirs of Holman v. Bank, 12 Ala. 423, holding that decree may be had against one of two heirs who submits himself to jurisdiction, where other, because of nonresidence, cannot be made party; Bank v. Lee, 11 Conn. 120, **27 Am. Dec.** 717, allowing one creditor to maintain suit for accounting in interest of all creditors; Thomas v. Kennedy, 24 Iowa, 403, **95 Am. Dec.** 744, holding heirs of grantor not necessary parties to bill to quiet title if their interests are not affected; Lawrence v. Rokes, 53 Me. 116, overruling demurrer, where persons named as parties were nonresidents and judgment could be had without them; Florence etc. Co. v. Grover etc. Co., 110 Mass. 9, overruling demurrer, where presence of foreign corporation in court was unnecessary; Board of Supervisors v. Railroad Co., 24 Wis. 134, holding decree not void as between parties before the court, because of absence of necessary party; Smith v. Ford, 48 Wis. 145, 2 N. W. 150, holding cestui que trust not necessary party to action for fraud against trustee.

Distinguished in Talbot J. Taylor etc. Co. v. Southern Pac. Co., 122 Fed. 155, holding court has no power to enjoin voting of stock at election of directors of corporation, in suit for that purpose, because the stockholder is not before court, and court has no power to prevent voting of the stock until complainant can implead stockholder.

Miscellaneous. Erroneously cited in Reab v. McAlister, 8 Wend. 126.

12 Wheat. 199–206, 6 L. Ed. 601, CONNOR v. FEATHERTONE.

Miscellaneous. Erroneously cited in the following cases: Baker v. Biddle, 1 Bald. 403, Fed. Cas. 764; Hardeman v. Downer, 39 Ga. 429; dissenting opinion in Ex parte Crane, 5 Pet. 204, **8 L. Ed.** 98.

12 Wheat. 206–212, 6 L. Ed. 603, EDWARDS' LESSEE v. DARBY.

In construing ambiguous law, contemporaneous construction of persons appointed to execute it entitled to great respect.

Approved in Houghton v. Payne, 194 U. S. 100, 103, **48 L. Ed.** 891, 892, 24 Sup. Ct. 590, books complete in themselves, though published at stated

intervals and in consecutive numbers, entitled to second-class postage rates; United States v. Finnell, 185 U. S. 244, 46 L. Ed. 893, 22 Sup. Ct. 636, holding clerk of District and Circuit Court is entitled to per diem compensation, recognized as his right under act March 3, 1887, c. 362, for every day he enters orders on journal and other proceedings transmitted to him by different judges, since to decide otherwise would overrule uniform construction given by Treasury Department; Fairbank v. United States, 181 U. S. 307, 45 L. Ed. 872, 21 Sup. Ct. 658, holding stamp tax imposed on foreign bill of lading under Act Cong., June 16, 1898 (30 Stats. at Large, 451, c. 498), § 6, is tax on articles included in bill and prohibited by United States Comp. Stats., art. I, § 9; Findlay v. United States, 225 Fed. 350, following Secretary of Treasury's construction of Revised Statutes, § 5294; First Nat. Bank v. United States, 206 Fed. 379, 46 L. R. A. (N. S.) 1145, 124 C. C. A. 256, following Secretary of Treasury's construction of section 239, Penal Code; United States v. Newport News Shipbuilding etc. Co., 178 Fed. 204, 101 C. C. A. 514, construing contract for building and testing vessel for United States according to practice of Navy Department; Lorsch v. United States, 135 Fed. 215, provision in par. 435, Tariff Act 1897, c. 11, § 1, sched. N., for imitation of precious stones not exceeding an inch in dimensions, measurement contemplated is that of any single dimension; Britt v. United States, 122 Fed. 514, holding under Act Cong., April 25, 1890 (26 Stat. 62), providing for appointment of World's Columbian Commission, the commission had authority at its first meeting to elect an auditor from among its members; Southern Pine Co. v. Hall, 105 Fed. 91, holding under act April 8, 1871 (Acts Miss. 1871, pp. 482–487), relating to charter of the Pearl River Improvement & Navigation Co., a bond required of said company for expenditure of certain money for improvements need not be signed by company; Fitzwilliam v. Campbell, 99 Fed. 37, holding under act of Congress of Texas, December 20, 1836 (Hart. Dig. Tex., 1850, p. 146), creating probate court, the court has power to sell both real and personal property of estate; M'Fadden v. Mountain View Min. & Mill. Co., 97 Fed. 677, holding construction placed on act of Congress relating to land office by land department which has uniformly been followed is entitled to great weight; State v. Board of School Commrs., 183 Ala. 575, 63 South. 82, applying rule in construing statutes relating to appropriation of sixteenth section for school purposes; Avery v. Pima Co., 7 Ariz. 32, 60 Pac. 703, construing Rev. Stats. U. S., §§ 5539, 5547, relating to control of Federal prisoners in state prisons; Cheyney v. Smith, 3 Ariz. 145, 23 Pac. 681, holding organic acts limits session of legislature to sixty legislative days and sixty consecutive days; United States v. Root, 22 App. D. C. 431, following construction placed by Secretary of War on Act of February 2, 1901, providing for increase in army; State v. O'Neil, 147 Iowa, 526, Ann. Cas. 1912B, 691, 33 L. R. A. (N. S.) 796, 126 N. W. 458, holding person performing acts forbidden by statute after it had been held void by State Supreme Court and before it had been upheld by United States Supreme Court could not be prosecuted thereunder;

State v. United States Fidelity & Guaranty Co., 93 Md. 318, 48 Atl. 920, holding where advances made by testator to heirs clearly appeared to be intended as charges they should be considered as advances and not draw interest; Henry v. State, 87 Miss. 59, 39 South. 872, construing Rev. Code, 1892, § 3201, relating to working of convicts on farm leased for that purpose; Campbell v. Moran, 71 Neb. 619, 99 N. W. 500, applying rule to homestead statute; Saunders v. Nashua, 69 N. H. 493, 43 Atl. 621, holding where resolution of city council in regard to duties and compensation of its officers is ambiguous, the construction placed upon it by counsel with consent of incumbent is competent evidence of intention of council; Labadie v. Smith, 41 Okl. 779, 140 Pac. 429, following construction placed by Department of Indian Affairs on statute allotting lands to Indians; McClelland v. Lewis, 40 Okl. 555, 139 Pac. 991, holding construction placed by executive officers on statute relating to employing clerical help for board of agriculture was erroneous; Sanders v. Sanders, 28 Okl. 72, 117 Pac. 343, following construction placed by executive officers on statute relating to alienation of Indian lands; Pitts v. Logan County, 3 Okl. 740, 41 Pac. 591, act regulating accounting by clerks of territorial District Court for fees is void; dissenting opinion in Bates etc. Co. v. Payne, 194 U. S. 111, 48 L. Ed. 896, 24 Sup. Ct. 595, majority holding refusal by postmaster-general to admit to mails periodical as second class, each issue of which is complete in itself, not reviewable by courts; Smythe v. Fiske, 23 Wall. 382, 23 L. Ed. 49, affirming construction placed upon revenue act by Treasury Department; United States v. Moore, 95 U. S. 763, 24 L. Ed. 589, confirming appointment made by Secretary of Navy under act of Congress; United States v. Pugh, 99 U. S. 269, 25 L. Ed. 323, refusing to reverse decision of Court of Claims based upon its construction of act relative to abandoned property; Hahn v. United States, 107 U. S. 406, 27 L. Ed. 529, 2 Sup. Ct. 497, following construction of Treasury Department of act relative to fines and penalties provided for violation of revenue laws; Five Per Cent Cases, 110 U. S. 485, 28 L. Ed. 202, 4 Sup. Ct. 218, construing act of Congress appropriating part of proceeds of sales of public lands for use of States upon admission to Union; Brown v. United States, 113 U. S. 571, 28 L. Ed. 1080, 5 Sup. Ct. 650, construing act relating to retirement of naval officers; United States v. Hill, 120 U. S. 180, 182, 30 L. Ed. 631, 632, 7 Sup. Ct. 516, 517, affirming 25 Fed. 379, in holding conclusive a uniform construction by courts and officers, of act prescribing amount of clerk's fees in naturalization proceedings; United States v. Johnson, 124 U. S. 252, 31 L. Ed. 396, 8 Sup. Ct. 455, affirming construction by Treasury Department of act providing for disposition of proceeds of sales of abandoned property; Merritt v. Cameron, 137 U. S. 552, 34 L. Ed. 775, 11 Sup. Ct. 178, construing act relative to ascertainment and liquidation of duties by collector of customs; Schell v. Fauché, 138 U. S. 572, 34 L. Ed. 1043, 11 Sup. Ct. 380, construing act prescribing form of protest against exaction of duties; United States v. Alabama etc. R. R. Co., 142 U. S. 621, 35 L. Ed. 1136, 12 Sup. Ct. 308, refusing to change construction

of act fixing rate of pay to railroads for carrying mails; United States v. Healey, 160 U. S. 141, 40 L. Ed. 371, 16 Sup. Ct. 249, confirming practice of Land Department in sales of desert lands; Hedden v. Iselin, 24 Blatchf. 459, 31 Fed. 268, holding collector of port not liable to penalty for exacting fee of importer, where such act was done under direction of Secretary of Treasury; Swayne v. Hager, 13 Sawy. 621, 37 Fed. 783, holding that definition adopted by customs officers will not be regarded as changed by act of Congress unless intention to change is clearly manifest; Gear v. Grosvenor, 1 Holmes, 218, Fed. Cas. 5291, approving practice of commissioner of patents in ordering publication of notice in suit for infringement; United States v. Union Pac. Ry. Co., 37 Fed. 555, refusing to set aside grant of lands executed by Land Department under act of Congress and acquiesced in for long period; Rand v. United States, 38 Fed. 667, holding commissioners of Treasury Department entitled to fees for issuing writs according to construction of act of Congress by officers of department; United States v. Barber, 74 Fed. 488, 41 U. S. App. 424, construing act of Congress relative to interest on judgments recovered in Court of Claims; Grossett v. Townsend, 86 Fed. 912, s. c., sub nom. The J. D. Peters, 56 U. S. App. 721, adopting construction placed by Treasury Department on act permitting seamen to stipulate for allotment of wages to creditor; United States v. Dean etc. Co., 87 Fed. 456, 57 U. S. App. 722, following construction of revenue act under which linseed oil cake was declared to be a manufactured article and not waste; Bloxham v. Consumers etc. Co., 36 Fla. 543, 51 Am. St. Rep. 49, 29 L. R. A. 510, 18 South. 447, holding act of controller assessing railroads conclusive as to liability, under act taxing railroads generally; Commonwealth v. Lockwood, 109 Mass. 339, 12 Am. Rep. 713, confirming pardon granted by Governor under State Constitution; Holbrook v. Wightman, 31 Minn. 172, 17 N. W. 282, construing homestead statute; Barney v. Leeds, 51 N. H. 266, adopting contemporaneous interpretation of tern "head of family"; Pitts v. Logan County, 3 Okl. 741, 41 Pac. 591, approving practice of territorial courts in appointing special clerks entitled to compensation under act relating to clerks generally; McSorley v. Hill, 2 Wash. 651, 27 Pac. 556, affirming grant executed by Land Department under private act of Congress; Keane v. Brygger, 3 Wash. 351, 28 Pac. 658, approving practice of Land Department allowing entryman to relinquish all interest in his entry; Harrington v. Smith, 28 Wis. 68, construing statute requiring commissioners empowered to sell public lands to give certificate of sale upon payment of price; State ex rel. v. Timme, 54 Wis. 340, 11 N. W. 793, approving practice of legislature under provision in State Constitution relative to amendments; Baca v. Perez, 8 N. M. 195, 42 Pac. 164, arguendo.

The following cases modify the rule in holding contemporaneous construction not to be entitled to consideration when the intent of the statute is clear to the contrary; Swift Co. v. United States, 105 U. S. 695, 26 L. Ed. 1109; United States v. Graham, 110 U. S. 221, 28 L. Ed. 127, 4 Sup. Ct. 218; Northern Pacific Ry. Co. v. Sanders, 47 Fed. 609; Lockwood v. Bank,

9 R. I. 333, 11 Am. Rep. 266; dissenting opinion in State v. Kelsey, 44 N. J. L. 47.

Miscellaneous. Cited also in Atkins v. Disintegrating Co., 18 Wall. 306, 21 L. Ed. 845, but application not apparent.

12 Wheat. 212-213, 6 L. Ed. 605, DEVEREAUX v. MARR.

Supreme Court has no jurisdiction of question on which opinions of circuit judges were opposed, where division arose after final decision.

Cited in Daniels v. Railroad Co., 3 Wall. 254, 18 L. Ed. 225, refusing to entertain certificate where question was as to retaxation of costs after execution of judgment.

Distinguished in United States v. Chicago, 7 How. 191, 12 L. Ed. 663, where question was as to matter of discretion and arose simultaneously with decision upon merits.

12 Wheat. 213-369, 6 L. Ed. 606, OGDEN v. SAUNDERS.

The citing cases seem to have found it difficult to determine which of the several opinions in the principal case embodied the final decision. Thus, Mr. Justice Daniel declared in Cook v. Moffat, 5 How. 313, 12 L. Ed. 167, 168, that he had great difficulty in reconciling the case with other decisions of the court, or even with itself, and Chief Justice Parker, delivering the opinion in Blake v. Williams, 6 Pick. 306, 17 Am. Dec. 376, and again in Braynard v. Marshall, 8 Pick. 196, questioned whether any judicial decision could be predicated of the case. The confusion seems to arise from the fact that the broad question first argued and decided, viz.: That the States had power to enact insolvent laws operating prospectively, failed to dispose of a case presenting the narrower question as to whether such a law could have an extraterritorial effect. Mr. Justice Johnson, who had been with the majority in affirming the general power, voted in the negative with the three justices who constituted the minority in the first instance, in denying to such legislation any extraterritorial effect. Of the four justices ultimately voting for an affirmance of the decision of the lower court, three went upon the ground that the State had no power to pass the law in question at all, Mr. Justice Johnson alone basing his opinion upon the ground that the law could have no operation beyond the limits of the State. It is to be noted, however, that in Boyle v. Zacharie, 6 Pet. 348, 8 L. Ed. 423, the Supreme Court, in answer to a direct question, declared that the opinion of Mr. Justice Johnson was to be deemed the opinion of the other judges who assented, and that whatever principles were there established were the settled law of the court.

Obligation of contract is law which binds parties to perform their agreement; law in force at time contract is made enters into and becomes part of contract.

Approved in Foltz v. Noon, 16 Ariz. 416, 146 Pac. 512, holding statute giving lien to laborers on mining claim could not apply to owner giving

option to sell, prior to statute, to employer of laborers claiming lien; Crippen v. Laighton, 69 N. H. 549, **76 Am. St. Rep. 196**, 44 Atl. 541, holding when the laws of Kansas provide for the liability of stockholders of Kansas corporations, the liability cannot be enforced in New Hampshire; Greenville Nat. Bk. v. Evans-Snyder-Buell Co., 9 Okl. 364, 60 Pac. 253, chattel mortgage executed and filed conformably to laws of another State on property therein is superior to local attachment after brought here, though mortgage not recorded here; dissenting opinion in Shrigley v. Black, 66 Kan. 230, 71 Pac. 306, majority holding that where mortgaged premises were sold for taxes but tax deed was held invalid but taxes were declared lien and property ordered sold and grantee of mortgagor redeems, he does not take free from mortgage (sec. 4949, Gen. Stats. 1901, Kan.); Van Hoffman v. City of Quincy, 4 Wall. 550, **18 L. Ed.** 408 and Commissioners of Limestone County v. Rather, 48 Ala. 447; where statute authorizes levy of tax to redeem municipal bonds, it cannot be repealed so as to impair bonds issued under it; State v. Rives, 12 Ark. 726, where county warrants have been issued under a statute making such warrants receivable in payment of taxes, county officers are bound to receive them; Nebbett v. Cunningham, 27 Miss. 298, where statute prescribes rate of interest payable on certain classes of bonds, such bonds will bear that interest, whether it is specified on face of bonds or not; Micou v. Tallassee Bridge, 47 Ala. 656, charter of a corporation is a contract and as such is not repealable, unless the right is expressly reserved; McLaren v. Pennington, 1 Paige, 109, where such right has been reserved and the charter is repealed and property of corporation vested in receiver, claims against corporation, arising after repeal, are not enforceable against receiver; State v. Corbett, 57 Minn. 352, **24 L. R. A. 501**, 59 N. W. 319, parties to sales are also deemed to act with reference to existing laws, accordingly where statute prohibits purchaser from selling a passenger ticket, he cannot claim that he is being deprived of his property without due process of law; Weil v. State, 46 Ohio St. 452, 21 N. E. 644, sale of personal property is inoperative to pass title if not recorded as required by statute; Stone v. Gazzam, 46 Ala. 275; Bowen v. Blount, 48 Ala. 674, if statute provides that certain conveyances to a married woman shall vest in her a separate estate, creditors of the husband, or of the husband and wife jointly, are concluded thereby; Anderson v. Creditors, 33 La. Ann. 1161, contracts are deemed to be made with reference to existing insolvent laws; Orr v. Lisso, 33 La. Ann. 478, holding that foreign creditor is barred by cessio bonorum made by a debtor under such laws; Howard v. Jones, 50 Ala. 69, Watson v. Rose, 51 Ala. 300, statute exempting certain property from execution and statutes of limitations are also of this binding force; Wachter v. Farnachow, 62 Wis. 122, 22 N. W. 162, holding that debtor who, fraudulently representing himself solvent, obtains surrender of overdue notes, and induces his creditor to accept new ones payable in future, incurs obligation to pay and renders his property subject to attachment; Watts v. Kilburn, 7 Ga. 359, holding that where judgment debtor fraudulently removes property, subject to judgment lien, to another State, and sells it, it may

be attached in the hands of the vendee, if returned to the State; Pritchard v. Norton, 106 U. S. 133, **27 L. Ed. 107**, 1 Sup. Ct. 109; In re Insurance Co. of Pennsylvania, 22 Fed. 115; Chamberlain v. Insurance Co., 55 N. H. 265, applying principle to attempt to enforce obligations in foreign jurisdiction has called for the application of the principle, and holding that lex loci contractus is to govern; Brown v. Smart, 69 Md. 330; Isom v. Mississippi etc. R. R. Co., 36 Miss. 312; Le Prince v. Guillemot, 1 Rich. Eq. 213, arguendo.

Obligation of contracts. Note, **14 Am. Dec. 740.**

Remedy given for enforcement of contract constitutes no part of contract, and it may be changed or modified at will of legislature.

Approved in National Surety Co. v. Architectural Decorating Co., 226 U. S. 283, **57 L. Ed. 225**, 33 Sup. Ct. 17, holding legislature could, after giving of bond, change time of notice required to give right to sue thereon; Swann v. Mutual Reserve Fund Life Assn., 100 Fed. 929, holding where a foreign corporation is permitted to carry on business in a State upon subjecting it to suit therein, after the license of such corporation has been revoked a policy-holder cannot bring suit in State court; Ireland v. Mackintosh, 22 Utah, 305, 61 Pac. 903, holding where action on note dated January 2, 1892, payable one day after date, was commenced August 30, 1898, and at date of note the limitation was four years, but was extended to six years, March 20, 1897, the four year limitation was a bar.

The doctrine of the syllabus has been affirmed and invoked for purpose of upholding laws exempting certain property from execution and giving to such laws a retrospective operation (Hardeman v. Downer, 39 Ga. 427, 431; Grimes v. Bryne, 2 Minn. 102; dissenting opinion in Danks v. Quackenbush, 1 N. Y. 132, 133, 135); in permitting retrospective operation of so-called "stay laws" postponing rendition of judgments or of execution on judgments already rendered (Ex parte Pollard, 40 Ala. 83, 88, 92; Farnsworth v. Vance, 2 Cold. 112, 115, 116, 119; dissenting opinions in Aycock v. Martin, 37 Ga. 171, 174, 175, 177, 179, and State v. Carew, 13 Rich. 543); of laws extending time for redemption of property sold under foreclosure or execution (Bugbee v. Howard, 32 Ala. 716; Beverly v. Barnitz, 55 Kan. 472, **49 Am. St. Rep. 262, 31 L. R. A. 76**, 42 Pac. 727, (overruling 55 Kan. 431, 40 Pac. 319, and following dissenting opinion, 55 Kan. 435, 40 Pac. 320); State v. Gilliam, 18 Mont. 99, 44 Pac. 396; dissenting opinion in Scobey v. Gibson, 17 Ind. 578); law prescribing time in which judgments were to be enforced was held to operate upon judgments previously rendered (Griffin v. McKenzie, 7 Ga. 166, **50 Am. Dec. 391**); as also law enlarging time for recommencing action upon judgments reversed (Bishop v. Wilds, 1 Harr. 102); dissenting opinion in Hibernia Soc. v. Hayes, 56 Cal. 303, applied principle in arguing that statute prescribing time in which claims against the State must be enforced, was applicable to claims previously existing; statutes providing that judgments shall constitute lien upon judgment debtor's property may apply to existing judgments

(Moore v. Letchford, 35 Tex. 213, 216, 14 **Am. Rep.** 367, 369); as also statutes providing, on other hand, that judgments should not constitute such liens (Moore v. Holland, 16 S. C. 24, 30); statutes extending the time for enforcement of mechanics' liens are valid as to existing liens (Garland v. Irrigation Co., 9 Utah, 360, 34 Pac. 370); dissenting opinion in Jordan v. Wimer, 45 Iowa, 72, argues in favor of retroactive operation of a statute abolishing vendor's liens; also it has been held that legislature may give retroactive effect to law abolishing preference given by previous law to judgment debts of decedents (Deichman's Appeal, 2 Whart. 396, **30 Am. Dec.** 272); and prescribing rate of interest payable on judgments Morley v. Lake Shore Ry. Co., 146 U. S. 171, **36 L. Ed.** 930, 13 Sup. Ct. 58); likewise new remedies may be provided against corporations or their stockholders, and rights of appeal given where previously none had existed (Fourth Nat. Bank v. Francklyn, 120 U. S. 755, **30 L. Ed.** 828, 7 Sup. Ct. 761; Commercial Bank v. State, 4 Smedes & M. 495, 507; Tutweiler v. Tuskaloosa etc. Co., 89 Ala. 398, 7 South. 399; Long's Appeal, 87 Pa. St. 119); right to imprison debtor constitutes no part of contract, and laws providing for discharge from imprisonment, or abolishing right entirely, do not impair obligation of prior contracts (Lee v. Gamble, 3 Cr. C. C. 375, Fed. Cas. 8189; Beers v. Haughton, 1 McLean, 233, Fed. Cas. 1230; Pugh v. Bussel, 2 Blackf. 398; Wood v. Funk, 7 Ohio, 197; In re Penniman, 11 R. I. 343; Von Hoffman v. City of Quincy, 4 Wall. 53, **18 L. Ed.** 409); Parmelee v. Lawrence, 48 Ill. 339, holding that law reducing the penalty provided for taking usurious interest operates as to penalties already accrued; State v. Bank of Tennessee, 3 Baxt. 405, upholding validity of statute withdrawing the right to sue State, and leaving only right to submit claims to the legislature; Simpson v. Savings Bank, 56 N. H. 470, **22 Am. Rep.** 494, statute authorizing reduction of deposit accounts of insolvent banks, so as to divide losses equitably among depositors; Mills v. King, 5 S. C. 151, holding that law requiring mortgages to be recorded applies to mortgages previously executed; Elliott v. Mayfield, 4 Ala. 424, asserting retrospective operation of statute providing for issuance of execution against surety of executor upon return of "no property found," on execution issued against latter; McCormick v. Rusch, 15 Iowa, 130, **83 Am. Dec.** 403, statute continuing suits against persons engaged in military service of United States; Newkirk v. Chapron, 17 Ill. 348, holding that delay in enforcement of contract, caused by change of jurisdiction from one court to another, does not impair obligation; Blann v. State, 39 Ala. 355, **84 Am. Dec.** 788, holding that statute providing penalty, in case person who has erected bridge by contract, knowingly allows it to remain out of repair, applies to contracts previously executed; Fitzgerald v. Grand Trunk R. R. Co., 63 Vt. 174, **3 L. R. A.** 72, 22 Atl. 77, holding that contracts respecting commerce made before action by Congress fixing rates, must have been made with reference to the right of Congress to so act, and when it did so, its action operated to reduce the obligation arising from a contract to pay a greater rate; dissenting opinion in Jacoway v. Denton, 25 Ark. 649, 654, 658, majority holding that an act which freed

slaves, thus cutting off all remedy on contracts for their purchase, was inoperative as to prior contracts; dissenting opinion in Second Ward Bank v. Schranck, 97 Wis. 268, 270, **39 L. R. A. 576**, 577, 73 N. W. 37, 38, majority holding void an act providing that within ten days after attachment debtor might make assignment for benefit of creditors which would dissolve attachment; State ex rel. v. Hager, 91 Mo. 456, 3 S. W. 846, Fitzgerald v. Fitzgerald etc. Co., 41 Neb. 464, 59 N. W. 862, arguendo.

Distinguished in Moore v. State, 43 N. J. L. 205, **39 Am. Rep. 559**, in holding void law authorizing prosecution of person for an act previously committed and as to which prosecution was already barred by statute.

Constitutionality of exemption statutes relating to personal property. Note, **45 Am. Dec. 251.**

Legislature may change rules of evidence, and if remedy on existing contract is thereby affected, its obligation is not necessarily impaired.

Approved in Li Sing v. United States, 180 U. S. 493, **45 L. Ed. 637**, 21 Sup. Ct. 452, holding decision of customs officer admitting a Chinaman on certificate issued by Chinese government and vised by United States consul in Hong Kong is not conclusive in his favor was to preclude examination by United States commissioner, since 28 Stats. at Large, 390, c. 301, and 25 Stats. at Large, 476, c. 1015, are not in force; United States v. Chin Ling Quong, 224 Fed. 759, holding Congress could fix quantity, character and quality of evidence required to admit alien into United States; Low Foon Yin v. United States etc. Commr., 145 Fed. 796, upholding Chinese Exclusion Act of 1892, placing burden of proof of right of Chinese without certificate to remain in United States on him; Hibernia Savings & Loan Soc. v. Jordan, 2 Cal. App. Unrep. 84, holding repeal of statute giving mortgagor right to foreclose without presenting claim against estate of mortgagee did not impair vested right; Cummings v. Wildman, 116 Md. 317, 81 Atl. 613, upholding statute requiring trustees for benefit of creditors to file bond before title passes to them; Miners' etc. Bank v. Snyder, 100 Md. 65, **108 Am. St. Rep. 390**, **68 L. R. A. 312**, 59 Atl. 708, upholding Acts 1904, p. 597, c. 337, taking away pre-existing right of creditor to enforce stockholders' liability and substituting therefor suit in equity by all creditors against all stockholders; Cutts v. Hardee, 38 Ga. 356, ascribing retrospective operation to act changing rules of evidence in actions of debt, and allowing jury to reduce debt according to equities of case; Burbank v. Rumsey, 90 Ill. 555, act making collector's report in application for execution against land for unpaid taxes prima facie evidence of regularity of assessment; Freeman v. Thayer, 33 Me. 83, act prescribing evidence sufficient to sustain tax sale; Williams v. Haines, 27 Iowa, 254, **1 Am. Rep. 270**, act abolishing distinction between sealed and unsealed instruments; Oriental Bank v. Freese, 18 Me. 112, **36 Am. Dec. 703**, act prescribing new rules of evidence in actions against sureties on "poor debtors'" bonds; Holmes v. Hunt, 122 Mass. 516, **23 Am. Rep. 386**, act making report of auditor prima facie evidence of matters

embraced therein; Rich v. Flanders, 39 N. H. 323, act removing the disqualification of witnesses on ground of interest; Kingley v. Cousins, 47 Me. 95, act providing that no suit shall be maintained upon special promise to pay debt discharged under insolvency law, unless it be in writing; Southerland v. Norris, 74 Md. 329, 333, **28 Am. St. Rep. 256, 260,** 22 Atl. 137, 139, statute providing that in order to enable person leaving State to vote upon his return, he must make affidavit of his intention to return, held to be law prescribing rule of evidence, and was given a retrospective operation; Fong Yue Ting v. United States, 149 U. S. 729, **37 L. Ed. 919,** 13 Sup. Ct. 1028, upholding provision in Chinese Exclusion Act for system of registration and identification of Chinese leaving this country with intent to return.

Law, which in any way varies obligation of contract to slightest degree, impairs that obligation and is void.

Relying upon this principle, the courts have held that where a statute authorizes assessment of tax for redemption of municipal bonds, it cannot be repealed so as to impair value of bonds which have been issued in reliance upon it (Edwards v. Williamson, 70 Ala. 152; County Commissioners v. King, 13 Fla. 476; State v. Young, 29 Minn. 528, 529, 9 N. W. 741); or where it authorizes the assessment of tax for the purpose of improving streets, it cannot be repealed or modified so as to impair a contract for such work (Goodale v. Fennell, 27 Ohio St. 432, **22 Am. St. Rep. 326**); a statute providing for the issue of substitute municipal bonds was held void in so far as it tended to lessen city's liability (People ex rel. v. Otis, 90 N. Y. 52); county warrants have been declared to be contracts, and law which provides that they shall be receivable in payment of taxes cannot be repealed so as to impair that right (People ex rel. v. Hall, 8 Colo. 492, 9 Pac. 37); act which declares that counties are not corporations subject to suit cannot operate to defeat claims already existing (National Bank v. Sebastian Co., 5 Dill. 418, Fed. Cas. 10,040); act providing that estate of one jointly liable with another shall not be discharged by his death, operates retrospectively so as to create new obligation (Randall v. Sackett, 77 N. Y. 482); act giving courts and juries power to remit interest is within prohibition (Roberts v. Cocke, 28 Gratt. 215); as well as an act which prohibits bank from transferring evidences of debt, its charter having authorized it to acquire and dispose of property generally; Leach v. Smith, 25 Ark. 253, applying this principle, declared void an act making Confederate money receivable in payment of debts; Boswell v. Security Mut. Life Ins. Co., 193 N. Y. 474, **19 L. R. A. (N. S.) 949,** 86 N. E. 534, holding statute limiting amount of insurance which company could write impaired obligation of contract between company and agent by which agent had twenty-year contract to develop business at own expense on commission; dissenting opinion in Town of New Decatur v. American Tel. & Tel. Co., 176 Ala. 508, **Ann. Cas. 1915A, 875,** 58 South. 618, majority holding municipality could repeal ordinance granting fran-

chise to telephone company to occupy streets, and compel removal of poles and wires.

Laws purporting to operate only upon remedies given for enforcement of contracts are not entirely free from operation of this constitutional prohibition. While authorities are by no means unanimous upon question, considerable number rely upon rule, as stated in principal case, in declaring that laws exempting certain property from execution, although operating on remedy, so far affect obligation as to be inoperative as to contracts entered into or judgments recovered prior to enactments (Forsyth v. Marbury, Charlt. (Ga.) 331, 334; Deering v. Boyle, 8 Kan. 535, **12 Am. Rep. 489**; In re Kennedy, 2 S. C. 222; Hannum v. McInturf, 6 Baxt. 231; Homestead Cases, 22 Gratt. 288, **12 Am. Rep. 515**). Following cases have declared "stay laws" invalid, except in their prospective operation: Aycock v. Martin, 37 Ga. 140, 147, **92 Am. Dec. 66**; State v. Carew, 13 Rich. 508, **91 Am. Dec. 248**; Barry v. Iseman, 14 Rich. 135, 138, **91 Am. Dec. 263, 266**; Webster v. Rose, 6 Heisk. 98, 99, **19 Am. Rep. 585, 586** (overruling Farnsworth v. Vance, 2 Cold. 112, 115, 116, 119); and seen dissenting opinion in Ex parte Pollard, 40 Ala. 102, 105; of same effect are laws staying foreclosure sales, and they have been denied their retrospective operation; Taylor v. Stearns, 18 Gratt. 271, 274, 280; Swinburne v. Mills, 17 Wash. 622, **61 Am. St. Rep. 939**, 50 Pac. 492; Von Baumbach v. Bade, 9 Wis. 576, 591, 593, **76 Am. Dec. 287**; this construction has been given to statute suspending execution unless creditor accepts paper upon State bank in satisfaction of his judgment (Grayson v. Lilly, 7 T. B. Mon. 11); and to a statute abolishing vendor's liens (Jordan v. Wimer, 45 Iowa, 68); Schuster v. Weiss, 114 Mo. 174, **19 L. R. A. 187**, 21 S. W. 443, declared although legislature could change rules relating to appeals, such change could not vary liability of surety on an appeal bond; dissenting opinion in Mason v. Haile, 12 Wheat. 379, **6 L. Ed. 663**, it arguing that discharge from imprisonment under insolvent law could not operate to discharge surety on bail bond; Lawson v. Jeffries, 47 Miss. 706, **12 Am. Rep. 354**, where the rule is approved in general discussion; State ex rel. v. New Orleans, 32 La. Ann. 718, and Pierce v. Kitzmiller, 19 W. Va. 573, while recognizing soundness of this rule, declare that judgments founded on torts are not contracts within the meaning of the prohibition, and laws regulating the rendition of such judgments or the issuance of execution thereon may operate retrospectively; dissenting opinion in McElvain v. Mudd, 44 Ala. 76, also distinguishes principal case in arguing that prohibition does not apply to acts of the national government, and that emancipation proclamation operated to discharge contracts for the purchase of slaves.

What attacks may be made on statute showing illegal enactment. Note, **85 Am. Dec. 357**.

Presumption is always in favor of validity of legislative act, unless contrary is shown beyond reasonable doubt.

Approved in **Board of Commrs. v. Tollman**, 145 Fed. 766, upholding Act N. C. 1885, p. 445, c. 233, § 14, providing for issuance of county aid

bonds for railroad; Manigault v. S. M. Ward etc. Co., 123 Fed. 716, holding under Constitution of South Carolina, one legislature cannot bind succeeding one by making conditions regarding passage of bill; McGovern v. Mitchell, 78 Conn. 564, 63 Atl. 443, upholding Laws 1905, p. 410, c. 213, increasing salaries of judges; Park v. Candler, 114 Ga. 472, 40 S. E. 526, holding acts of legislature involved in this action relating to payment of interest on bonded debt will be presumed to be constitutional; Noble v. Bragaw, 12 Idaho, 272, 85 Pac. 904, upholding act of 1905, creating office of State veterinary surgeon; Perkins v. Commrs. of Cook County, 271 Ill. 472, 111 N. E. 589, upholding forest preserve district act of 1913; Eckerson v. City of Des Moines, 137 Iowa, 475, 115 N. W. 186, upholding act of 32d General Assembly, providing for uniform government of cities of first class; State v. Phillips, 107 Me. 253, 78 Atl. 285, upholding statute prohibiting automobiles on Mt. Desert Island as exercise of police power; State v. Poulin, 105 Me. 228, **134 Am. St. Rep. 543, 24 L. R. A. (N. S.) 408,** 74 Atl. 121, holding under presumption of validity public must assume toward statute same attitude, whether valid or void; State v. Wagener, 130 Minn. 428, 153 N. W. 750, upholding liquor license statute; Farrell v. Hicken, 125 Minn. 413, **L. R. A. 1915B, 401,** 147 N. W. 817, upholding provisions of city charter for preferential voting; State v. St. Louis County Board, 124 Minn. 129, 144 N. W. 757, upholding statute providing cities be classified under State census; State v. Layton, 160 Mo. 499, 61 S. W. 177, holding Mo. Act May 11, 1899, prohibiting sale of alum baking powder is constitutional; State v. Edwards, 38 Mont. 266, 99 Pac. 945, upholding statute establishing police commission for cities; State v. Barton, 91 Neb. 385, 136 N. W. 32, upholding statute relating to elections for voting school bonds; Booth v. McGuinness, 78 N. J. L. 371, 75 Atl. 461, holding civil service laws void so far as operation depended on adoption by municipality; State v. Marron, 17 N. M. 312, 128 Pac. 488, upholding, under § 16, art. IV, Constitution, general appropriation bill which included authorization for certificates of indebtedness to realize funds to pay appropriation, made by bill; State v. Lawing, 164 N. C. 497, **51 L. R. A. (N. S.) 62,** 80 S. E. 71, upholding statute authorizing town to establish fire limits within which building restrictions might be imposed; Tripp v. Commissioners, 158 N. C. 186, 73 S. E. 898, upholding assessment for building of stock law fence not submitted to referendum; Chadbourn Sash etc. Lumber Co. v. Parker, 153 N. C. 134, 69 S. E. 3, upholding statute of 1905 relating to exemption of homesteads; State v. Williams, 146 N. C. 624, 637, **14 Ann. Cas. 562, 17 L. R. A. (N. S.) 307,** 61 S. E. 63, 67, holding void, act limiting quantity of liquor which one could bring into county for personal use; Stettler v. O'Hara, 69 Or. 538, **Ann. Cas. 1916A, 217,** 139 Pac. 750, upholding minimum wage law; Reising v. Portland, 57 Or. 300, **Ann. Cas. 1912D, 895,** 111 Pac. 379, applying rule in construing provisions of city charter; Commonwealth v. McComb, 227 Pa. 379, 76 Atl. 101, upholding statute prohibiting killing game with automatic guns; State v. Kofines, 33 R. I. 219, **Ann. Cas. 1913C, 1120,** 80 Atl. 436, upholding statute requiring license for lobster fishing in

State waters; dissenting opinion in Prairie Oil & Gas Co. v. United States, 204 Fed. 822, majority holding void act declaring pipe-line companies to be common carriers; dissenting opinion in State v. Junkin, 85 Neb. 12, 23 L. R. A. (N. S.) 839, 122 N. W. 477, majority holding void statute prohibiting political parties from referring in any manner to candidates for judicial and educational offices; dissenting opinion in Beckett v. Knight, 169 N. C. 359, L. R. A. 1915F, 898, 85 S. E. 431, majority holding void statute providing notary public was not officer of State; dissenting opinion in State v. Ray, 151 N. C. 714, 134 Am. St. Rep. 1005, 19 Ann. Cas. 566, 66 S. E. 205, majority holding statute making it felony to marry outside State while spouse is living was void as attempting to give it extraterritorial effect; dissenting opinion in Allen v. Reed, 10 Okl. 153, 63 Pac. 876, majority holding void act of 1893, relating to change of county seat; dissenting opinion in Ex parte Dodson, 3 Okl. Cr. 525, 107 Pac. 454, majority holding § 6751, Snyder's Stats., repugnant to provision of Constitution relating to indictment by grand jury; George v. Concord, 45 N. H. 437, and Metropolitan Bank v. Van Dyck, 27 N. Y. 460, declaring legal tender acts valid; Grant Co. v. Sels, 5 Or. 245, and Edwards v. Dupuy, 21 La. Ann. 695, asserting power of legislature to fix fees and salaries of county judges; Alexander v. People ex rel., 7 Colo. 166, 2 Pac. 900, State ex rel. v. Commissioners Sumter County, 19 Fla. 531, Whallon v. Ingham, Circuit Judge, 51 Mich. 515, 16 N. W. 881, and Evans v. Job, 8 Nev. 339, statute to provide for removal of county seats in absence of express prohibition; Common Council of Detroit v. Rush, 82 Mich. 540, 10 L. R. A. 174, 46 N. W. 953, Wooley v. Watkins, 2 Idaho, 564, 22 Pac. 105, and People ex rel. v. Thompson, 155 Ill. 465, 40 N. E. 310, statute to regulate State elections generally and to apportion senatorial districts; State ex rel. v. Hunter, 38 Kan. 593, 17 Pac. 185, upholding act providing that municipal officers shall appoint police commissioners; Attorney-general v. Preston, 56 Mich. 179, 22 N. W. 262, act making village president ex-officio member of board of supervisors; Burch v. Hardwicke, 30 Gratt. 32, 32 Am. Rep. 642, act giving mayor authority to remove municipal officers; Bridges v. Shallcross, 6 W. Va. 572, act prescribing duties of State officers and providing for a board of public works; Cutts v. Hardee, 38 Ga. 355, act changing rules of evidence in actions of debt; State ex rel. v. County Judge Davis County, 2 Iowa, 282, holding that statute providing for vacation and relocation of roads did not violate constitutional provision that "every law shall embrace but one object"; Stewart v. Supervisors, 30 Iowa, 14, 1 Am. Rep. 242, upholding act levying tax to aid in construction of railroad; Owen v. Sioux City, 91 Iowa, 197, 59 N. W. 5, holding fact that statute relating to public improvements deals with cities of certain class does not make it void as being special legislation; Police Jury v. McDonogh, 8 La. Ann. 361, holding constitutional restriction upon giving aid to corporations was no limitation upon aid legislature could authorize police jury to grant; State ex rel. v. Fagan, 22 La. Ann. 557, asserting power of State to prescribe location

where slaughtering of cattle is to be carried on; State v. Maine, etc. R. R. Co., 66 Me. 515, asserting power of legislature to form new and distinct corporation out of two or more corporations previously existing; Eames v. Savage, 77 Me. 216, 52 **Am. Rep.** 752, act to authorize executions on judgments against towns to be levied against property of inhabitants; Simpson v. Savings Bank, 56 N. H. 469, 22 **Am. Rep.** 493, act to authorize reduction of deposit accounts of insolvent savings banks, so as to divide losses equitably among depositors; In re New York Elevated R. R. Co., 70 N. Y. 343, act to authorize railroad to use other motive power than charter prescribed; Sage v. Brooklyn, 89 N. Y. 196, upholding act providing for condemnation of land for streets and remitting owner, for sole remedy, to fund to be raised by taxation; Sweet v. City of Syracuse, 129 N. Y. 350, 29 N. E. 294, act providing for establishment and maintenance of municipal waterworks; Bartol v. Eckert, 50 Ohio St. 41, 33 N. E. 295, giving retroactive effect to statute limiting time for commencing suits on judgments; State v. District of Narragansett, 16 R. I. 440, 3 **L. R. A.** 298, 16 Atl. 906, holding provision regarding formation of corporations directory only and substantial compliance sufficient; Farnsworth v. Vance, 2 Cold, 122, upholding act staying execution on judgments in suits pending at time of passage; Stone v. Sumper, 1 Tex. App. Civ. 140, act exempting corporations from taxation; State v. Strander, 8 W. Va. 703, giving retroactive effect to act providing for examination of persons charged with felony before County Court; Stow v. Parks, 2 Pinn. 129, applying principle in giving national bankrupt law effect in territory, in absence of express exclusion of territories; Commissioners of Wyandotte Co. v. Abbott, 52 Kan. 157, 34 Pac. 417, holding statute providing for public improvements void because assessment not made in manner prescribed by Constitution; United States v. Boyer, 85 Fed. 430, but void, act of Congress providing for inspection of cattle about to be slaughtered, such legislation not being within commerce power; dissenting opinions in following cases; Pollock v. Farmers' L. & T. Co., 158 U. S. 699, 39 **L. Ed.** 1147, 15 Sup. Ct. 944, majority holding income tax void; Koehler v. Hill, 60 Iowa, 588, 14 N. W. 761, majority holding that amendment had not become part of Constitution, where it was not properly entered upon journal of assembly; Louisville Bridge Co. v. Louisville, 81 Ky. 211, majority denying validity of municipal tax upon bridge across navigable river; State v. Cumberland etc. R. R. Co., 40 Md. 54, majority holding void, an act taxing coal transported for sale, so far as it operated upon interstate commerce; Jacobs v. Smallwood, 63 N. C. 126, arguing in favor of validity of "stay law"; Chesapeake etc. Ry. Co. v. Miller, 19 W. Va. 421, arguendo.

Constitutional prohibition against ex post facto laws has reference to prescribing punishment for act innocent at time it was committed.

Approved in League v. Texas, 184 U. S. 161, 46 **L. Ed.** 481, 22 Sup. Ct. 477, holding claimant of land sold to the State by administrative sale for nonpayment of taxes is not deprived of his property without due process of law, by statute enacted subsequent to such sale; De Pass v. Bidwell,

124 Fed. 623, the constitutional prohibition against ex post facto laws applies only to criminal or penal statutes; Curtis v. Boquillas Land etc. Co., 9 Ariz. 65, 76 Pac. 613, holding statute of limitations had no effect on action commenced before statute went into effect; Diamond State Iron Co. v. Husbands, 8 Del. Ch. 226, 68 Atl. 246, upholding statute to remedy real estate title, though retrospective in operation; Shepherd v. Grimmett, 3 Idaho, 409, 31 Pac. 795, holding elector's oath enacted at first session of Idaho legislature not ex post facto law; dissenting opinion in In re Ebbs 150 N. C. 58, **17 Ann. Cas. 592, 19 L. R. A. (N. S.) 892**, 63 S. E. 197, to point that statute relating to disbarment of attorney was not ex post facto; dissenting opinion in State v. Tingley, 24 Utah, 228, 67 Pac. 34, majority holding that under Const. Utah, art. VII, § 20, declaring that until otherwise provided by law, Governor's salary shall not be increased during term of office, his salary may be increased during term by statute; Watson v. Mercer, 8 Pet. 110, **8 L. Ed. 885**, holding a civil statute respecting deeds of land not ex post facto; Baltimore etc. R. R. Co. v. Nesbit, 10 How, 402, **13 L. Ed. 472**, respecting charter conferring power of eminent domain; Foster v. Police Commrs., 102 Cal. 490, **41 Am. St. Rep. 197**, 37 Pac. 765, asserting power of States to deprive persons previously convicted of felony of right to sell liquor; Shepherd v. Grimmett, 2 Idaho, 1128, 31 Pac. 795, Ex parte Hunter, 2 W. Va. 159, Ex parte Quarrier, 4 W. Va. 223, dissenting opinions in Ex parte Garland, 4 Wall. 390, **18 L. Ed. 374**, and Green v. Shumway, 39 N. Y. 432, in support of "test-oath" acts; dissenting opinion in Moore v. State, 43 N. J. L. 231, arguing that merely removing bar to a prosecution for act punishable when committed was not ex post facto; Wilder v. Lumpkin, 4 Ga. 215, 219, act declaring it unnecessary to make sureties on appeal and injunction bonds parties to writs of error inoperative as to cases pending; Burch v. Newbury, 10 N. Y. 391, act reviving right of appeal in cases where right was barred by lapse of time is void; dissenting opinion in The Legal Tender Cases, 12 Wall. 670, 672, **20 L. Ed. 351**, arguing that the legal tender acts operated to impair vested rights; dissenting opinion in Sinking Fund Cases, 99 U. S. 765, **25 L. Ed. 518**, majority upholding an act of Congress, varying a government contract with the Pacific railroads and compelling them to maintain a sinking fund to meet the government debt.

Appointment to office as executive or legislative function. Note, **13 Am. St. Rep. 145.**

Actual exercise of power by Congress, and not mere grant to Congress, precludes its exercise by States.

Approved in Weaver v. Pegelly, 29 Pa. St. 29, **70 Am. Dec. 153**, asserting concurrent power of the States to regulate weights and measures, in absence of congressional action; License Cases, 5 How. 607, **12 L. Ed. 303**, States may, in exercise of their police power, prohibit sales of liquor, thus restricting its transportation; Phelps v. Racey, 60 N. Y. 15, **19 Am. Rep. 144**, or may prohibit persons from having in their possession certain game birds; Hockett v. State, 105 Ind. 259, **55 Am. Rep. 207**, 5 N. E. 183, may

regulate charges of telephone companies; Boardman v. Lake Shore etc. Ry. Co., 84 N. Y. 186, in absence of congressional action, may authorize consolidation of several interstate lines operating within their limits; People ex rel. v. Curtis, 50 N. Y. 328, **10 Am. Rep. 488**, holding that extradition of fugitives from a foreign country was an exclusive power of Federal government; and to same effect is Ex parte Holmes, 12 Vt. 645; dissenting opinion in Gilman v. Morse, 12 Vt. 557, majority denying power of State to disband the militia; Simmons v. Miller, 40 Miss. 25, asserted exclusive power of the Confederate Congress over the militia by holding that State, by raising militia, could not retain its enlisted men as against the conscription acts; Lynch v. Clarke, 1 Sand. Ch. 644, denies power of State to prescribe rules of naturalization. See also Day v. Buffington, 3 Cliff. 386, Fed. Cas. 3675, where the rule is approved in general discussion.

Distinguished in dissenting opinion in Dred Scott v. Sandford, 19 How. 578, **15 L. Ed. 772**, arguing that exclusive power of naturalization vested in Congress extended only to removing disabilities of foreign birth and not to conferring citizenship upon freed slaves.

In absence of congressional action States may pass bankrupcty laws, subject only to restriction that they are not to be given retrospective operation.

Approved in Arnold Grocery Co. v. Shackelford, 140 Ga. 588, 79 S. E. 471, holding limitations fixed by bankruptcy act superseded those of State; Boston etc. Co. v. Ould-Carter Co., 123 Ga. 463, 51 S. E. 468, in absence of proceeding in Federal courts, State courts have jurisdiction of cases within purview of insolvent traders' act; Lace v. Smith, 34 R. I. 8, 10, 15, 17, **Ann. Cas. 1913E, 945**, 82 Atl. 271, 272, 274, 275, holding farmer entitled to benefit of State insolvency laws, being expressly excluded from privileges of Federal bankruptcy act; Merrill v. Bowler, 20 R. I. 231, 38 Atl. 116, holding that States may enact bankruptcy laws where no Federal law exists; United States ex rel. Von Hoffman v. City of Quincy, 4 Wall. 552, **18 L. Ed. 409**, In re Reiman, 7 Ben. 466, Fed. Cas. 11,673, Mather v. Nesbit, 4 McCrary, 506, 13 Fed. 873, State v. Curran, 12 Ark. 352, Rhodes v. Borden, 67 Cal. 8, 6 Pac. 850, Hempstead v. Reed, 6 Conn. 490, 491, Orr v. Lisso, 33 La. Ann. 477, Felch v. Bugbee, 48 Me. 11, **77 Am. Dec. 204**, Marsh v. Putnam, 3 Gray, 555, Goreley v. Butler, 147 Mass. 12, 16 N. E. 737, Wendell v. Lebon, 30 Minn. 238, 239, 15 N. W. 111, Steven v. Brown, 49 Miss. 599, Sebring v Messerean, 9 Cow. 346, Elton v. O'Connor, 6 N. D. 5, 6, 68 N W. 85, In re Reynolds, 8 R. I. 489, 493, **5 Am. Rep. 617, 621**, Merrill v. Bowler, 38 Atl. 116, upholding power of State to pass insolvency laws operating upon future contracts; Brighton Bank v. Merick, 11 Mich. 417, 418, arguendo.

As instances where laws purporting to operate retrospectively were held void: Schwartz v. Drinkwater, 70 Me. 410, holding such law inoperative to discharge debts existing, and not proven against debtor's estate at time of passage, Peabody v. Stetson, 88 Me. 279, 34 Atl. 76, or to dissolve an attachment previously levied. In Van Hook v. Whitlock, 26 Wend. 53, **37 Am. Dec. 248**, the principle was recognized, but held inapplicable where creditors of insolvent corporation, whose claims existed prior to act, had

accepted dividends under discharge, thereby estopping themselves from denying validity of law. So also in Hundley v. Chaney, 65 Cal. 363, 4 Pac. 238, discharge under State act of 1880 was held to bar recovery on judgment recovered in 1876, such act having been merely amendatory of previous act, and more favorable to creditor than previous act. In re Klein, 14 Fed Cas. 724, attempting to apply restriction to acts passed by Congress, and declared national act of 1841 void, so far as it purported to operate upon previous contracts, but this decision was reversed in In re Klein, 14 Fed. Cas. 717, 718, 1 How. 279, 280, 281, 11 **L. Ed. 131, 132.**

There is authority for holding, that even while a national bankrupt law is in force the State may pass laws dealing with matters not covered by the act of Congress; Baldwin v. Buswell, 52 Vt. 62, holding valid an act authorizing compositions with creditors. Ebersole v. Adams, 10 Bush, 85, an act to prevent fraudulent assignments was held not to be an insolvent or bankrupt law, and so not superseded by national act.

Power of States to pass bankruptcy laws. Note, **7 Am. Dec. 592.**

Validity of insolvency laws passed during existence of national bankruptcy act. Note, **23 Am. Dec. 358.**

Effect of national bankruptcy act on State insolvency law with respect to who may be adjudged bankrupt. Note, **Ann. Cas. 1913E, 957.**

The effect of the passage of national bankrupt law is to suspend similar State laws.

Approved in Hickman v. Parlin-Orendorf Co., 88 Ark. 520, 115 S. W. 371, following rule; In re Sage, 224 Fed. 539, holding receiver appointed in State court could not take property of bankrupt after filing of petition in Federal court; United States v. McCullagh, 221 Fed. 295, holding void act of March 4, 1913, providing for protection of migratory birds; Roberts Cotton Oil Co. v. Morse & Co., 97 Ark. 520, 135 S. W. 337, and In re Weedman Stave Co., 199 Fed. 951, both holding receiver for insolvent appointed by State court could be required to turn over assets to trustee in bankruptcy; Johnson v. Crawford, 154 Fed. 765, holding assignment under State insolvency act could be carried out until challenged in bankruptcy proceedings; Davis v. Bohle, 92 Fed. 326, holding under Bankruptcy Act 1898, § 3, declaring it act of bankruptcy for debtor to make general assignment for benefit of creditors if proceedings in bankruptcy are instituted within four months an adjudication will avoid assignment; Rockville Nat. Bank v. Latham, 88 Conn. 72, 89 Atl. 1117, holding State probate court had no jurisdiction over voluntary assignment of insolvent engaged chiefly in tillage of soil; Staley v. Illinois Cent. R. R. Co., 268 Ill. 379, **L. R. A. 1916A, 450,** 109 N. E. 350, holding compensation act of Illinois did not apply to railroad employee injured while engaged in interstate commerce; Harbaugh v. Costello, 184 Ill. 113, **75 Am. St. Rep. 148,** 56 N. E. 363, holding under act of July 1, 1898, providing that the Federal bankruptcy act shall be in full force and effect on its passage, the State

voluntary assignment law was suspended thereby; Parmenter Mfg. Co. v. Hamilton, 172 Mass. 179, 70 **Am. St. Rep.** 259, 51 N. E. 530, holding United States bankruptcy act July 1, 1898, declaring it shall be in full force and effect from its passage, supersedes all State insolvent laws from date of its passage; Binder v. McDonald, 106 Wis. 336, 82 N. W. 157, holding Rev. Stats. Wis., § 1694a, providing voluntary assignment made within ten days of attachment shall dissolve attachment and all property shall be turned over to assignee or receiver was not superseded by Federal bankruptcy laws 1898; Stellwagen v. Clum, 218 Fed. 736, 134 C. C. A. 408, arguendo.

Other citing cases have held that proceedings under State laws instituted while national act was in force, were absolutely void (Globe Ins. Co. v. Cleveland Ins. Co., 10 Fed. Cas. 490; Van Nostrand v. Carr, 30 Md. 131); and in such cases the courts will grant motions dismissing proceedings in the State courts (In re Reynolds, 9 Bank. Reg. 52, 54, 55, 57, 5 **Am. Rep.** 618, 619, Fed. Cas. 11,723, 8 R. I. 490, 491); or will grant injunctions to restrain assignees under State laws from interfering with the property of the assignors. And this is so whether proceedings have been instituted against a debtor under the national act or not (Griswold v. Pratt, 9 Met. 17, 19). In Thornhill v. Bank, 1 Woods, 8, Fed. Cas. 13,992, an act to provide for the liquidation of banks and the forfeiture of their charters was held in effect an insolvent law and so suspended by the act of Congress. And in In re Independent Ins. Co., 1 Holmes, 104, Fed. Cas. 7017, it was even held that, although a corporation had been previously dissolved under such a State law, it was still in existence for the purpose of proceeding against it under the national act. But in Rasch v. Creditors, 3 Rob. (La.) 409, it was held that a State law providing a mere respite for a debtor was not an insolvent law, inasmuch as it did not purport to discharge the debt. Moreover, where the act of Congress by its terms is not to be operative until a future date, State laws are continued in force until that time (Martin v. Perry, 37 Cal. 210; Day v. Bardwell, 97 Mass. 250); and proceedings commenced under a State law during that period may be carried to conclusion, even after the national act has become operative (Chamberlin v. Perkins, 51 N. H. 340). State laws, being merely suspended by the enactment of a national bankrupt law, they are ipso facto revived by its repeal (Butler v. Goreley, 146 U. S. 308, 313, 36 **L. Ed.** 984, 986).

Contemporary practical construction of a Constitution is entitled to great respect.

Approved in State v. Carter, 174 Ala. 279, 56 South. 979, applying rule to provision of Constitution against one person holding two offices at same time; Board of Water Commrs. v. Curtis, 87 Conn. 511, 89 Atl. 190, applying rule in determining that grant to municipal board of right to condemn property for public use was not a "law" within meaning of Constitution; State v. Taylor, 22 N. D. 374, 133 N. W. 1051, construing provisions of Constitution relating to establishment of additional State institutions; Higgins v. Brown, 20 Okl. 371, 1 Okl. Cr. 48, 94 Pac. 709, upholding State court's jurisdiction over indictment for murder found before Federal

court prior to admission of State; State v. Lewis, 26 Utah, 124, 72 Pac. 389, upholding Sess. Laws 1903, p. 50, c. 55, increasing number of judges in third judicial district to four, empowering Governor to appoint one judge and fixing term of office; Wheeler's Appeal, 45 Conn. 315, giving effect to statute regulating appeals; Commissioners of Franklin County v. Bunting, 111 Ind. 145, 12 N. E. 151, construing act relative to powers of county commissioners; Hovey v. State ex rel., 119 Ind. 388, 21 N. E. 890, act relative to appointive powers of legislature; Board of Commrs. of White County v. Gwin, 136 Ind. 572, 22 L. R. A. 409, 36 N. E. 241, practice construing statute to effect that circuit judges must hold court at county seats, held to govern; McPherson v. Secretary of State, 92 Mich. 383, 31 Am. St. Rep. 591, 16 L. R. A. 478, 52 N. W. 471, asserting power of legislature to divide State into districts; Trustees v. McIver, 72 N. C. 83, adopting legislative construction of act regulating election of trustees of State university; Tillman v. Cocke, 9 Baxt. 451, holding that continued grants of charters containing exemptions from taxation fixes constitutional right of legislature; Bridges v. Shallcross, 6 W. Va. 576, construing act prescribing duties of public officers; State ex rel. v. Harrison, 116 Ind. 309, 19 N. E. 150, holding that where ambiguous statute providing for compensation of public officer has been construed by legislature and acquiesced in by officer, he is bound thereby; Rhode Island v. Massachusetts, 12 Pet. 723, 9 L. Ed. 1260, Talcott v. Township of Pine Grove, 1 Flipp. 156, Fed. Cas. 13,735, and Baca v. Perez, 8 N. M. 196, 42 Pac. 165, arguendo.

Unconstitutionality of part of a statute does not necessarily render the whole void.

Approved in Barry v. Iseman, 14 Rich. 135, 91 Am. Dec. 263, and Goggans v. Turnipseed, 1 S. C. 82, 98 Am. Dec. 398, holding "stay law" void only so far as it purported to operate on previous contracts or judgments; Santo v. State, 2 Iowa, 208, 63 Am. Dec. 506, construing statute providing for State elections.

Doctrine of stare decisis as applicable to decision by divided court. Note, 16 Ann. Cas. 113.

In construing Constitution, intention of instrument prevails, and is collected from words, understood in ordinary sense.

Approved in People v. City Council of Denver, 60 Colo. 377, 153 Pac. 692, holding constitutional prohibition of liquor traffic applied to whole State; Schwartz v. People, 46 Colo. 255, 104 Pac. 97, construing provisions of Constitution for prohibition legislation; Mutual Reserve Fund Life Ins. Co. v. Fowler, 2 Ga. App. 542, 59 S. E. 471, construing act of 1901 amending garnishment laws; State v. Lubee, 93 Me. 421, 45 Atl. 521, holding Maine Stats. 1897, c. 285, relating to short lobsters, is not repugnant to section 9, article I, of State Constitution; State ex rel. Olson v. Board of Control, 85 Minn. 167, 88 N. W. 534, every law presumed to be valid; also all doubts resolved in favor of the law giving liberal construction to title provided it be fairly suggestive; Fitzgerald v. Cleveland, 88 Ohio St. 387,

Ann. Cas. 1915B, 106, 103 N. E. 525, construing together provisions of Constitution relating to primary elections and nomination and election of municipal officers; Ex parte Hunnicut, 7 Okl. Cr. 223, 123 Pac. 183, holding court not bound by punctuation in construing statute; Ex parte Whitehouse, 3 Okl. Cr. 103, 110, 104 Pac. 374, 377, upholding statute giving County Superior Courts concurrent criminal jurisdiction with County Court; Henderson v. Alexander, 2 Ga. 85, construing clause in State judiciary act relative to abatement of actions; In re O'Neil's Will, 91 N. Y. 520, statute providing for subscription of testator's name at "end of the will"; Charleston v. Oliver, 16 S. C. 52, holding taxes not to be debt within meaning of statute prohibiting imprisonment for debt; dissenting opinion in State v. Jennings, 81 Mo. 203, declaring rule to be applicable in construing penal statute.

The positive authority of a decision is coextensive only with the facts upon which it is made.

The following cases affirm and follow this rule, refusing to be guided by dicta in previous cases: Walker v. Walker, 17 Ala. 400; Lake Shore etc. R. R. Co. v. Wilson, 11 Ind. App. 493, 38 N. E. 345; Decoster v. Wing, 76 Me. 455; Marsh v. Putnam, 3 Gray, 554; Crampton v. Valido Marble Co., 60 Vt. 300, 15 Atl. 158; Evans v. Virgin, 72 Wis. 427, 7 Am. St. Rep. 871, 39 N. W. 865; Paine v. Jones, 93 Wis. 78, 67 N. W. 33; dissenting opinion in Estate of Breitung, 78 Wis. 39, 47 N. W. 18; Beverly v. Barnitz, 55 Kan. 473, 49 Am. St. Rep. 263, 42 Pac. 727; Grimes v. Bryne, 2 Minn. 102; Danks v. Quackenbush, 1 N. Y. 143.

Approved in Littlefield v. Gay, 96 Me. 424, 52 Atl. 926, holding petition in bankruptcy under statutes of Maine is ineffective during pendency of United States bankruptcy law; Clarksburg Elec. Light Co. v. City of Clarksburg, 47 W. Va. 746, 35 S. E. 996, holding under general statute law of West Virginia, a grant to railroad of privilege to operate conveyances for public use is valid; Becker v. Chester, 115 Wis. 146, 91 N. W. 107, holding when realty is conveyed by will, with power to convert it into personalty and hold same beyond period allowed for holding realty, it is valid if not fettered by some invalid trust; dissenting opinion in Vollmer v. Spencer, 5 Idaho, 570, 51 Pac. 613, majority holding where action is based on two notes and one of the notes is secured, the motion to dissolve the attachment was properly granted; dissenting opinion in Harrington v. Pier, 105 Wis. 525, 82 N. W. 359, majority holding where under will realty is directed to be converted into personalty for void purposes, the realty will pass to heirs as property undisposed of.

Signature of indorser is evidence of his promise that bill shall be paid, and of his having received value for it.

Approved in Ross v. Jones, 22 Wall. 589, 22 L. Ed. 734, and Duerson v. Alsop, 27 Gratt. 243, in entertaining suits against indorsers; Haily v. Falconer, 32 Ala. 541, special indorsement expressing only one of legal implications arising from an indorsement in blank, excludes all others.

Drawer of bill of exchange is entitled to notice of its dishonor, and law presumes that he has stipulated for such notice.

Approved in Indianapolis v. Ritzinger, 24 Ind. App. 72, 56 N. E. 143, holding under Burns' Rev. Stats. 1894, § 4416 (Ind.), relating to vacation of plotted lots by county commissioners, and Act March 14, 1867, granting city councils the same power, city councils had power to vacate an unimproved addition to city on same proceedings required by commissioners; State v. Comptoir Nat. D'Escompte de Paris, 51 La. Ann. 1280, 26 South. 94, holding under La. Act No. 150 of 1890, relating to licensing banks where agency in New Orleans for foreign bank had never been required to pay license by those in charge of collection, no back licenses could be collected; McLain v. Marich, 60 Neb. 358, 83 N. W. 87, holding under Neb. Comp. Stats. 1899, c. 79, § 4, subd. 2, defining qualification of voters, wife of person owning a homestead is not owner of real property; English v. Mitchell Cattle Co., 8 Wyo. 89, 55 Pac. 313, holding contract to gather defendant's cattle will be implied from the facts of the case; McVeigh v. Bank, 26 Gratt. 850, dismissing suit where such notice was not given.

In case of implied contract, law presumes parties have made those stipulations which, as fair and just men they ought to have made.

Approved in Hughes v. Dundee etc. Co., 10 Sawy. 236, 238, 21 Fed. 174, 175, Saunders v. Saunders, 90 Me. 289, 38 Atl. 173, Nolan v. Swift, 111 Mich. 61, 69 N. W. 98, and English v. Mitchell Cattle Co., 55 Pac. 313, all holding that where valuable services are rendered, under circumstances not inconsistent with existence of contract, parties are presumed to have stipulated for reasonable compensation; Gliddon v. McKinstry, 25 Ala. 248, holding that diligence in collecting fund out of which person had promised to pay in writing certain amount, was implied term of contract; Lawler v. Murphy, 58 Conn. 310, **8 L. R. A. 118**, 20 Atl. 458, agreement by an insurance association to pay, on the death of the insured, "a sum received from a death assessment," etc., implied agreement to levy assessment.

Distinguished in Hays v. McConnell, 42 Ind. 287, and Weir v. Weir, 3 B. Mon. 648, **39 Am. Dec. 490**, holding that contract cannot be implied from the fact that child remains in service of his parents after attaining his majority, and refusing to allow recovery for services; Dunphy v. Ryan, 116 U. S. 497, **29 L. Ed. 705**, 6 Sup. Ct. 488, holding implied promise not enforceable where it was within statute of frauds.

Usage of banks in extending time of grace to three days, becomes part of contract embodied in promissory note.

Cited in Bank of Tennessee v. Officer, 3 Baxt. 175, holding indorser's liability not fixed by demand on drawer before the third day; Weems v. Ventress, 14 La. Ann. 269, and Duerson v. Alsop, 27 Gratt. 239, where the rule is approved in general discussion.

What demands may be discharged under state insolvent laws. Note, **23 Am. Dec. 348, 350, 351, 352, 353.**

Where nonresident creditor submits his claim in proceedings for discharge under State law, he is bound thereby.

Approved in Davidson v. Smith, 1 Biss. 348, Fed. Cas. 3608, following rule; Norton v. Cook, 9 Conn. 318, 320, **23 Am. Dec. 344, 345**, McCarty v. Gibson, 5 Gratt. 322, holding mere appearance in court, for the purpose of opposing the discharge, has been held insufficient.

Assignment for creditors will not convey debtor's property in foreign jurisdiction; contra as to debtor's own deed of assignment for creditors.

Approved in Charles Roesch & Sons Co. v. Mumford, 230 Fed. 62, holding where legal title of debtor's property passed to assignee for creditors, creditors could not thereafter attach property; In re Bugbee, 9 Bank. Reg. 262, 4 Fed. Cas. 610, Blake v. Williams, 6 Pick. 306, **17 Am. Dec. 376**, Hoyt v. Thompson, 5 N. Y. 349, 350, 353, and Beall v. Lowndes, 4 S. C. 283, assignment, under insolvent laws, cannot bar right of nonresident creditor to attach debtor's property in foreign jurisdiction; assignment cannot dissolve an attachment already issued; Boston Iron Co. v. Boston Locomotive Works, 51 Me. 589, Dalton v. Currier, 40 N. H. 248, Dunlap v. Rogers, 47 N. H. 287, **93 Am. Dec. 435**, and Goodsell v. Benson, 13 R. I. 246, 247, 250; Betton v. Valentine, 1 Curt. 172, Fed. Cas. 1370, Johnson v. Hunt, 23 Wend. 90, 94, 97, it cannot invalidate bona fide transfer of property to citizen of State where it is situated; Booth v. Clark, 17 How. 337, **15 L. Ed. 170**, declaring that appointment of receiver under creditor's bill in State court did not vest in receiver the debtor's title to claim against foreign government; Abraham v. Plestoro, 3 Wend. 549, 559, **20 Am. Dec. 742, 751**, reversing Plestoro v. Abraham, 1 Paige, 237, holding that assignee under foreign commission was not entitled to injunction to restrain debtor from receiving from custom-house, property which was on way when commission issued; Crapo v. Kelly, 16 Wall. 627, **21 L. Ed. 437**, to same effect; Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 629, **43 L. Ed. 837**, Robinson v. Rapelye, 2 Stew. 101, May v. Breed, 7 Cush. 39, 41, 44, **54 Am. Dec. 710, 712, 715**, Frank v. Babbitt, 155 Mass. 115, 29 N. E. 210, Weider v. Maddox, 66 Tex. 376, **59 Am. Rep. 620**, 1 S. W. 170, holding where assignment in question was purely voluntary, that property in foreign jurisdiction passed under it as against a creditor within that jurisdiction.

Modified in Willitts v. Waite, 25 N. Y. 586, holding that receiver appointed under State law could take assets of insolvent corporation, in another jurisdiction, subject to claims of foreign attaching creditors; Torrens v. Hammond, 4 Hughes, 599, 600, 10 Fed. 902, 903, Perry Mfg. Co. v. Brown, 2 Wood. & M. 463, 465, 467, 471, Fed. Cas. 11,015, holding that where property has actually passed to the assignee it is not subject to attachment.

State laws can have no effect, proprio vigore, upon process or proceedings in the Federal courts.

Approved in Darst v. Duncan, 6 Fed. Cas. 1195, holding, in an action against sheriff for escape of prisoner committed on execution for debt from Federal court, that it was no defense that prisoner had been discharged under State law; Duncan v. Klinefelter, 5 Watts, 142, **30 Am. Dec. 297**, denying power of State court to discharge person in custody under Federal process.

Distinguished in Beers v. Haughton, 9 Pet. 359, **9 L. Ed. 157**, affirming s. c., 1 McLean, 229, 231, Fed. Cas. 1230, Wood v. Funk, 7 Ohio, 197, holding that where Federal courts have adopted rules in force in State courts, they will recognize discharge from imprisonment under State law.

Discharge under insolvent laws of another State as defense. Note, **4 Am. Dec. 74.**

Discharge under foreign bankrupt law. Note, **54 Am. Dec. 716.**

Effect of foreign discharge in bankruptcy. Note, **62 Am. Dec. 611.**

Conclusiveness of discharge in insolvency. Note, **15 Am. St. Rep. 212, 215.**

Conclusiveness of judgment of foreign country. Note, **20 L. R. A. 674.**

Discharge in insolvency under State law cannot operate to discharge debt due citizen of another State.

Among the citations of the rule above stated the following approve the general rule: In re Salmon, 143 Fed. 405, holding Rev. Stats. Mo. 1899, §§ 1305, 1306, relating to liquidation of insolvent banks, is, in respect to private banks, superseded by bankruptcy act of 1898; Old Town Bank v. McCormick, 96 Md. 351, **94 Am. St. Rep.** 579, 53 Atl. 935, 936, holding Maryland bankruptcy act was not superseded by United States bankruptcy act as to proceedings begun against a farmer; Ryles, Wilson & Co. v. Shelley Mfg. Co., 93 Mo. App. 181, holding demand created by fraud of defendant, whereby he secures money of plaintiff, is not a debt within meaning of attachment act; Holshouser v. Copper Co., 138 N. C. 255, **70 L. R. A. 183**, 50 S. E. 653, New Jersey statute declaring annual license fee imposed on corporations shall be preferred debt on insolvency does not give such claim preference in insolvency proceedings in another State; dissenting opinion in Sams v. St. Louis etc. Ry., 174 Mo. 96, 73 S. W. 698, majority holding Rev. Stats. 1899, § 2873, which provides for liability of railroad corporation for negligence of servants, does not apply to street railroads.

The earlier cases give the rule various applications. The first group of citations embraces those which most nearly resemble the principal case, in that in each of them the contract sought to be enforced was performable in the State where the discharge was granted. These cases involved various contracts, but, disregarding the nature of the contracts, the courts uniformly held that the nonresident creditor's right could not be defeated; Denny v. Bennett, 128 U. S. 497, **32 L. Ed. 494**, 9 Sup. Ct. 137; Satterthwaite v. Ambercrombie, 23 Blatchf. 309, 24 Fed. 544; Newton v. Hagerman, 10 Sawy. 462, 463, 22 Fed. 526, 527; Bancher v. Fisk, 33 Me. 316;

Felch v. Bugbee, 48 Me. 13, 15, 77 **Am. Dec.** 206, 207; Braynard v. Marshall, 1 Pick. 196, 197; Phelps v. Borland, 103 N. Y. 410, 57 **Am. Rep.** 756, 9 N. E. 309; Main v. Messner, 17 Or. 79, 20 Pac. 255; Bedell v. Scranton, 54 Vt. 494; Demeritt v. Exchange Bank, 7 Fed. Cas. 450; dissenting opinion in Scribner v. Fisher, 2 Gray, 46. Actions on bills of exchange and promissory notes payable to nonresidents have frequently called for the application of the rule, and the courts have found no difficulty where the paper was drawn in favor of such persons; Baldwin v. Hale, 1 Wall. 232, 17 **L. Ed.** 533 (affirming Hale v. Baldwin, 1 Cliff. 515, Fed. Cas. 5913); Baldwin v. Bank of Newbury, 1 Wall. 239, 17 **L. Ed.** 535; Byrd v. Badger, 1 McAll. 265, Fed. Cas. 2265; Springer v. Foster, 2 Story, 387, Fed. Cas. 13,266; Rhodes v. Borden, 67 Cal. 9, 6 Pac. 851; Kelley v. Drury, 9 Allen, 29; Fareira v. Keevil, 18 Mo. 188; Beers v. Rhea, 5 Tex. 356, 360, 361. Where the paper was originally drawn between citizens of the State where the discharge was granted, but indorsed to a nonresident, a more difficult case was presented. Generally, however, on the principle that the indorsee's rights, as against the maker, are coextensive with those of the original payee, the courts have held that a nonresident indorsee cannot be barred by a discharge in the State where the maker resides; Stevenson v. King, 2 Cliff. 2, Fed. Cas. 13,417; Towne v. Smith, 1 Wood. & M. 122, 123, 124, 125, 127, 128, 129, 130, 136, Fed. Cas. 14,115; Anderson v. Wheeler, 25 Conn. 607, 610, 611; Savoye v. Marsh, 10 Met. 595, 43 **Am. Dec.** 452; Phoenix Bank v. Batchelder, 151 Mass. 591, 8 **L. R. A.** 646, 24 N. E. 918; Donnell v. Lewis County Bank, 80 Mo. 172. In Brighton Bank v. Merick, 11 Mich. 414, 415, 420, 422, the court was divided, so the decision of the lower court, declaring a nonresident indorsee barred by a discharge in the State where the note was made, was affirmed. Nonresident judgment creditors are also protected by this rule, whether their judgments were obtained in the State of discharge or not. The mere pursuit of a claim in the courts of the State where the debtor resides does not operate as a waiver of the creditor's extraterritorial immunity from the effect of a discharge. Such has been the ruling in every citing case in which the question has arisen; Donnelly v. Corbett, 7 N. Y. 503, 504, 505; Soule v. Chase, 39 N. Y. 344, 35 N. H. 466, 467, 469; Murphy v. Manning, 134 Mass. 489; Evans v. Sprigg, 2 Md. 470; Potter v. Kerr, 1 Md. Ch. 281; Poe v. Duck, 5 Md. 6, 7, 9, 10; Brook v. Brown, 5 Cr. C. C. 489, 492, Fed. Cas. 1931. The dissenting opinion in Soule v. Chase, 39 N. Y. 346, 348, attempted to distinguish the principal case on this point, in arguing that a nonresident judgment creditor could not, after discharge, sue upon a judgment he had previously recovered in the State.

Several cases have held the rule inapplicable, when the contract sued upon was one to be performed in the State of discharge. Thus, where, at the time of discharge, both parties were resident in the State, the subsequent removal of the creditor to another jurisdiction, or the assignment of his rights to a nonresident, did not operate to remove the bar; Von Glahn v. Varrenne, 1 Dill. 517, 519, 520, Fed. Cas. 16,994; Thomas v. Crow, 65 Cal. 471, 4 Pac. 448; Pugh v. Bussell, 2 Blackf. 400, 401; Brigham v. Hen-

derson, 1 Cush. 432, 433, 48 **Am. Dec.** 611, 612; Stone v. Tibbetts, 26 Me. 112; Peck v. Hibbard, 26 Vt. 704, 62 **Am. Dec.** 609. Similar cases are those which have held that a creditor residing in the State of discharge cannot proceed against property of his debtor situated in another State; Cole v. Cunningham, 133 U. S. 114, 33 **L. Ed.** 542, 10 Sup. Ct. 271; Burlock v. Taylor, 16 Pick. 341; Bank of Utica v. Card, 7 Ohio (pt. II), 170. And applying the same principle, it was held in Letchford v. Convillon, 20 Fed. 608, 609, that an alien, living and doing business in the State of discharge, was barred by such discharge. Manning, J., in Brighton Bank v. Merick, 11 Mich. 424, distinguished the principal case upon this point, in arguing that indorsement of a note to a nonresident, even before discharge, was not sufficient to give the indorsee extraterritorial rights. The court being divided, the decision of the lower court, according with this view, was affirmed. The Louisiana courts have even gone to the length of deciding that as the State law applied expressly to all persons and all contracts, a nonresident indorsee of a note executed between residents of the State was barred; Northern Bank v. Squires, 8 La. Ann. 338, 339, 340, 58 **Am. Dec.** 685, 686, 687; Orr v. Lisso, 33 La. Ann. 479. And in McDonald v. Bank, 47 Minn. 68, 69, 28 **Am. St. Rep.** 329, 13 **L. R. A.** 463, 49 N. W. 395, the court asserted that a State law could dispose of property within the State so as to bar a nonresident creditor on a contract made within the State.

It being, then, the established rule that contracts performable in the State of discharge are not affected thereby, it follows conclusively that a State insolvent law cannot operate to discharge a contract performable in the foreign jurisdiction where the creditor resides; Boyle v. Zacharie, 6 Pet. 348, 8 **L. Ed.** 423; s. c., 6 Pet. 643, 8 **L. Ed.** 530; Babcock v. Weston, 1 Gall. 169, Fed. Cas. 703; Agnew v. Platt, 15 Pick. 420; Glenn v. Clabaugh, 65 Md. 69, 3 Atl. 904; Pinckney v. Lanahan, 62 Md. 450; Larrabee v. Talbott, 5 Gill. 438, 46 **Am. Dec.** 642; Esterly v. Goodwin, 35 Conn. 284, 287, 95 **Am. Dec.** 238, 240; Hawley v. Hunt, 27 Iowa, 307, 308, 309, 310, 1 **Am. Rep.** 274, 275, 276, 277. And in those cases where a note payable to a nonresident has been held to be a contract performable where the creditor resides, the rule has been applied; Cook v. Moffat, 5 How. 307, 308, 310, 315, 316, 2 **L. Ed.** 165, 166, 169; Frey v. Kirk, 4 Gill & J. 519, 520, 23 **Am. Dec.** 585, 586. Likewise a discharge from imprisonment in the State where the debtor is domiciled does not bar arrest beyond that State; Woodhull v. Wagner, Bald. 298, 301, Fed. Cas. 17,975. Wood v. Malin, 10 N. J. L. 210, gives the rule an extreme application in holding that a person arrested in New Jersey on a contract made in New York, where both parties resided, was not entitled to release on common bail, although he was so entitled in the latter State.

Several of the citing cases are of a miscellaneous nature; Ex parte Norwood, 3 Biss. 512, Fed. Cas. 10,364, and In re Republican Ins. Co., 8 Bank. Reg. 200, 20 Fed. Cas. 549, holding that receiver of a foreign bankrupt corporation may, in the Federal courts, prove debt against person discharged in another State; Suydam v. Broadnax, 14 Pet. 75, 10 **L. Ed.** 361,

holding that statute barring actions against executors of insolvent estates cannot be pleaded in bar to an action by nonresident in Federal court; Mississippi Mills v. Ranlett, 19 Fed. 195, 197, holding that State law cannot, by declaratory force alone, without vesting title to debtor's property in an assignee, remove property from reach of nonresident creditor; Herschfeld v. Drexel, 12 Ga. 586, and Varnum v. Camp, 13 N. J. L. 331, **25 Am. Dec. 481**, holding that assignment of property under the law of assignor's domicile cannot pass property in another State contrary to the policy of that State; Flagg v. Baldwin, 38 N. J. Eq. 224, **48 Am. Rep. 312**, refusing to enforce foreign contract for speculation in stocks upon margins, such contracts being prohibited by the law of the State; State Tax on Foreign Held Bonds, 15 Wall. 326, **21 L. Ed. 189**, holding that State law cannot require treasurer of corporation to withhold certain percentage of interest due foreign holders of bonds as tax upon such bonds; Baylies v. Houghton, 15 Vt. 632, where promissory note payable in Massachusetts, to citizen of that State, was held not subject to foreign attachment under Vermont law; dissenting opinion in Beers v. Haughton, 9 Pet. 364, 365, 366, 367, 372, 373, 374, 376, **9 L. Ed. 159, 160, 162, 163**, arguing that Federal court cannot, by adopting rules of State court regarding mesne process, give effect to discharge from imprisonment as against nonresident creditor; dissenting opinion in Canada Southern Ry. Co. v. Gebhard, 109 U. S. 545, **27 L. Ed. 1027**, 3 Sup. Ct. 375, majority holding corporation to be subject to laws of the place where it was created, and that persons dealing with it elsewhere do so with reference to those laws affecting its powers and obligations; dissenting opinion in Scribner v. Fisher, 2 Gray, 46, majority holding discharge bars nonresident creditor, if the contract by its terms is to be performed in State of discharge; dissenting opinion in Moore v. Wayne Circuit Judge, 55 Mich. 92, 93, 20 N. W. 806, majority holding that a judgment by default against a nonresident defendant entitles the plaintiff to proceed against garnishees, although notice was served on the principal defendant outside of the jurisdiction of the court; Wilson v. Finley, 32 Ala. 342, 344, Hempstead v. Reed, 6 Conn. 492, Vanbuskirk v. Hartford Fire Ins. Co., 14 Conn. 592, Lehner v. Herr, 1 Duv. (Ky.) 362, Elton v. O'Connor, 6 N. D. 19, **33 L. R. A. 526**, 68 N. W. 90, Corrie's Case, 2 Bland, 497, Hall v. Williams, 6 Pick. 243, **17 Am. Dec. 364**, arguendo.

Distinguished in dissenting opinion in Bergner & Engel Brewing Co. v. Drefus, 172 Mass. 163, 51 N. E. 534, majority holding foreign corporation which had procured license for sale of goods, and which had appointed a person on whom process might be served, is not under State insolvency law, so that discharge in insolvency is bar to action for goods; Schroeder's Syndics v. Nicholson, 2 La. 354, holding that cession of property under State law, accepted by creditor, cannot be affected by judgment against debtor obtained later in Federal courts by foreign creditor; Brown v. Smart, 145 U. S. 457, **36 L. Ed. 775**, 12 Sup. Ct. 959, sustaining power of State to provide that conveyance containing preferences should be cause for decree in insolvency, and holding such law to be binding as against

preferred creditors who are citizens of other States; Marsh v. Putnam, 3 Gray, 556, 557, 558, 559, 560, 561, 562, 564, 565, Crampton v. Valido Marble Co., 60 Vt. 298, 299, 1 L. R. A. 123, 15 Atl. 157, Betts v. Bagley, 12 Pick. 579, where the parties were citizens of the State of discharge, the creditor is barred from suing on a contract performable in another State; Very v. McHenry, 29 Me. 215, holding that if State insolvent law cannot operate to discharge contract to be executed elsewhere, e converso it can discharge contract performable in State, irrespective of residence of creditor.

Power to regulate weights and measures. Note, 70 Am. Dec. 154.

Miscellaneous. Cited in Flint River etc. Co. v. Foster, 5 Ga. 205, 48 Am. Dec. 257, Beall v. Beall, 8 Ga. 218, and Bank of St. Marys v. State, 12 Ga. 498, as instance where court exercised its power to determine constitutionality of State law; Saunders v. Taylor, 7 Mart. (N. S.) 15, as instance where Supreme Court affirmed judgment of Circuit Court without awarding damages for delay caused by appeal; Cherokee Nation v. Georgia, 5 Pet. 47, 8 L. Ed. 41, to point that by Revolution powers and duties of parliament devolved upon the respective States; Lane v. Townsend, 1 Ware, 290, Fed. Cas. 8054, and Nicolls v. Rodgers, 2 Paine, 440, Fed. Cas. 10,260, to point that Federal courts will adopt practice of State courts under certain circumstances; Ex parte Hull, 12 Fed. Cas. 856, as distinguishing between bankrupt and insolvent laws; Lick v. Faulkner, 25 Cal. 421, to point that where selection of means is discretionary with Congress, it is to be sole judge as to their necessity; State ex rel. v. Dews, Charlt. 429, to point that public corporations are subject to legislative control; Governor v. Daniel, Charlt. 451, to point that where verdict only found debt mentioned in bond, execution for principal and interest from date of bond is void; Maxey v. Loyal, 38 Ga. 534, quoting Johnson, J., to effect that it is "duty of society to enforce the rights of humanity," in sustaining homestead exemption laws as provision for debtor's family; Richmond etc. R. R. Co. v. Richmond, 26 Gratt. 99, to point that State legislatures are vested with certain police powers which may be exercised to any extent compatible with the Constitution; dissenting opinion in Legal Tender Cases, 12 Wall. 618, 679, 20 L. Ed. 334, 353, to point that Congress cannot make anything but gold and silver coin legal tender; dissenting opinion in Rose v. Buckland, 17 Ill. 320, to point that Congress cannot interfere with power of States to regulate descents. Cited erroneously in Ex parte Crane, 5 Pet. 206, 8 L. Ed. 98.

12 Wheat. 369, 6 L. Ed. 660, SHAW v. ROBBINS.

Discharge under State insolvent law cannot defeat rights of creditor who is citizen of another State.

Cited in Woodhull v. Wagner, 1 Bald. 300, 301, Fed. Cas. 17,975, holding discharge from imprisonment in one State does not protect debtor from arrest in another State at instance of citizen of latter; Hempstead v. Reed, 6 Conn. 490, but holding that discharge good as between citizens of State of discharge is pleadable in bar to action elsewhere; Frey v. Kirk,

4 Gill & J. 519, **28 Am. Dec. 585**, ruling similarly in action upon note payable to nonresident; also in Savoye v. Marsh, 10 Met. 595, **43 Am. Dec. 452**, in action upon note drawn and payable to maker in State of discharge, but indorsed to person in another State; Whitney v. Whiting, 35 N. H. 468, holding such discharge not a bar to action on judgment rendered in favor of nonresident creditor. Beers v. Haughton, 1 McLean, 229, Fed. Cas. 1230, declaring that State laws can have no effect, proprio vigore, upon Federal process; Van Hook v. Whitlock, 26 Wend. 53, **37 Am. Dec. 249**, dissenting opinion in Beers v. Haughton, 9 Pet. 373, 374, 376, **9 L. Ed. 162**, 613, arguendo.

Distinguished in Marsh v. Putnam, 3 Gray, 560, holding discharge under State law binding as to citizens of that State, although contract performable elsewhere; dissenting opinion in Soule v. Chase, 39 N. Y. 348, majority holding that nonresident creditor did not waiver extraterritorial immunity from effect of State law by suing debtor in State of discharge.

12 Wheat. 370–383, 6 L. Ed. 660, MASON v. HAILE.

Right to imprison for debt is not part of obligation, but of remedy; going at large under discharge from imprisonment by special act of legislature, does not constitute breach of bail bond.

Approved in State Sav. Bank v. Matthews, 123 Mich. 59, 81 N. W. 919, holding Pub. Acts 1899 (Mich.), No. 200, providing that foreclosure decree shall not direct sale until after six months from filing bill, instead of one year, and giving right of redemption for six months, does not preclude its application to mortgage executed prior to its enactment; Beers v. Haughton, 9 Pet. 359, **9 L. Ed. 157**, holding bail entitled to exoneretur upon discharge of debtor; Tennessee v. Sneed, 96 U. S. 74, **24 L. Ed. 612**, asserting right of legislature to give retrospective operation to statute limiting remedies of person paying illegal taxes; Penniman's Case, 103 U. S. 717, **26 L. Ed. 605**, affirming s. c., 11 R. I. 340, 341, 343, 344, 346, 350, holding statute abolishing imprisonment for debt, does not impair obligation of contracts previously entered into; Woodfin v. Hopper, 4 Humph. 21, to same effect; Antoni v. Greenhow, 107 U. S. 775, **27 L. Ed. 471**, 2 Sup. Ct. 96, asserting power of legislature to require person tendering interest coupons on municipal bonds in payment of taxes, to pay in coin, under protest, if collector disputes validity of bonds; In re Reynolds, 9 Bank. Reg. 57, **5 Am. Rep. 620**, Fed. Cas. 11,723, 8 R. I. 493, enactment of national bankrupt law did not suspend law providing merely for discharge from imprisonment; In re Kirkland, 14 Fed. Cas. 678, giving retroactive effect to change in rules relating to pursuit of remedy on maritime liens; Campbell v. Iron-Silver Min. Co., 83 Fed. 646, 55 U. S. App. 154, upholding act reducing number of new trials allowable in ejectment suits; Ex parte Pollard, 40 Ala. 88, and Farnsworth v. Vance, 2 Cold. 120, holding valid, a "stay law" postponing rendition of judgments in certain cases; Newton v. Tibbatts, 7 Ark. 153, holding where legislature abolished imprisonment for debt after bail bond was executed, failure of bail to surrender principal did not render him liable for debt; Taylor v. Keeler,

30 Conn. 327, holding statute authorizing judge to allow costs in certain cases applied to actions pending; Cook v. Gray, 2 Houst. 470, **81 Am. Dec.** 188, holding obligation of bail bond not impaired by repeal of statute, providing that ca. sa. should not issue on judgments recovered by non-residents; Wilder v. Lumpkin, 4 Ga. 220, holding act declaring it to be unnecessary to make sureties on appeal and injunction bonds parties to writs of error, applicable to cases pending; Searcy v. Stubbs, 12 Ga. 439, giving similar effect to statute providing that suit shall not abate upon death of party; Cutts v. Hardee, 38 Ga. 366, asserting power of legislature to pass retroactive law changing rules of evidence in proceedings against insolvents; Hardeman v. Downer, 39 Ga. 427, 429, and Hill v. Kessler, 63 N. C. 446, sustaining validity of homestead exemption laws; Bonner v. Martin, 40 Ga. 504, giving retroactive effect to statute creating new equitable defenses to actions on promissory notes; Newkirk v. Chapron, 17 Ill. 348, and Scott v. Smart, 1 Mich. 306, holding delay caused by change of jurisdiction from one court to another does not impair obligation of contracts; Pugh v. Bussell, 2 Blackf. 398, holding where debtor has been discharged from imprisonment, execution upon judgment recovered can be levied only against property; Maynes v. Moore, 16 Ind. 123, upholding act providing new remedy for enforcement of mortgage; McCormick v. Rusch, 15 Iowa, 136, **83 Am. Dec. 408**, act providing for continuance of suits against persons in military service of United States; Beverly v. Barnitz, 55 Kan. 469, **49 Am. St. Rep. 260, 31 L. R. A. 75**, 42 Pac. 726, law regulating redemption of property is applicable to mortgages previously executed; Rousseau v. New Orleans, 35 La. Ann. 559, holding act prohibiting levy of fi. fa. against city, in suit upon bonds, did not impair obligation of bonds; Bronson v. Newberry, 2 Doug. (Mich.) 47, and Brown v. Dillahunty, 4 Smedes & M. 725, **43 Am. Dec. 502**, holding recognizance of special bail rendered inoperative by act abolishing imprisonment for debt; Rockwell v. Hubbell, 2 Doug. (Mich.) 203, **45 Am. Dec. 250**, and Morse v. Goold, 11 N. Y. 288, **62 Am. Dec. 107**, holding law exempting property from execution applicable to contracts previously made; so also in Stephenson v. Osborn, 41 Miss. 129, **90 Am. Dec. 366**, giving same effect to statute varying existing exemption laws; Simpson v. Savings Bank, 56 N. H. 470, **22 Am. Rep. 494**, holding valid, an act authorizing reduction of deposit accounts in insolvent banks, so as to divide losses equitably among depositors; Rader v. Southeasterly Road Dist., 36 N. J. L. 277, asserting power of legislature to provide that costs shall not be recoverable in certain actions; Conkey v. Hart, 14 N. Y. 30, giving retroactive effect to statute abolishing distress for rent; Ward v. Funk, 7 Ohio, 197, declaring that discharge from imprisonment under State law discharges from imprisonment on process of Federal Circuit Court; Templeton v. Kraner, 24 Ohio St. 563, asserting validity of act providing new remedy for breach of covenant of warranty; Pennsylvania Co. v. McCann, 54 Ohio St. 18, **56 Am. St. Rep. 697, 31 L. R. A. 652**, 42 N. E. 769, law providing rules of evidence in actions for negligence, applies

to actions pending; Gray v. Monongahela etc. Co., 2 Watts & S. 160, 37 Am. Dec. 502, holding act giving new privileges to corporation did not impair vested rights of stockholders, although by extending liabilities of corporation, stockholders were incidentally affected; In re Nichols, 8 R. I. 55, holding valid, a special act of legislature discharging tort debtor from imprisonment; Moore v. Holland, 16 S. C. 24, 30, holding act abolishing judgment liens applicable to judgments in actions pending; Moore v. Litchford, 35 Tex. 215, 218, 14 Am. Rep. 368, 370, giving same effect to act declaring that judgments shall constitute liens on property; Warsham v. Stevens, 66 Tex. 91, 17 S. W. 404, holding act prohibiting attorneys from confessing judgment against clients, did not impair contract providing for such confession; dissenting opinion in Aycock v. Martin, 37 Ga. 179, majority holding "stay law" unconstitutional; dissenting opinion in Scobey v. Gibson, 17 Ind. 578, majority holding law providing for redemption of property sold on execution, void as to sales made previously; dissenting opinion in Watkins v. Glenn, 55 Kan. 438, 40 Pac. 321, majority holding law regulating redemption of mortgage inoperative as to mortgages previously executed; Woodhull v. Wagner, 1 Bald. 298, 301, Fed. Cas. 17,975; Towne v. Smith, 1 Wood. & M. 121, 130, Fed. Cas. 14,115; Ex parte Hull, 12 Fed. Cas. 853; Fisher v. Slayton, 3 Harr. 278; Judd v. Porter, 7 Me. 340; Metropolitan Bank v. Van Dyck, 27 N. Y. 458; Langdon v. Strong, 2 Vt. 257, arguendo.

Distinguished in Van Hoffman v. City of Quincy, 4 Wall. 553, 554, 18 L. Ed. 409, 410, Commissioners etc. of Limestone County v. Rather, 48 Ala. 447, and Commissioners of Columbia County v. King, 13 Fla. 476, holding right to tax for purpose of redeeming bonds cannot be withdrawn or restricted so as to impair rights of holders; Lyman v. Mower, 2 Vt. 519, holding bond to remain true prisoner is for benefit of creditor, and surety cannot be released by discharge of debtor from imprisonment; dissenting opinion in In re Penniman, 11 R. I. 357, arguing that debtor who is fraudulently concealing property should not be allowed benefit of discharge from imprisonment.

Constitutionality of exemption statutes relating to personal property. Note, 45 Am. Dec. 251.

Exemption laws as retrospective. Note, 10 Am. Dec. 138.

Definiteness of question to be certified. Note, 31 L. R. A. 395.

Miscellaneous. Cited in Edwards v. Kearzey, 96 U. S. 603, 24 L. Ed. 797, citing dissenting opinion in principal case to point that remedy cannot be altered so as to impair obligation; Pritchard v. Norton, 106 U. S. 133, 27 L. Ed. 107, 1 Sup. Ct. 109, but not in point; dissenting opinion in McElvain v. Mudd, 44 Ala. 76, to point that State cannot impair obligation by withdrawing all remedy; Micou v. Tallassee Bridge Co., 47 Ala. 656, and Howard v. Jones, 50 Ala. 69, to point that law in force at time contract is made, enters into and becomes part of it; Smith v. Judge Twelfth

Dist., 17 Cal. 562, but apparently erroneous; Whitney v. Whiting, 35 N. H. 463, to point that discharge of contract in State where it is made is binding everywhere, irrespective of domicile of parties.

12 Wheat. 383–408, 6 L. Ed. 664, COLUMBIAN INS. CO v. CATLETT.

Plaintiff's joinder in demurrer, without defendant's having distinctly admitted, upon record, every fact which evidence conduced to prove.

Cited in Doe d. Wilkins v. Rue, 4 Blackf. 265, 29 Am. Dec. 371, where facts admitted showed execution sale to have been made in good faith and judgment was given for defendant in ejectment; Booth v. Cotton, 13 Tex. 362, sustaining lower court in refusing to submit cause to jury, after demurrer to evidence; dissenting opinion in Slocum v. New York Life Ins. Co., 228 U. S. 414, Ann. Cas. 1914D, 1029, 57 L. Ed. 900, 33 Sup. Ct. 523, majority holding court could not on demurrer to evidence set aside verdict and render judgment on evidence without new trial.

Distinguished in Slocum v. New York Life Ins. Co., 228 U. S. 390, Ann. Cas. 1914D, 1029, 57 L. Ed. 891, 33 Sup. Ct. 523, holding common-law rules relating to demurrers to evidence and nonsuit did not warrant Federal court in setting aside verdict and rendering judgment on evidence without new trial.

Delay to accomplish objects of voyage, by selling cargo reasonably, and according to known course of trade, is not deviation.

Approved in The Citta Di Messina, 169 Fed. 476, holding delay to await cargo did not amount to deviation; Hostetter v. Park, 137 U. S. 40, 34 L. Ed. 572, 11 Sup. Ct. 4, and Hostetter v. Gray, 11 Fed. 181, holding it not deviation for vessel to touch and stay at port out of its course, if such departure is within established usage of trade; Constable v. National Steamship Co., 154 U. S. 66, 38 L. Ed. 911, 14 Sup. Ct. 1068, ruling similarly where vessel in case of emergency docked at other than her accustomed pier; The Giulio, 34 Fed. 911, holding owner of vessel not liable to indemnify charterer for loss caused by putting into port on account of stress of weather; Walsh v. Homer, 10 Mo. 16, 45 Am. Dec. 349, holding it not deviation to stop and aid vessel in distress; Arnold v. Insurance Co., 78 N. Y. 17, 19, holding underwriter not discharged by reason of protracted delay for purpose of selling cargo; Mutual Benefit etc. Co. v. Ruse, 8 Ga. 540, construing term usage of trade; Natchez Ins. Co. v. Stanton, 2 Smedes & M. 377, 41 Am. Dec. 597, arguendo.

Distinguished in Burgess v. Insurance Co., 126 Mass. 81, 30 Am. Rep. 659, holding rule inapplicable in absence of proof of usage of trade.

Detention for reasonable time for purpose of adventure insured as a deviation. Note, 9 E. R. C. 401.

Construing general terms in policy to include acts and events incidental to adventure. Note, 14 E. R. C. 45.

Insurance of shifting or successive cargoes. Note, 13 E. R. C. 607.

Where policy provides for payment in case of loss in sixty days after loss, failure to adjust loss after proof offered is waiver.

Approved in Continental Ins. Co. v. Wickham, 110 Ga. 135, 35 S. E. 289, holding refusal to pay anything upon insurance policy, if made by authorized agent, is waiver of clause that insurance shall not become payable until sixty days after notice and proof of loss; Norwich etc. Co. v. Western Ins. Co., 6 Blatchf. 250, Fed. Cas. 10,363, (reprinted in 34 Conn. 571), ruling similarly where company denied liability after notice of loss; Cobb v. Insurance Co., 11 Kan. 99, where clause provided for payment within sixty days of notice and proof, and denial of liability was held to waive proof.

Though policy requires sixty days' notice of abandonment, letter containing notice may operate as abandonment at end of sixty days.

Approved in Canada Sugar Refining Co. v. Insurance Co., 175 U. S. 618, 44 L. Ed. 296, 20 Sup. Ct. 242, holding recovery of insurance on profits of cargo under policy insuring against total loss will not be prevented where cargo was abandoned as total loss although other insurers subsequently saved part of cargo; Lovering v. Insurance Co., 12 Pick. 361, holding that premature offer to abandon in case of detention, if unrevoked, may operate as abandonment at end of period contemplated by policy; Macy v. Whaling Ins. Co., 9 Met. 359, arguendo.

If sale of perishable cargo becomes necessary, in consequence of peril of sea before arrival at destination, it is constructive total loss.

Cited in Rossiter v. Chester, 1 Doug. (Mich.) 176, holding pro rata freight to be due where ship is unavoidably forced into port short of destination and is unable to proceed, and goods are accepted by owner.

Where specific sum is insured on cargo for round voyage, whole sum is at risk, though part of outward cargo had been landed.

Cited in Hugg v. Augusta Ins. Co., 7 How. 610, 12 L. Ed. 840, holding that company, in case of loss on return cargo, is not entitled to deduct amount of freight earned; American Ins. Co. v. Griswold, 14 Wend. 468, 472, 479, 488, 506, where facts were similar to those in principal case; Weston v. Minot, 3 Wood. & M. 443, Fed. Cas. 17,453, arguendo.

Freight is charge upon cargo, against which underwriters do not undertake to indemnify owner of cargo.

Approved in Shultz v. Insurance Co., 1 B. Mon. 339, holding insurer not liable for extra freight incurred by transshipment in case of disaster insured against; Daniels v. Insurance Co., 24 N. Y. 457, 458, under facts similar to those in principal case.

Miscellaneous. Cited in Lindley v. Kelley, 42 Ind. 300, to point that there cannot be bill of exceptions where there is demurrer to evidence; Schultz v. Insurance Co., 14 Fla. 117, and American Ins. Co. v. Bryan, 26

Wend. 582, 37 Am. Dec. 283, to point that after proof of loss all presumptions are with insured; Deming v. Merchants' etc. Co., 90 Tenn. 343, 13 L. R. A. 529, 17 S. W. 97, as authority for holding that in policy of insurance actual date controls.

12 Wheat. 408–419, 6 L. Ed. 674, GENERAL INTEREST INS. CO. v. RUGGLES.

Insurance effected by agent vested with authority to obtain insurance, is vitiated by suppression of material fact, though principal be innocent.

Distinguished in Augusta etc. Co. v. Abbott, 12 Md. 374, where representation in question was stated to have been made upon information.

Necessity of communicating to insured all matters affecting risk. Note, 13 E. R. C. 531.

Master of vessel is agent of owner in such matters as are connected with and incident to such employment.

Cited in The Flash, Abb. Adm. 71, Fed. Cas. 4857, holding vessel bound to shipper for performance of contract of affreightment made with master.

An agent cannot bind his principal except in matters coming within the scope of his authority.

Cited in Morton v. Day, 6 La. Ann. 763, denying liability of owner for goods purchased by captain on orders of merchants, with view to procuring freight; The Dolphin, 1 Flipp. 583, Fed. Cas. 3973, declaring that master cannot effect insurance upon vessel without authority.

Marine insurance, effected by owner, in good faith, after loss, is not vitiated by fact that master concealed fact of loss from owner.

Approved in El Dia Ins. Co. v. Sinclair, 228 Fed. 841, upholding insurance contract dated before loss but issued after, when issued and received in good faith; Clement v. Insurance Co., 6 Blatchf. 485, Fed. Cas. 2881, ruling similarly as to insurance effected by principal while purchasing agent had knowledge of loss; Folsom v. Insurance Co., 8 Blatchf. 175, Fed. Cas. 4902, holding policy not vitiated because of failure of master to notify owner of loss by telegraph; Security etc. Co. v. Kentucky etc. Co., 7 Bush (Ky.), 86, 3 Am. Rep. 302, enforcing contract of reinsurance, executed after loss of property unknown to insured company; Hallock v. Insurance Co., 26 N. J. L. 275, 284, holding company bound where loss of vessel occurred after application for insurance and before delivery of policy.

Distinguished in Rogers v. Equitable etc. Assn., 103 Iowa, 340, 72 N. W. 539, holding accident insurance company not liable where accident occurred between time of application and issuance of policy.

After loss or abandonment, master becomes agent of underwriters and is responsible to them for management of property saved.

Cited in Lovering v. Insurance Co., 12 Pick. 366, holding delivery of vessel to agent appointed by master not to be waiver of abandonment.

12 Wheat. 419–460, 6 L. Ed. 678, BROWN v. STATE OF MARYLAND.

Statutes are presumed constitutional, and the burden of proof is upon the party questioning them.

Approved in Austin v. State, 101 Tenn. 572, **70 Am. St. Rep. 708**, 48 S. W. 308, holding Acts 1897, c. 30, § 1 (Tenn.), relating to sale of cigarettes is not unconstitutional; Ex parte Thornton, 4 Hughes, 233, 12 Fed. 547; construing Virginia act of 1882, licensing sales by sample; Nunn v. State, 1 Ga. 246, construing act prohibiting carrying of concealed weapons; Railroad Co. v. Harris, 99 Tenn. 704, 43 S. W. 120, involving a tax law; Austin v. State (Tenn.), 48 S. W. 308, upholding cigarette law.

Construction of constitutional provisions, involving conflicting powers of Federal and State governments.

Approved in Fitzgerald v. City of Cleveland, 88 Ohio St. 384, **Ann. Cas. 1915B, 106**, 103 N. E. 525, construing provisions of Constitution for primaries and nomination and election of municipal officers; Rhode Island v. Massachusetts, 12 Pet. 722, 723, **9 L. Ed. 1260**, construing clause relative to judiciary and asserting jurisdiction of suit in equity by one State against another to determine a question of disputed boundary; Ex parte Anderson, 46 Tex. Cr. 399, 81 S. W. 987, arguendo.

Impost or duty on imports, within meaning of Constitution, is custom or tax levied upon articles brought into country.

Approved in May v. New Orleans, 178 U. S. 507, **44 L. Ed. 1169**, 20 Sup. Ct. 979, holding original packages which cannot be assessed for local taxation consist of the boxes or bales in which the goods are shipped and not the smaller packages that are offered for sale; Shaw v. United States, 141 Fed. 471, importation of wine in casks having wantage in excess of normal, collector cannot assess duty without allowance for excess; In re Sydow, 4 Ariz. 210, 36 Pac. 215, upholding Act No. 83, Laws 1893, licensing peddlers; Kehrer v. Stewart, 117 Ga. 973, 44 S. E. 855, holding agent in one State who takes orders there and receives goods therein from his principal in another State in original packages is engaged in interstate commerce; Dooley v. United States, 183 U. S. 153, 159, 173, **46 L. Ed. 130, 132, 137**, 22 Sup. Ct. 63, holding tax on goods imported into Porto Rico from New York under Foraker act, April 20, 1900 (31 Stats. at Large, 77, c. 191), is not unconstitutional; Woodruff v. Parham, 8 Wall. 130, 131, 137, 138, **19 L. Ed. 384, 386, 387**, holding goods brought into one State from another not imports, and hence subject to State law, taxing all sales made within State; Brown v. Houston, 114 U. S. 628, **29 L. Ed. 259**, 5 Sup. Ct. 1094, affirming s. c., 33 La. Ann. 845, **39 Am. Rep. 286**, and holding coal sent from one State into another for sale, to be taxable under uniform State law, although it may be subsequently sold for foreign exportation; United States v. Cigars, 2 Curt. 437, Fed. Cas. 16,450, holding importation to be complete, when goods are brought within limits of a port of entry; New York v. Compagnie Générale etc., 20 Blatchf. 304, 10 Fed. 362, holding alien passengers not imports, in sense that State may levy inspection

tax upon vessel carrying them; Clarke v. Clarke, 3 Woods, 410, 411, 412, Fed. Cas. 2846, construing term export, and holding goods already inspected under State law and delivered for export, to be exempt from State taxation; Nelson v. Loraine, 22 Fed. 57, holding that mere intention to export does not exempt goods from State taxation; People v. Walling, 53 Mich. 270, 18 N. W. 811, holding goods brought into one State from another not to be imports; Commonwealth v. Philadelphia etc. R. R. Co., 62 Pa. St. 296, 297, 1 Am. Rep. 408, 409, holding tax on railroad, upon basis of gross amount of business done, not tax on imports; dissenting opinions in Passenger Cases, 7 How. 477, 490, 534, 535, 537, 554, 12 L. Ed. 783, 789, 807, 808, 809, 816, arguing that law requiring master of vessel to pay per capita tax for privilege of landing alien passengers, does not lay tax upon imports.

Distinguished in Thomas v. United States, 192 U. S. 371, 48 L. Ed. 484, 24 Sup. Ct. 306, upholding war revenue act of 1898, imposing stamp duty on sales of corporate shares.

Tax to cover expenses of inspection constitutes exception to constitutional prohibition on States to lay duties on imports or exports.

Approved in Red "C." Oil Mfg. Co. v. Board of Agriculture, 172 Fed. 706, upholding statute providing for inspection and testing of kerosene oil; Turner v. Maryland, 107 U. S. 57, 27 L. Ed. 378, 2 Sup. Ct. 61, holding charge for storage of tobacco in State warehouse, pending inspection, not a duty on exports; Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 354, 356, 43 L. Ed. 194, 18 Sup. Ct. 865, 866, affirming validity of State law imposing inspection tax on imported guano; Neilson v. Garza, 2 Woods, 290, Fed. Cas. 10,091, holding, where duty purports to be inspection tax, question as to whether it is excessive is for Congress to determine; Green v. Savannah, Charlt. R. M. 370, affirming validity of city ordinance prohibiting sales of liquor without having them gauged by city inspector.

Distinguished in Plummer v. Coler, 178 U. S. 133, 44 L. Ed. 1007, 20 Sup. Ct. 836, holding legacy of United States lands is not exempt from State taxation under act of Congress, July 14, 1870.

Exception of particular thing from general words of statute.

Approved in United States v. First Nat. Bank, 190 Fed. 341, construing Criminal Code, section 239, relating to interstate liquor shipments; Tognazzini v. Jordan, 165 Cal. 23, Ann. Cas. 1914C, 655, 130 Pac. 881, holding statute providing for change of articles of incorporation, but prohibiting extension of corporate existence by such change authorized shortening of existence, though change had effect of immediate dissolution; Tulsa St. Ry. Co. v. Oklahoma Union Traction Co., 27 Okl. 349, 113 Pac. 184, construing ordinance granting franchise for street railway and excepting certain streets; J. W. Kelly & Co. v. State, 123 Tenn. 542, 132 S. W. 200, construing statute prohibiting tippling liquor, but excepting sales by manufacturers in wholesale to apply to all other sales; Bacon v. Locke, 42 Wash.

217, 83 Pac. 721, holding void Laws 1905, providing for license tax on peddlers of goods after shipment to State; Arnold v. United States, 147 U. S. 499, 37 L. Ed. 255, 13 Sup. Ct. 408, holding knit woolen undershirts to be dutiable as "wool wearing apparel," under revenue laws, and not as "knit fabrics made on frames," which constitute distinct class; Magill v. Brown, 16 Fed. Cas. 442, holding that statute denying a right was evidence that right existed at common law; Tinkham v. Tapscott, 17 N. Y. 152, holding that exception of particular officers from general prohibition indicates intention that all other officers are to be included; Friedman v. Mathes, 8 Heisk. 495, construing clause in State Constitution exempting certain capital from taxation; State ex rel. v. Cunningham, 83 Wis. 155, 35 Am. St. Rep. 59, 17 L. R. A. 171, 53 N. W. 59, arguendo; dissenting opinion in Groves v. Slaughter, 15 Pet. 514, 10 L. Ed. 824, arguing that slaves were subjects of commerce and State could not prevent admission to State.

Questions of power do not depend upon degree to which it may be exercised.

Approved in Northern Securities Co. v. United States, 193 U. S. 336, 48 L. Ed. 700, 24 Sup. Ct. 436, upholding enforcement of anti-trust act by injunction against corporation organized in pursuance of combination of stockholders of two competing interstate railroads; Toney v. State, 141 Ala. 125, 109 Am. St. Rep. 23, 67 L. R. A. 286, 37 South. 334, holding void act of 1901, making it penal to break labor contracts; State v. Armstead, 103 Miss. 797, Ann. Cas. 1915B, 495, 60 South. 780, holding void statute imposing penalty upon laborer or renter for violating contract to labor or cultivate land; In re Jacobs, 98 N. Y. 106, 50 Am. Rep. 639, denying power of legislature to impair value of property by prohibiting pursuit of lawful trade therein; Patterson v. Barlow, 60 Pa. St. 80, holding, where power to regulate elections is exclusively in legislature, its acts can be reviewed by courts only in case of abuse of discretion; McCullough v. Brown, 41 S. C. 250, 23 L. R. A. 422, 19 S. E. 473, denying power of legislature to establish monopoly; State v. Goodwill, 33 W. Va. 184, 25 Am. St. Rep. 867, 6 L. R. A. 624, 10 S. E. 287, denying power to restrict right of contract in respect to a lawful trade or business; dissenting opinion in Munn v. People, 69 Ill. 99, majority asserting power of legislature to regulate charges by public warehouses; Wynehamer v. People, 13 N. Y. 473, asserting plenary power of State to regulate liquor traffic.

So long as goods remain property of importer in original package in which imported, State tax void.

Approved in Price v. People of State of Illinois, 238 U. S. 454, 59 L. Ed. 1406, 35 Sup. Ct. 892, holding court would not assume goods shipped from State to State were in original packages exempt from police laws of State; McDermott v. Wisconsin, 228 U. S. 134, 136, Ann. Cas. 1915A, 39, 47 L. R. A. (N. S.) 984, 57 L. Ed. 767, 768, 33 Sup. Ct. 431, holding void State statute regulating labels on corn syrup, so far as relating to packages

in hands of importer, properly branded under food and drugs act; Hipolite Egg Co. v. United States, 220 U. S. 56, 55 L. Ed. 367, 31 Sup. Ct. 364, holding eggs shipped in violation of food and drugs act to one who intended using them for baking purposes were subject to seizure within State; Kehrer v. Stewart, 197 U. S. 65, 49 L. Ed. 666, 25 Sup. Ct. 403, upholding Georgia act of 1900, imposing tax on resident managing agents of nonresident meat-packing houses; American Steel etc. Co. v. Speed, 192 U. S. 519, 520, 521, 48 L. Ed. 546, 547, 24 Sup. Ct. 370, 371, holding goods brought into State in original package after they had arrived at destination may be taxed by State, though they are stored at distributing point from which they are subsequently to be delivered in same package to purchasers outside of State; Norfolk etc. Ry. Co. v. Sims, 191 U. S. 449, 48 L. Ed. 257, 24 Sup. Ct. 153, holding article made in one State and shipped in original package to buyer in another State is sold in former State and seller cannot be subjected to license tax in State where property is delivered; Austin v. Tennessee, 179 U. S. 350, 354, 45 L. Ed. 229, 230, 21 Sup. Ct. 135, holding sale of cigarettes not in original packages is within police power of State; Pitkin v. Brooks, 193 Ill. 269, 61 N. E. 1048, holding under United States Constitution, art. I, § 10, par. 2, imported goods in hands of importer in original packages are not subject to State taxation; Cook v. Marshall Co., 119 Iowa, 388, 392, 93 N. W. 373, 375, holding where many boxes of cigarettes each containing ten cigarettes absolutely loose are given to an express company they are not an "original package"; May & Co. v. City, 51 La. Ann. 1067, 25 South. 960, holding goods taken from original packages as shipped and received by importer are subject to State taxation; State v. Montgomery, 94 Me. 200, 47 Atl. 166, holding under section 1, chapter 298, Laws of 1889 (Me.), relating to granting of licenses to hawkers and peddlers, a citizen but not an alien cannot obtain such a license; Commonwealth v. Caldwell, 190 Mass. 357, 76 N. E. 955, holding void Rev. Laws, c. 65, §§ 15, 16, permitting sale by peddlers of agricultural products of United States without license, but forbidding unlicensed sales of foreign products; Gerdan v. Davis, 67 N. J. L. 88, 50 Atl. 587, imported goods in hands of importer in original packages are not subject to State taxation; Range Co. v. Campen, 135 N. C. 517, 522, 523, 529, 531, 47 S. E. 662, 664, 666, 667, holding void Revenue Act 1903, § 36, levying tax on peddlers as applied to sales by sample of goods manufactured in another State and delivered in original packages; State v. Smith, 61 W. Va. 339, 56 S. E. 532, discussing but not deciding validity of statute prohibiting railroad agent from delivering liquor to consignees not ordering it; Low v. Austin, 13 Wall. 32, 33, 20 L. Ed. 518, 519, ruling similarly where duty upon goods had already been paid to Federal officers and goods were merely awaiting sale; Cook v. Pennsylvania, 97 U. S. 573, 24 L. Ed. 1017, holding State law taxing sales made by auctioneers, inoperative as to sale of goods in original package for importer; Bowman v. Chicago etc. Ry. Co., 125 U. S. 506, 508, 31 L. Ed. 714, 715, 8 Sup. Ct. 1065, 1067, applying principle in denying power of

State to intercept goods in transit from consignor to consignee, under police regulation prohibiting sales of liquor; Leisy v. Hardin, 135 U. S. 108, 110, **34 L. Ed. 132, 133**, 10 Sup. Ct. 683, 684, denying right of State to restrict importation of liquor by prohibiting sales in original packages; Tuchman v. Welch, 42 Fed. 555, enjoining institution of contempt proceedings against person violating injunction from State court forbidding sale of liquor in original packages; In re Sanders, 52 Fed. 805, **18 L. R. A. 551**, holding law prohibiting sales of seeds in packages unmarked with date when grown, inapplicable to sales in original packages; In re Ware, 53 Fed. 784, ruling similarly as to law requiring packages of baking powder containing alum to be so labeled; Sawrie v. Tennessee, 82 Fed. 617, holding act prohibiting sale of cigarettes invalid, as to cigarettes imported from other States and foreign countries and sold in original packages; Blount v. Munroe, 60 Ga. 64, 65, holding timber in process of preparation for export to foreign country not taxable under State law; Wind v. Iler, 93 Iowa, 323, **27 L. R. A. 221**, 61 N. W. 1003, holding drawing of bungs of casks to test liquor does not constitute breaking of package so as to subject liquor to police regulation; State ex rel. v. Assessors, 46 La. Ann. 146, **49 Am. St. Rep. 319**, 15 South. 11, following rule; State v. Burns, 82 Me. 568, 569, 19 Atl. 914, 915, where liquor held by importer in original packages was declared not be subject to seizure under prohibitory State law; Bode v. State, 7 Gill, 329, holding law prohibiting sales of liquor on Sunday inapplicable to sales in original package by importer; State v. Shapleigh, 27 Mo. 347, 349, and State v. Kennedy, 19 La. Ann. 426, 427, where law requiring merchants generally to pay license tax, was held not to apply to importers selling goods in original packages; State v. Pratt, 59 Vt. 592, 9 Atl. 558, holding void a tax imposed upon vendors of foreign teas; Scanlan v. Childs, 33 Wis. 667, holding that, where State has not prohibited manufacture of beer, sales of beer so manufactured, in bottles or casks, are lawful in absence of express prohibition by statute; Coe v. Errol, 116 U. S. 526, **29 L. Ed. 718**, 6 Sup. Ct. 478, Louisville etc. Co. v. Collector, 49 Fed. 568, 6 U. S. App. 53, Jenkins v. Ewin, 8 Heisk. 482, 483, Hancock v. Singer Mfg. Co., 41 Atl. 852, arguendo.

Distinguished in Cook v. Marshall Co., 196 U. S. 269, 270, 275, **49 L. Ed. 474, 477**, 25 Sup. Ct. 233, upholding Iowa Code, § 5007, as applied to sales at retail of packages of ten cigarettes each which had been imported loose to retail; Austin v. Tennessee, 179 U. S. 385, **45 L. Ed. 242**, 21 Sup. Ct. 136, holding tobacco is an article of commerce although to a certain extent under police regulations of State; American Steel etc. Co. v. Speed, 110 Tenn. 546, **100 Am. St. Rep. 814**, 75 S. W. 1042, where goods sent in original packages to agent and delivered in that form to customers, and ninety per cent went to jobbers out of State and balance to jobbers in State, goods taxable; Commonwealth v. Armour & Co., 118 Va. 250, 87 S. E. 614, upholding statute imposing tax on manufacturers selling goods at places other than that of manufacture; Loring v. Beverly, 222 Mass. 334, 110 N. E. 976, holding dividends made by Massachusetts corporation

not exempt from taxation; C. Adolph Low & Co. v. Austin, 1 Cal. Unrep. 639, 641, 642, holding goods of merchant exposed for sale subject to State taxation though in original imported packages; dissenting opinion in Crenshaw v. State, 95 Ark. 472, 475, 476, 130 S. W. 572, 573, 574, majority upholding State license tax on traveling agents of foreign manufacturers; License Cases, 5 How. 574, 576, 587, 588, 594, 603, 604, **12 L. Ed. 288, 293, 294, 297, 301**, affirming validity of State laws exacting license for privilege of retailing liquors in less than stipulated quantity; Waring v. Mayor, 8 Wall. 121, 122, **19 L. Ed. 346**, affirming s. c., 41 Ala. 151, 152, where, under facts, shipper was held to be importer, and his vendee at port of entry was liable to tax upon goods sold, although such goods were still in original packages; Hinson v. Lott, 8 Wall. 151, **19 L. Ed. 388**, affirming s. c., 40 Ala. 132, 138, 140, holding rule inapplicable to shipments from other States, and law prohibiting sales of liquor, operative as to such liquor in original packages; Beall v. State, 4 Blackf. 108, holding law imposing fine upon person selling foreign merchandise without license not to be void as restrictive of right to import; State v. Robinson, 39 Me. 154, and State v. Chapman, 1 S. D. 430, **10 L. R. A. 437**, 47 N. W. 416, holding tax upon sales of goods valid in absence of proof that they were made in original package and by importer; State v. Robinson, 49 Me. 287, and Niles v. Rhodes, 7 Mich. 384, holding burden of proof to be on person claiming to be importer, to show that he was such; Commonwealth v. Kimball, 24 Pick. 363, **35 Am. Dec. 329**, where license tax did not purport to operate on imports in original packages; King v. McEvoy, 4 Allen, 112, holding that person foreclosing mortgage on imported goods is not importer, exempt from operation of State tax; dissenting opinion in Leisy v. Hardin, 135 U. S. 134, 136, 138, **34 L. Ed. 141, 142**, 10 Sup. Ct. 693, 694, asserting right of States in exercise of police power to prohibit sales, in original packages, of liquor brought from other States.

Situs of personal property for the purpose of taxation. Note, **62 Am. St. Rep. 473.**

What constitutes "original package" as applied to interstate shipments. Note, **12 Ann. Cas. 1116, 1117.**

When importer has so acted upon thing imported, that it has become mixed up with mass of property in the country, it is taxable.

Approved in Fairbank v. United States, 181 U. S. 294, 296, **45 L. Ed. 867, 868**, 21 Sup. Ct. 653, holding stamp tax on foreign bill of lading imposed by act of Congress, June 13, 1898 (30 Stats. at Large, 451, c. 448), section 6, is taxable on article included in bill of lading; May v. New Orleans, 178 U. S. 504, **44 L. Ed. 1168**, 20 Sup. Ct. 980, holding State taxation on original packages of imported goods before they have been incorporated into mass of State property by importer are exempt from State taxation; Evansville Brewing Assn. v. Excise Commission, 225 Fed. 208, holding State could tax resale of beer shipped from another State; United States v. Five Boxes of Asafoetida, 181 Fed. 565, holding mere

receipt of misbranded drug not opened or offered for sale did not constitute offense under food and drugs act; Gibbs v. M'Neeley, 102 Fed. 597, holding association for manufacture of shingles within particular State formed for purpose of controlling production and prices is not operating in violation of anti-trust law of 1890; In re Wilson, 8 Mackey (D. C.), 348, 352, 12 L. R. A. 624, upholding tax on peddlers selling from house to house goods brought into district in original package containing smaller packages which were sold unbroken; State v. Davidson, 50 La. Ann. 1301, 69 Am. St. Rep. 481, 24 South. 325, holding council of municipality may fix place for sale of perishable food commodities and prohibit sale elsewhere under New Orleans Charter Act No. 45, of 1896, section 14; Tax Collector v. Ray, 50 La. Ann. 579, 23 South. 906, holding commercial traveler or canvasser who solicits orders by sample for his house whether in or out of the State is not a "traveling vender" under section 13, Act No. 150 of 1890 (La.); State v. Montgomery, 92 Me. 440, 43 Atl. 16, holding where after having secured orders for enlarged pictures defendant had the orders filled and placed in frames and attempted to sell to each customer a frame, he having no license was guilty of peddling picture frames without a license; John Rasch v. Maryland, 89 Md. 761, 43 Atl. 934, holding where plea to indictment charging sale of oleomargarine avers that oleomargarine was manufactured out of the State but fails to state that it was sold in original packages, a demurrer to plea was properly sustained; Lehigh etc. Coal Co. v. Borough of Junction, 75 N. J. L. 934, 15 L. R. A. (N. S.) 514, 68 Atl. 811, holding shipment of coal by owner to his own order as consignee to be stored in mass for sale in specific quantities was not interstate commerce exempt from State tax; Matheson & Co. v. Roberts, 158 N. Y. 166, 52 N. E. 1103, holding corporation selling imported goods from broken packages is not exempt from taxation under Laws of New York of 1880, chapter 542, section 3; Range Co. v. Campen, 135 N. C. 526, 47 S. E. 665, holding void Revenue Act 1903, § 36, levying tax on peddlers as applied to sales by sample of goods manufacured in another State and delivered in original package; In re Lipschitz, 14 N. D. 626, 95 N. W. 159, holding license tax on peddlers not tax on sale of goods in original packages; Ex parte Case, 70 Or. 302, 141 Pac. 747, holding agent selling upon orders taken from stock already shipped into State was subject to license tax on peddlers; Hagan v. City of Richmond, 104 Va. 732, 3 L. R. A. (N. S.) 1120, 52 S. E. 389, upholding power of local authorities to keep navigable waters unobstructed where Secretary of War fails to act; Indiana Road Mach. Co. v. Town of Lake, 149 Wis. 546, 136 N. W. 180, where machine had been shipped to agent of foreign corporation in State, unloaded and used, it was no longer subject of interstate commerce, and sale by agent without complying with law relating to foreign corporation gave no right to sue for price; McDermott v. State, 143 Wis. 30, 31, 46, 21 Ann. Cas. 1315, 126 N. W. 890, 891, 896, upholding statute forbidding sale of misbranded syrup, though sold in original container, when mixed with general stock of merchant; dissenting opinion in Austin v. Tennessee,

179 U. S. 380, 45 L. Ed. 240, 21 Sup. Ct. 142, 143, majority holding paper packages of cigarettes, containing ten cigarettes, without any shipping address, which are taken up in a basket from a loose pile and emptied on counter of consignee in another State, do not constitute original packages; License Cases, 5 How. 589, 610, 12 L. Ed. 294, 304, affirming validity of State law requiring retail dealer in liquors to pay license tax; State Tax on Railway Gross Receipts, 15 Wall. 295, 21 L. Ed. 168, applying principle in holding receipts arising from interstate commerce to be taxable as part of gross receipts of company doing domestic business also; Ex parte Brown, 48 Fed. 436, 438, holding valid a law taxing sales of farm produce which did not discriminate as against foreign produce; United States v. Hopkins, 82 Fed. 541, holding that cattle do not cease to be subject of interstate commerce by mere landing in stockyards; State v. Wheeler, 25 Conn. 294, upholding prohibitory law expressly excluding from its operation imported liquor in original packages; Padelford v. Savannah, 14 Ga. 442, 443, holding that tax upon goods sold in city includes goods imported from other States or foreign countries; Perdue v. Ellis, 18 Ga. 590, declaring valid delegation of authority to city to prohibit retailing of intoxicating liquors; City of South Bend v. Martin, 142 Ind. 42, 29 L. R. A. 535, 41 N. E. 318, peddlers of imported goods subject to law imposing license tax upon peddlers generally; McGregor v. Cone, 104 Iowa, 469, 470, 471, 65 Am. St. Rep. 525, 526, 528, 39 L. R. A. 486, 73 N. W. 1043, 1044, construing statute prohibiting sale by all persons save jobbers doing an interstate business; State v. Davidson, 24 South. 325, asserting power of municipality to fix places for retailing perishable goods; State v. Blackwell, 65 Me. 558, holding goods held by importer, with intent to sell in broken quantities, to be subject to tax by State; Myers v. Baltimore County, 83 Md. 389, 55 Am. St. Rep. 352, 34 L. R. A. 311, 35 Atl. 145, cattle landed in stockyards for purpose of sale, held taxable under general law; Commonwealth v. Holbrook, 10 Allen, 201, holding that payment of internal revenue tax upon liquor does not make owner an importer so as to exempt him from State law; Harrison v. Vicksburg, 3 Smedes & M. 586, 41 Am. Dec. 635, sustaining validity of ad valorem tax upon sales by flat-boat traders within city; Tracy v. State, 3 Mo. 6, of a tax upon retail dealers generally; State v. Emert, 103 Mo. 246, 23 Am. St. Rep. 877, 11 L. R. A. 220, 15 S. W. 82, of tax upon peddlers, holding it applicable to peddlers dealing in imported goods only; Territory v. Farnsworth, 5 Mont. 317, 5 Pac. 874, and Ex parte Asher, 23 Tex. App. 674, 5 S. W. 97, of a tax upon commercial travelers generally; Dunbar v. Garrity, 58 N. H. 576, denying right of vender of liquor in broken packages to recover purchase price, such sales being illegal under State law; dissenting opinion in Wynehamer v. People, 13 N. Y. 462, concurring with majority, holding that State may regulate retail sales of liquor, but dissenting on other grounds; Wynne v. Wright, 1 Dev. & B. 21, holding dealer in jewelry subject to general license tax, although dealing solely in imported goods; Davis v. Dashiel, Phil. (N. C.) 116, extending rule and holding that State may discriminate against imported liquor by im-

posing greater tax upon retail sales; State v. Gorham, 115 N. C. 726, 44 Am. St. Rep. 495, 23 L. R. A. 422, 20 S. E. 181, holding goods subject to tax when package broken for distribution to agents; Ragnet v. Wade, 4 Ohio, 110, holding valid a tax upon merchants generally; City Council v. Ahrens, 4 Strob. 258, a law imposing penalty upon retail grocers for having liquor upon premises without license to sell; State v. Chapman, 1 S. D. 433, 47 N. W. 417, holding that in order to claim exemption from general State tax seller must show himself to be importer selling goods in original package; Murray v. Charleston, 96 U. S. 446, 24 L. Ed. 763, discussing State power of taxation; Bowman v. Chicago etc. Ry. Co., 125 U. S. 507, 31 L. Ed. 714, 8 Sup. Ct. 1065, Keller v. State, 11 Md. 534, 69 Am. Dec. 230, McGuire v. State, 42 Ohio St. 532, arguendo.

Distinguished in State v. Eckenrode, 148 Iowa, 183, 127 N. W. 59, holding sale by agent and delivery in original packages to customers of misbranded goods shipped from another State not subject to pure food law of State; Western Oil Refining Co. v. Dalton, 131 Tenn. 334, 174 S. W. 1139, holding shipment of oil in tank-car and delivery in barrels furnished by shipper and filled from car was interstate commerce; dissenting opinion in In re Wilson, 8 Mackey (D. C.), 365, 366, 367, 12 L. R. A. 624, majority upholding tax on peddlers selling from house to house goods brought into district in original package containing smaller packages which were sold unbroken; Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 341, 342, 30 L. Ed. 1203, 7 Sup. Ct. 1122, 1123, criticising State Tax on Railway Gross Receipts, supra; United States v. Haun, 26 Fed. Cas. 230, holding persons smuggled into State against their own will to be subject to provision of Federal law prohibiting slave trading.

In the exercise of its power of taxation, a State may tax occupations.

Approved in State v. Allgeyer, 110 La. 840, 34 South. 799, holding license tax on business of buyer of cotton for export is duty on exports within meaning of Constitution; State v. Parker Distilling Co., 236 Mo. 308, 139 S. W. 479, Laws 1909, p. 654, imposing license on manufacturers of and dealers in intoxicating liquors does not violate article I, section 10, of Federal Constitution; Range Co. v. Campen, 135 N. C. 519, 47 S. E. 662, holding void Revenue Act 1903, § 36, levying tax on peddlers as applied to sales by sample of goods manufactured in another State and delivered in original package; Royall v. Virginia, 116 U. S. 582, 29 L. Ed. 738, 6 Sup. Ct. 515, under Virginia law, assessment made by law a condition precedent to license for practicing law is payable in State bond coupons; Ex parte Williams, 31 Tex. Cr. 275, 21 L. R. A. 787, 20 S. W. 582, recognizing validity of law taxing attorneys; Jones v. Page, 44 Ala. 658, holding valid a law requiring payment of license tax by each lawyer composing a firm; Little Rock v. Prather, 46 Ark. 478, affirming power of State to authorize cities to tax occupations generally; New Orleans v. Graves, 34 La. Ann. 843, holding valid a license tax upon traveling agents; People v. Walling, 53

Mich. 269, 18 N. W. 810, upon retail dealers in liquor; Hopkins v. United States, 171 U. S. 595, 43 L. Ed. 297, arguendo.

Distinguished in Walling v. Michigan, 116 U. S. 460, 29 L. Ed. 696, 6 Sup. Ct. 460, denying right of State to so tax occupations that result is discrimination against introduction and sale of products of other States.

States may, in exercise of their police power, cause removal or destruction of infectious or unsound articles.

Approved in New York v. Miln, 11 Pet. 142, 147, 148, 9 L. Ed. 663, 666, affirming right of a State to require masters of vessels to furnish descriptive lists of immigrant passengers on board on arriving in port; Holmes v. Jennison, 14 Pet. 616, 617, 619, 10 L. Ed. 619, 620, 621, asserting power of State to extradite criminals for offenses committed against laws of foreign countries; License Cases, 5 How. 600, 619, 620, 622, 625, 12 L. Ed. 299, 308, 309, 310, 311, to prohibit the sale of liquor in less than a stipulated quantity; United States v. E. C. Knight Co., 156 U. S. 12, 39 L. Ed. 329, 15 Sup Ct. 253, and United States v. Addyston, 78 Fed. 718, 722, denying right of Congress, as incident to its commerce power, to restrict formation of monopolies in staple articles, although such articles may be intended for interstate trade; Minneapolis etc. Ry. Co. v. Milner, 57 Fed. 278, affirming right of State board of health to detain and disinfect immigrants; Dorman v. State, 34 Ala. 246, 248, State v. Allmond, 2 Houst. 635, and Santo v. State, 2 Iowa, 201, 63 Am. Dec. 501, sustaining validity of laws prohibiting sales of intoxicating liquor; Fuller v. Chicago etc. R. R. Co., 31 Iowa, 210, asserting power of State to provide penalty for overcharge in freight or passenger rates; Pearson v. International Distillery, 72 Iowa, 354, 34 N. W. 4, to prohibit manufacture of intoxicating liquor for export; State v. Wheelock, 95 Iowa, 586, 58 Am. St. Rep. 446, 30 L. R. A. 441, 64 N. W. 622, to require payment of license from vender of drugs, although in original packages; Keller v. State, 11 Md. 532, 533, 69 Am. Dec. 229, to levy license tax for privilege of making and selling beer; Waterbury v. Newton, 50 N. J. L. 541, 14 Atl. 608, sustaining validity, as police regulation, of law prohibiting sales of oleomargarine artificially colored; Baker v. Wise, 16 Gratt. 196, applying principle in asserting power of State to require pilots on outgoing vessels to search vessels for runaway slaves; dissenting opinion in Bowman v. Railway Co., 125 U. S. 512, 514, 518, 31 L. Ed. 716, 717, 718, 8 Sup. Ct. 708, 709, 711, majority denying power of State to regulate importations of intoxicating liquors from other States.

Distinguished in The Passenger Cases, 7 How. 423, 12 L. Ed. 761, refusing to sustain, as police regulation, a law requiring shipmaster to pay per capita tax upon immigrants landed; Bowman v. Chicago etc. Ry. Co., 125 U. S. 490, 31 L. Ed. 708, 8 Sup. Ct. 701, denying constitutionality of act requiring common carrier, before delivering liquors, to show certificate to effect that consignee is licensed to sell liquor; Crutcher v. Kentucky, 141 U. S. 60, 35 L. Ed. 653, 11 Sup. Ct. 855, and Voight v. Wright, 141 U. S.

65, 35 L. Ed. 639, 11 Sup. Ct. 856, holding statute requiring foreign corporations to pay license fee not to be a valid exercise of police power; Council Bluffs v. Kansas City etc. R. R. Co., 45 Iowa, 354, 24 Am. Rep. 783, holding law prescribing place of transfer for connecting interstate roads not sustainable as police regulation; dissenting opinion in Leisy v. Hardin, 135 U. S. 150, 34 L. Ed. 146, 10 Sup. Ct. 698, arguing in favor of power of State, as a police regulation, to prevent sales in original packages of liquor brought from other States.

Power of Congress to regulate commerce with foreign nations and among the several States is complete in itself, and has no limitation other than as prescribed by Constitution.

Approved in Houston etc. R. Co., v. United States, 234 U. S. 351, 58 L. Ed. 1348, 34 Sup. Ct. 833, holding Congress had power to prevent unjust discrimination against interstate commerce arising from relation between intrastate and interstate rates; Louisville etc. R. Co., v. Mottley, 219 U. S. 480, 34 L. R. A. (N. S.) 671, 55 L. Ed. 302, 31 Sup. Ct. 265, holding under commerce act carrier could not issue interstate transportation in pursuance of contract made prior to statute; United States v. Louisville Bridge Co., 233 Fed. 280, holding Congress could authorize Secretary of War to remove bridges impeding navigation without compensation to owner; The Margaret J. Sanford, 203 Fed. 339, holding act of Congress relating to anchorage in navigable channels did not supersede nonconflicting State regulations; Southern Express Co. v. State, 188 Ala. 478, 66 South. 123, under State laws of 1909 prohibiting sale of liquors, carrier bringing liquors into State for delivery to one intending to sell violated State law; State v. Illinois Cent. R. Co. 246 Ill. 212, 92 N. E. 826, upholding State tax on gross income of railroad doing interstate business when imposed in lieu of all taxes on property within State; American Express Co. v. Beer, 107 Miss. 547, Ann. Cas. 1916D, 127, 65 South. 581, upholding Webb-Kenyon act prohibiting interstate shipment of liquors for purposes in violation of law of State; State v. Missouri Pac. Ry. Co., 212 Mo. 679, 111 S. W. 505, holding void statute regulating hours of service of telegraphers so far as affecting those employed in interstate commerce; Missouri etc. Ry. Co. v. Lenahan, 39 Okl. 289, 135 Pac. 386, holding Employers' Liability Act superseded State laws on same subject as to persons employed in interstate commerce; State v. Peet, 80 Vt. 457, 130 Am. St. Rep. 998, 14 L. R. A. (N. S.) 677, 68 Atl. 664, holding statute prohibiting keeping with intent to ship out of State flesh of calf under four weeks old when killed was void as violating commerce clause.

Sale is object of importation and is essential ingredient of that intercourse of which importation constitutes part.

Approved in United States v. First Nat. Bank, 190 Fed. 338, in reviewing legislation relating to interstate shipment of liquors; State v. Grier, 4 Boyce (Del.), 368, 371, 88 Atl. 598, 599, holding State could not prohibit

or regulate sale of liquors imported in original packages; D. E. Foote & Co. v. Clagett, 116 Md. 236, 81 Atl. 514, holding void tax on sale of oysters shipped from other States; State v. Eighteen Casks of Beer, 24 Okl. 792, 25 L. R. A. (N. S.) 492, 104 Pac. 1095, holding liquor shipped from outside State to owner as consignee was subject to confiscation under State law while still on premises of carrier but in possession of owner; Taylor v. Carpenter, 2 Wood. & M. 19, Fed. Cas. 13,785, holding alien friend entitled to damages, for infringement of trademark, to extent of his damage by loss of sales; dissenting opinion, Mugler v. Kansas, 123 U. S. 675, 31 L. Ed. 215, 8 Sup. Ct. 304, arguing against authority of State to pass law divesting right to sell liquor already manufactured under its authority.

The taxing power of a State is coextensive with its sovereignty over persons and property within its territory.

Approved in Davis v. Cleveland etc. Ry. Co., 146 Fed. 409, cars owned by railroad and delivered by it to another road, with freight, to be used in transportation of such freight to another State, are not attachable under laws of State into which they are carried; United States v. Green, 137 Fed. 188, under Oleomargarine Act, § 1, arrival of renovated butter duly stamped and labeled within State other than that from which it was shipped did not remove liability for violating act; H. K. Mulford Co. v. Curry, 163 Cal. 284, 125 Pac. 239, holding void license tax on total capital stock of foreign corporations doing business in State as taxing property outside State; Range Co. v. Campen, 135 N. C. 514, 516, 47 S. E. 661, holding void Revenue Act 1903, § 36, levying tax on peddlers as applied to sales by sample of goods manufactured in another State and delivered in original package; Greek etc. Sponge Co. v. Richardson etc. Co., 124 Wis. 475, 102 N. W. 890, transaction by which merchandise is sold to domestic corporation by foreign corporation, and is consigned to local agent of latter for inspection by purchaser, and after inspection to be delivered in original package, constitutes interstate commerce; Society v. Coite, 6 Wall. 607, 18 L. Ed. 902, affirming power of State to tax deposits in savings banks, although such deposits are invested in Federal securities; Transportation Co. v. Wheeling, 99 U. S. 279, 25 L. Ed. 414, holding steamboats engaged in interstate traffic taxable, under State law, as property of company having its main office in State; Central Pacific R. R. Co. v. California, 162 U. S. 125, 40 L. Ed. 914, 16 Sup. Ct. 778, affirming power of State to tax property of railroad chartered by Congress (but see dissenting opinion in Central Pacific R. R. Co. v. California, 162 U. S. 148, 40 L. Ed. 922, 16 Sup. Ct. 787); Forbes v. Gracey, 9 Fed. Cas. 403, holding ore taken from United States land taxable in hands of miner; Battle v. Mobile, 9 Ala. 237, 44 Am. Dec. 440, New Orleans v. Eclipse etc. Co., 33 La. Ann. 648, 39 Am. Rep. 280, and Howell v. State, 3 Gill, 27, asserting power of city to tax vessel of a citizen, although such vessel is enrolled under Federal laws; People v. Naglee, 1 Cal. 236, 52 Am. Dec. 316, holding valid a law imposing license tax upon miners, although mines situated on United

States land; Standard Oil Co. v. Combs, 96 Ind. 184, 49 Am. Rep. 161, holding goods in process of preparation for export subject to taxation as property; Second Municipality v. Corning, 4 La. Ann. 408, sustaining validity of tax upon dealers in bills of exchange; The Wharf Case, 3 Bland Ch. 374, 375, asserting right of State to charge fee for docking at State wharves; Coe v. Errol, 62 N. H. 313, holding timber cut for export to be taxable as property so long as it remains in State; State v. Engle, 34 N. J. L. 427, holding that property landed upon wharf for assortment, in course of transportation across State, has no situs in State for purpose of taxation; People ex rel. v. Commissioners, 35 N. Y. 448, where shares of State bank held to be taxable where bank is located, although capital invested in Federal securities; Salt Lake etc. Bank v. Golding, 2 Utah, 9, holding shares of national bank in hands of individual taxable as property under territorial law.

Distinguished in State Tonnage Tax Cases, 12 Wall. 224, 20 L. Ed. 377, denying right of States to tax vessels owned by their citizens at so much per ton of registered tonnage.

State jurisdiction in regard to vessels. Note, 62 Am. Dec. 239.

Power of State to discriminate against goods of foreign country by taxing sale. Note, 5 Ann. Cas. 880.

Corporate taxation and the commerce clause. Note, 60 L. R. A. 648, 662, 663, 664, 691.

States cannot restrain action of national government by any interference with its power to regulate commerce.

Approved in United States v. Hvoslef, 237 U. S. 13, Ann. Cas. 1916A, 286, 59 L. Ed. 819, 35 Sup. Ct. 459, holding void provisions of war revenue act for stamp tax on charter-party of vessel exclusively for foreign port; Western Union Telegraph Co. v. State of Kansas, 216 U. S. 32, 54 L. Ed. 368, 30 Sup. Ct. 190, holding void State statute imposing as tax on corporation percentage of all capital stock as tax on property beyond limits of State; Northern Securities Co. v. United States, 193 U. S. 353, 48 L. Ed. 706, 24 Sup. Ct. 436, upholding enforcement of anti-trust act by injunction against corporation organized in pursuance of combination of stockholders of two competing interstate railroads; Montgomery v. Portland, 190 U. S. 105, 47 L. Ed. 970, 23 Sup. Ct. 737, holding extension of wharves beyond local harbor line in navigable waters wholly within State is invalid under Act September 19, 1890, section 12 (25 Stats. at Large, 400, 425, c. 860), relating to construction under regulations of Congress; Cummings v. Chicago, 188 U. S. 430, 47 L. Ed. 531, 23 Sup. Ct. 477, holding under acts of March 3, 1887, c. 373 (24 Stats. at Large, 552), and August 13, 1888, c. 886 (25 Stats. at Large, 433, U. S. Comp. Stats. 1901, p. 508), Circuit Court has jurisdiction over action involving right to construct dock in navigable river; Lottery Case, 188 U. S. 348, 47 L. Ed. 498, 23 Sup. Ct. 323, holding carriage of lottery tickets from one State to another by ex-

press company is interstate commerce; Caldwell v. North Carolina, 187 U. S. 630, 47 L. Ed. 340, 23 Sup. Ct. 232, holding an ordinance under which license fee may be required from agent of nonresident portrait company who receives pictures and frames previously ordered and after breaking bulk and placing each picture in frame and delivering same is invalid; Stockard v. Morgan, 185 U. S. 30, 46 L. Ed. 792, 22 Sup. Ct. 578, holding tax imposed by State upon residents of that State as merchandise brokers whose business is confined to soliciting orders within the State to be filled by nonresident firm is unconstitutional; Austin v. Tennessee, 179 U. S. 372, 377, 45 L. Ed. 237, 239, 21 Sup. Ct. 143, holding tobacco especially after its manufacture has been made the subject of Federal regulations is a legitimate article of commerce; American Sugar Refining Co. v. Louisiana, 179 U. S. 92, 45 L. Ed. 104, 21 Sup. Ct. 45, holding manufacturer of refined sugar is not denied equal protection of the law because of discrimination made by Louisiana Constitution of 1879, article 206, taxing such manufacturer but exempting from tax those who refine product of their own plantations; George H. Lee Co. v. Webster, 190 Fed. 355, holding void State statute imposing registration fee on dealers shipping concentrated feeding-stuff into State; Shepard v. Northern Pac. Ry. Co., 184 Fed. 770, 795, holding State statute reducing passenger fares was void as creating unjust discriminations between points in State and points in other States and in violation of commerce clause of Constitution; Ex parte Eaglesfield, 180 Fed. 559, 560, 561, 562, holding void ordinance imposing license tax on sale cargo brought from one State to another on vessel; Larabee v. Dolley, 175 Fed. 393, holding void bank guaranty law of Kansas as denying equal protection of law to national banks which were unable to accept provisions; Kansas Natural Gas Co. v. Haskell, 172 Fed. 561, holding void statute limiting construction of gas-pipe lines to State corporations without power to deliver gas outside State; United States v. Colorado etc. R. Co., 157 Fed. 331, 13 Ann. Cas. 893, 15 L. R. A. (N. S.) 167, 85 C. C. A. 27, holding Safety Appliance Act applied to railroad engaged in interstate commerce though operating entirely within State; Snead v. Central of Georgia Ry. Co., 151 Fed. 618, upholding Employers' Liability Act of 1906; United States v. Thomas, 115 Fed. 209, holding when defendant was indicted for omitting to attach revenue stamp upon memoranda of sale of shares of railroad stock in violation of section 25, schedule A, entitled "Stamp Taxes," 1898, demurrer on the ground that tax was direct tax was properly overruled; In re Tinsman, 95 Fed. 649, holding municipal ordinance requiring persons soliciting orders on behalf of manufacturers of goods, to take out a license and pay tax when enforced against person soliciting orders for manufacturer in another State, is in violation of United States interstate commerce; Hughes v. Los Angeles, 168 Cal. 765, 145 Pac. 95, holding void occupation tax on agents of insurance companies; Smith v. Farr, 46 Colo. 369, 370, 104 Pac. 403, holding statute imposing license tax on itinerant venders void as tax on sale of goods imported into State; Stubbs v. People, 40 Colo. 419, 427, 122 Am. St. Rep. 1068, 13 Ann. Cas. 1025, 11

L. R. A. (N. S.) 1071, 90 Pac. 1115, 1118, holding void law prohibiting owning of docked horses brought into State; Van Winkle v. State, 4 Boyce (Del.), 597, 604, Ann. Cas. 1916D, 104, 91 Atl. 393, 396, holding Webb-Kenyon act removed protection of commerce clause only when liquors were to be used in violation of State laws and State law prohibiting liquor shipment in prohibition district was void as to interstate shipments for personal use; State v. Grier, 4 Boyce (Del.), 384, 88 Atl. 604, upholding State statute regulating interstate transportation of liquors into prohibition territory where transportation was connected with forbidden sale, and prohibited by Congress; Augusta City Council v. Augusta etc. Ry. Co., 130 Ga. 816, 124 Am. St. Rep. 197, 61 S. E. 993, holding city could not impose specific annual tax on business of railroad engaged exclusively in interstate commerce for running cars on city streets; Williams v. Fears, 110 Ga. 589, 35 S. E. 700, 701, holding tax upon "emigrant agent act of 1898 of Georgia," is not regulation of commerce; State v. Lowry, 166 Ind. 379, 380, 9 Ann. Cas. 350, 4 L. R. A. (N. S.) 528, 77 N. E. 730, holding State could not prohibit owning of original package of cigarettes imported from another State; State v. United States Express Co., 164 Iowa, 142, 145 N. W. 462, holding Congress had power to prohibit shipment of liquor into State for purpose of supplementing State's prohibitory laws; State v. Missouri Pac. Ry. Co., 96 Kan. 623, 152 Pac. 784, upholding statute of 1913 regulating shipment of liquor into State as complementary to Webb-Kenyon act; Wheeler v. Weightman, 96 Kan. 66, L. R. A. 1916A, 846, 149 Pac. 984, holding void tax on record of mortgages based on amount and term of debt as provision for unequal taxation of property; Cincinnati etc. R. Co. v. Commonwealth, 126 Ky. 566, 568, 104 S. W. 394, 395, holding void State statute limiting bringing into State of liquor; State v. Pabst Brewing Co., 128 La. 772, 55 South. 350, holding State could not tax sale of beer which constituted interstate commerce; American Mfg. Co. v. St. Louis, 238 Mo. 274, 275, 142 S. W. 298, holding jute butts imported by manufacturer to be made into bags not taxable while in original package; State v. Parker Distilling Co., 236 Mo. 246, 247, 285, 307, 309, 139 S. W. 458, 471, 479, 480, holding statute imposing license tax on dealers in and manufacturers of liquors did not violate constitutional prohibition against levying imposts on imports, that prohibition not applying to imports from other States; Durkee v. Moses, 67 N. H. 116, 23 Atl. 793, holding General Laws, chapter 109, section 18 (N. H.), making penal the solicitation for taking intoxicating liquors in the State for delivery in another State is void; New York etc. R. Co. v. Board of Chosen Freeholders, 76 N. J. L. 670, 16 Ann. Cas. 858, 74 Atl. 956, upholding resolution fixing ferry rates between New Jersey and New York; Hancock, Comptroller v. Singer Mfg. Co., 62 N. J. L. 342, 41 Atl. 852, holding exemption of shares of stock of an incorporated company in the hands of stockholders also exempts the capital stock; In re Wilson, 10 N. M. 36, 60 Pac. 75, holding territorial statute imposing license fee as condition upon which coal oil may be sold is unconstitutional when applied to sales in original packages by importer of oil refined without

the territory; Schleslinger v. Gilhooly, 189 N. Y. 16, 12 Ann. Cas. 1138, 81 N. E. 624, holding provisions of national banking act as to usury superseded all State laws as to usury as applied to national banks; State v. Rankin, 11 S. D. 149, 76 N. W. 301, holding laws of South Dakota of 1897, chapter 102, imposing license fee on solicitors taking orders for mercantile establishment violates interstate commerce clause of Constitution as against salesman for house in another State selling by sample; Atlas Powder Co. v. Goodloe, 131 Tenn. 506, 175 S. W. 551, upholding tax on foreign corporation doing business in State based on capital stock; State v. Hoyt, 71 Vt. 62, 42 Atl. 974, holding Vt. Stats., c. 198, relating to licenses to peddlers is unconstitutional since it discriminates in favor of foreign goods; Southern Express Company v. Goldberg, 101 Va. 624, 44 S. E. 895, holding Code 1887, § 1215, in so far as it undertakes to fit rates to be charged by interstate carriers, is void; Adkins v. Richmond, 98 Va. 95, 34 S. E. 968, holding city ordinance requiring resident agent for nonresident principal to pay license is regulation of commerce; Western Union Telegraph Co. v. Lakin, 53 Wash. 334, 17 Ann. Cas. 718, 101 Pac. 1097, holding Federal franchise to telegraph company to use post-roads not subject to State tax; Pennywitt v. Blue, 73 W. Va. 722, 81 S. E. 401, holding broker selling by sample for principals outside State not subject to license tax; Loverin & Browne Co. v. Travis, 135 Wis. 329, 330, 115 N. W. 831, holding shipment to agent in one container of several parcels as ordered by customers was interstate commerce, and upholding contract for such sales; dissenting opinion in Dooley v. United States, 183 U. S. 155, 162, 46 L. Ed. 131, 22 Sup. Ct. 64–71, majority holding tax imposed on goods imported from New York into Porto Rico under Foraker act, April 12, 1900 (31 Stats. at Large, 77, c. 191), is tax on exports within United States Const., art. I, § 9; The Passenger Cases, 7 How. 395, 398, 400, 423, 431, 433, 434, 439, 455, 12 L. Ed. 749, 750, 751, 761, 764, 765, 767, 774 (reversing 4 Met. 289, 297), and People v. Brooks, 4 Denio, 476, 478, 479, denying constitutionality of State law, requiring masters of vessels engaged in foreign commerce to pay certain amount per capita before landing alien passengers in State; Sinnot v. Commissioners, 22 How. 243, 16 L. Ed. 247, where statute requiring steamboats navigating State waters to register before leaving port, held to be in conflict with Federal navigation laws and void; Almy v. California, 24 How. 173, 16 L. Ed. 646, denying validity of State law, imposing stamp duty upon bills of lading for gold or silver shipped out of State; Crandall v. Nevada, 6 Wall. 47, 48, 18 L. Ed. 748 (reversing 1 Nev. 309, 310, 313), and Joseph v. Randolph, 71 Ala. 508, 46 Am. Rep. 352, placing invalidity of State law taxing railroads for carrying passengers out of State, upon ground that it interfered with right of citizens to pass through State; State Tonnage Tax Cases, 12 Wall. 216, 224, 20 L. Ed. 374, 377, holding tax upon vessels at so much per ton of registered tonnage to be repugnant to clause in Constitution prohibiting States from levying any duty on tonnage; Ward v. Maryland, 12 Wall. 429, 430, 20 L. Ed. 452, reversing 31 Md. 286, 288, 1 Am. Rep.

55, 57, and holding State law imposing discriminatory tax upon nonresident traders, in effect a restriction upon commerce and void; Farmers' etc. Bank v. Dearing, 91 U. S. 34, 23 L. Ed. 199, holding national banks not subject to State law prescribing legal rate of interest; Welton v. Missouri, 91 U. S. 278, 280, 281, 282, 23 L. Ed. 349, 350, and Brennan v. Titusville, 153 U. S. 301, 302, 38 L. Ed. 722, 723, 14 Sup. Ct. 832, 833, holding void, a State law requiring payment of license tax by dealers in goods not produced in State; Henderson v. New York, 92 U. S. 274, 23 L. Ed. 550, holding void, as being restrictive of foreign commerce, a statute requiring shipmasters to give bonds to indemnify State in case immigrants become charges upon it; Foster v. Master etc., 94 U. S. 247, 24 L. Ed. 123, denying validity of laws providing for survey of hatches of vessels arriving in port, and of damaged goods coming on board of them; Hall v. De Cuir, 95 U. S. 499, 24 L. Ed. 552, denying power of State to require steamboat companies to accord equal privileges to all passengers without discrimination on account of race or color; Guy v. Baltimore, 100 U. S. 438, 443, 25 L. Ed. 744, 746, denying right of States to discriminate against vessels engaged in interstate trade, by demanding excessive dockage fees; Telegraph Co. v. Texas, 105 U. S. 465, 26 L. Ed. 1068, holding State law taxing messages transmitted, to be inoperative as to messages sent upon Federal public business; Moran v. New Orleans, 112 U. S. 73, 28 L. Ed. 655, 5 Sup. Ct. 40, holding void, a municipal ordinance requiring payment of license tax by persons owning towboats engaged in interstate trade; Wabash etc. Ry. Co. v. Illinois, 118 U. S. 573, 30 L. Ed. 249, 7 Sup. Ct. 11, denying power of State to regulate fares and freight charges for transportation extending outside the State; Robbins v. Shelby etc. Dist., 120 U. S. 492, 30 L. Ed. 696, 7 Sup. Ct. 593, declaring void a law requiring drummers not having regularly licensed house of business in district, to pay license tax for privilege of selling goods there by sample; Fargo v. Michigan, 121 U. S. 243, 30 L. Ed. 894, 7 Sup. Ct. 862, declaring void a tax upon gross receipts of railroads derived from interstate trade; so also in Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 337, 347, 30 L. Ed. 1201, 1205, 7 Sup. Ct. 1120, 1125, as to similar tax on gross receipts of steamship companies; Bowman v. Chicago etc. Ry. Co., 125 U. S. 494, 499, 505, 31 L. Ed. 710, 712, 714, 8 Sup. Ct. 703, 706, 1065, denying validity of law requiring common carrier, before delivery of liquors, to show certificate to effect that consignee is licensed dealer; California v. Pacific R. R. Co., 127 U. S. 41, 32 L. Ed. 158, 8 Sup. Ct. 1081, denying power of State to tax franchise granted by Federal government; Leloup v. Mobile, 127 U. S. 646, 647, 32 L. Ed. 313, 314, 8 Sup. Ct. 1383, holding business of transmitting messages between States to be interstate commerce and so not taxable by States; Leisy v. Hardin, 135 U. S. 111, 117, 124, 34 L. Ed. 133, 134, 137, 10 Sup. Ct. 684, 685, 689, holding a law prohibiting sales of liquor inoperative as to sales by consignee in original packages; In re Rahrer, 140 U. S. 556, 557, 562, 35 L. Ed. 574, 575, 577, 11 Sup. Ct. 867, 869, but holding that as Congress has plenary power in the matter of

commerce, it may allow the States to prohibit sales of liquor in original packages; Pollock v. Farmers' L. & T. Co., 157 U. S. 581, 591, 39 L. Ed. 819, 823, 15 Sup. Ct. 689, 693, applying principle in denying power of Congress to tax municipal bonds issued under authority of State, such bonds being instrumentalities of State government; Rhodes v. Iowa, 170 U. S. 416, 42 L. Ed. 1093, 18 Sup. Ct. 665, holding that right of State to prohibit sales of liquor does not include right to prohibit importation; Schollenberger v. Pennsylvania, 171 U. S. 21, 22, 23, 43 L. Ed. 24, 18 Sup. Ct. 765, 766, denying power of States to exclude importation of oleomargarine; Day v. Buffinton, 3 Cliff. 387, Fed. Cas. 3675, applying principle in denying power of Congress to tax, as income, the salary of a State judge; In re Parrott, 6 Sawy. 382, 1 Fed. 514, holding provision in State Constitution, prohibiting employment of Chinese, repugnant to treaty with China and void; Railroad Tax Case, 8 Sawy. 250, 307, 13 Fed. 732, 778, denying right of State to evade constitutional provision as to "equal protection of laws," in exercise of its taxing power; Louisville etc. Ry. Co. v. Railroad Commission, 19 Fed. 713, denying power of States to regulate freight and passenger rates; Swift v. Sutphin, 39 Fed. 633, 635, In re Barber, 39 Fed. 645, and In re Rebman, 41 Fed. 869, holding unconstitutional, as being restrictive of interstate commerce, laws prohibiting sales of dressed meat in State, unless animals had been previously inspected on hoof by State officer (and see State cases printed as notes, 39 Fed. 637, 647, 648); American Fertilizing Co. v. Board of Agriculture, 43 Fed. 611, 11 L. R. A. 181, law taxing privilege of selling imported fertilizers; Spellman v. New Orleans, 45 Fed. 4, holding void, as applied to interstate freight, a law prohibiting railroad companies from selling perishable freight on their property; Georgia Packing Co. v. Macon, 60 Fed. 778, 22 L. R. A. 777, an act requiring dealers in imported meats to pay license; United States v. Elliott, 64 Fed. 30, and United States v. Debs, 64 Fed. 751, asserting power of Congress to provide penalty for obstructing interstate commerce; Cuban Steamship Co. v. Fitzpatrick, 66 Fed. 66, denying right of State to restrict landing of imported goods by unreasonable dock regulations; Ex parte Hough, 69 Fed. 331, holding void, an act taxing foreign dealers in pianos for privilege of selling in State; United States v. Boyer, 85 Fed. 434, but denying right of Congress, as incident to commerce power, to provide for inspection of cattle about to be slaughtered; Globe Ins. Co. v. Cleveland Ins. Co., 10 Fed. Cas. 491, denying validity of assignment for benefit of creditors in conflict with national bankrupt act; Philadelphia etc. Towboat Co. v. Philadelphia etc. R. R. Co., 19 Fed. Cas. 476, holding vessel licensed by Federal government for interstate coasting trade, not subject to State Sunday laws; United States v. Gould, 25 Fed. Cas. 1379, asserting power of Congress to prohibit slave trade; United States v. Jackson, 26 Fed. Cas. 562, to provide for inspection of vessels engaged in interstate coasting trade; Williams v. The Lizzie Henderson, 29 Fed. Cas. 1374, holding void an act exempting vessel owned in State, from payment of half-pilotage fees, as giving preference to ports of a State; McCreary v. State, 73 Ala. 482,

holding void a discriminatory tax upon imported liquors; Stratford v. Montgomery, 110 Ala. 626, 20 South. 129, holding law taxing brokers not applicable to brokers representing nonresident principals exclusively; Lin Sing v. Washburn, 20 Cal. 571, 580, denying validity of law taxing Chinese for privilege of residing in State; Carson River etc. Co. v. Patterson, 33 Cal. 340, denying power of State to levy toll on logs floated down stream from one State to another; People v. Raymond, 34 Cal. 498, 499, holding law requiring affixing of stamp to passenger tickets, restrictive of commerce and void; Ex parte Thomas, 71 Cal. 205, 12 Pac. 53, denying validity of act discriminating in taxation of dealers in imported goods; San Benito County v. S. P. R. R. Co., 77 Cal. 521, 19 Pac. 828, denying power of State to tax franchises of interstate railroads; State Treasury v. Philadelphia etc. R. R. Co., 4 Houst. 196, 204, to levy per capita tax upon railroads for persons carried into or out of the State; Webb v. Dunn, 18 Fla. 724, to levy toll on vessels entering harbor; Osborne v. State, 33 Fla. 172, **39 Am. St. Rep. 104, 25 L. R. A. 124,** 14 South. 591, law taxing business done by express companies applicable to companies doing local or State business; Hollida v. Hunt, 70 Ill. 113, **22 Am. Rep. 66,** holding void a State law purporting to regulate sales of patent rights and to prevent frauds in connection therewith; State ex rel. v. Garton, 32 Ind. 7, **2 Am. Rep. 319,** denying power of Congress to require affixing of revenue stamp as prerequisite to validity of sheriff's bond; City of Huntington v. Mahan, 142 Ind. 698, **51 Am. St. Rep. 202,** 42 N. E. 464, holding city ordinance requiring payment of license tax by peddlers to have no application to salaried distributing agent of firm located in another State; Council Bluffs v. Kansas City etc. R. R. Co., 45 Iowa, 349, **24 Am. Rep. 779,** holding void, an act requiring roads connecting with Union Pacific railroad to transfer at Council Bluffs; Gatton v. Chicago etc. Ry. Co., 95 Iowa, 129, **28 L. R. A. 562,** 63 N. W. 595, refusing to allow recovery for overcharge on interstate shipment; Daniel v. Trustees, 78 Ky. 544, holding void tax upon sales by auctioneers, discriminating against nonresidents; Higgins v. Lime, 130 Mass. 3, denying power of State to regulate inspection and sale of lime imported from another State; Coit v. Sutton, 102 Mich. 326, **25 L. R. A. 820,** 60 N. W. 690, holding law exacting franchise tax from foreign corporations doing business in State inoperative as to commercial corporations represented by agents; State v. North, 27 Mo. 475, 478, 479, 480, 481, holding void a discriminatory tax upon venders of foreign goods; Barker v. Bank, 59 N. H. 311, holding national bank not subject to penalty against usury imposed by State law; Erie Ry. Co. v. State, 31 N. J. L. 540, **86 Am. Dec. 234,** denying power of State to tax foreign railroad corporations upon basis of amount of freight and number of passengers carried (in accord with dissenting opinion, s. c., 30 N. J. L. 493); People ex rel. v. Wemple, 138 N. Y. 5, **19 L. R. A. 696,** 33 N. E. 721, franchises of corporation engaged in interstate transportation; State v. Norris, 78 N. C. 445, but asserting power of State to regulate sale of "commercial fertilizers" if imports are not discriminated against; Lawrence v. Hodges, 92 N. C. 677,

53 Am. Rep. 437, holding State law requiring registry of chattel mortgages inoperative as to mortgage on vessel enrolled under act of Congress; Sipe v. Murphy, 49 Ohio St. 546, 17 L. R. A. 187, 31 N. E. 887, declaring void a city ordinance levying special tax upon goods brought into city and sold at auction; Arnold v. Yanders, 56 Ohio St. 420, 60 Am. St. Rep. 755, 47 N. E. 51, denying power of State to regulate sale of convict-made goods imported from other States; State v. Rankin, 76 N. W. 301, holding person soliciting orders for nonresident manufacturer not liable to license tax; Southern Express Co. v. Hood, 15 Rich. 78, 94 Am. Dec. 144, holding tax levied upon gross receipts of express companies generally included receipts of company doing interstate business; Railroad Commrs. v. Railroad Co., 22 S. C. 236, denying power of State to regulate rates and fares for transportation to points outside State; State v. Morgan, 2 S. D. 51, 48 N. W. 320, but holding mercantile agency not an instrument of interstate commerce entitled to exemption from taxation; State v. Scott, 98 Tenn. 258, 259, 36 L. R. A. 462, 39 S. W. 2, denying validity of special tax upon persons soliciting for photographers outside State; Railroad Co. v. Harris, 99 Tenn. 710, 43 S. W. 120, but holding valid a law purporting to tax only railroads operating wholly within State; Higgins v. Rinker, 47 Tex. 390, 392, holding void a prohibitory liquor law discriminating against imported liquors; N. & W. R. R. Co. v. Commonwealth, 88 Va. 101, 29 Am. St. Rep. 710, 13 L. R. A. 109, 13 S. E. 342, holding statute prohibiting running of trains on Sunday inoperative as to interstate lines; dissenting opinions in the following cases: New York v. Miln, 11 Pet. 156, 160, 161, 9 L. Ed. 669, 671, majority holding valid, as a police regulation, a State law requiring masters of vessels to furnish lists of immigrants; Groves v. Slaughter, 15 Pet. 511, 10 L. Ed. 823, arguing against invalidity of clause in State Constitution empowering legislature to prohibit admission of slaves; Woodruff v. Parham, 8 Wall. 144, 19 L. Ed. 390, majority holding that tax upon sales generally included goods brought from other States; O'Neil v. Vermont, 144 U. S. 354, 36 L. Ed. 463, 12 Sup. Ct. 705, where constitutionality of act in question was not considered by majority; Vance v. W. A. Vandercook Co., 170 U. S. 464, 42 L. Ed. 1110, 18 Sup. Ct. 684, dissenting only from reasoning of majority, and concurring in holding State law regulating sales of liquors, inoperative to prevent storage in original packages; Hinson v. Lott, 40 Ala. 135, 136, majority asserting power of State to levy special tax upon liquor imported from other States; Coite v. Society for Savings, 32 Conn. 191, 196, arguing against validity of act taxing savings banks whose deposits were largely invested in Federal securities; Commonwealth v. Huntley, 156 Mass. 248, 249, 15 L. R. A. 845, 846, 30 N. E. 1132, majority holding valid a law regulating sales of oleomargarine imported; Walcott v. People, 17 Mich. 93, majority asserting power of State to tax express companies on gross amount of business done in State; Crow v. State, 14 Mo. 306, 317, majority holding dealer in imported goods to be subject to law taxing merchants generally; Commonwealth v. Gloucester Ferry Co., 98 Pa. St. 119, 121, majority holding ferry company

landing passengers in State to be foreign corporation liable to tax upon capital stock; New York ex rel. Parke, Davis & Co. v. Roberts, 171 U. S. 671, 676, 43 L. Ed. 328, 19 Sup. Ct. 78, where majority held corporation dealing largely in imported drugs liable to general tax upon capital stock; Lake Shore etc. Ry. Co. v. Ohio, 173 U. S. 316, 43 L. Ed. 713, 17 Sup. Ct. 357, majority asserting power of State to require interstate roads to stop trains at certain stations; Interstate Commerce Com. v. Brimson, 154 U. S. 470, 38 L. Ed. 1055, 14 Sup. Ct. 1130, United States v. C. C. Knight Co., 156 U. S. 15, 39 L. Ed. 330, 15 Sup. Ct. 255; Sweatt v. Railroad Co., 5 Bank. Reg. 248, 3 Cliff. 351, Fed. Cas. 13,684, United States v. Bridleman, 7 Sawy. 250, 7 Fed. 901, Beebe v. State, 6 Ind. 538, Norris v. Doniphan, 4 Met. (Ky.) 431, Dover v. Portsmouth Bridge Co., 17 N. H. 229, Stacy v. La Belle, 99 Wis. 522, 67 Am. St. Rep. 880, 41 L. R. A. 421, 75 N. W. 61, arguendo.

Distinguished in Flint v. Stone Tracy Co., 220 U. S. 167, Ann. Cas. 1912B, 1312, 55 L. Ed. 420, 31 Sup. Ct. 342, holding Congress had power to levy excise tax upon business of corporation; New York v. Wells, 208 U. S. 20, 52 L. Ed. 372, 28 Sup. Ct. 193, holding capital employed in State by foreign manufacturer in selling his products was subject to State taxation; New York v. Reardon, 204 U. S. 158, 9 Ann. Cas. 736, 51 L. Ed. 421, 27 Sup. Ct. 188, upholding State tax on transfers of stock; Addyston Pipe & Steel Co. v. United States, 175 U. S. 227, 44 L. Ed. 142, 20 Sup. Ct. 102, holding agreement between corporations engaged in manufacture of pipe, under which they enter into public bidding for contracts, when in truth there is no competition, is void under anti-trust act of Congress, July 2, 1890, when applied to sales beyond State; Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 244, holding Michigan franchise tax act of 1891 (Comp. Laws 1897, § 8574), has no application to foreign corporations whose business is interstate; D. E. Foote & Co. v. Stanley, 117 Md. 339, 82 Atl. 381, holding State could levy inspection tax on oysters which may be subject of interstate shipment; New York v. Miln, 11 Pet. 134, 136, 145, 147, 9 L. Ed. 660, 661, 665, 666, holding State statute requiring masters to furnish city officers with lists of immigrants not a regulation of commerce; License Cases, 5 How. 578, 601, 12 L. Ed. 289, 300, affirming 13 N. H. 580, 586, and asserting power of State to prohibit sales of liquor in less than certain quantity; Veazie v. Moor, 14 How. 575, 14 L. Ed. 548, holding valid a State law granting to an individual exclusive privileges of navigation upon a river lying wholly within the State and not navigable in connection with any interstate waterway; Gilman v. Philadelphia, 3 Wall. 730, 18 L. Ed. 101, refusing to enjoin the erection of a bridge across a navigable river lying within a State, it appearing that such bridge would benefit the public generally and that Congress had not acted in such matters; Pervear v. Commonwealth, 5 Wall. 478, 18 L. Ed. 609, holding license from Federal government, under internal revenue laws, no bar to indictment under State law prohibiting sale of liquor; Society v. Coite, 6 Wall. 605, 18 L. Ed. 902, holding that where State law taxes deposits in savings

banks, a bank is not exempt because of fact that deposits are invested in Federal securities, themselves exempt from taxation; Sherlock v. Alling, 93 U. S. 103, 23 L. Ed. 820, holding valid a State law subjecting owners of vessels engaged in interstate trade to liability for negligence resulting in injury to passengers; Doyle v. Continental Ins. Co., 94 U. S. 542, 24 L. Ed. 152, asserting power of State to exclude foreign corporations not complying with State regulations; Beer Co. v. Massachusetts, 97 U. S. 33, 24 L. Ed. 992, to prohibit manufacture or sale of liquors, although such act may divest powers of corporation organized for that purpose under State law; Machine Co. v. Gage, 100 U. S. 677, 25 L. Ed. 755, and Emert v. Missouri, 156 U. S. 312, 313, 316, 321, 39 L. Ed. 434, 435, 436, 437, 15 Sup. Ct. 371, 372, 374, affirming validity of State law taxing venders of sewing-machines regardless of place of manufacture; Tiernan v. Rinker, 102 U. S. 126, 26 L. Ed. 104, refusing to enjoin operation of State law prohibiting sales of liquor generally in less than certain quantity; Home Ins. Co. v. New York, 134 U. S. 599, 33 L. Ed. 1029, 10 Sup. Ct. 595, holding that tax upon corporations, upon basis of capital stock, is operative as to corporation whose capital is invested in Federal bonds; New York ex rel. Parke, Davis & Co. v. Roberts, 171 U. S. 664, 43 L. Ed. 326, 19 Sup. Ct. 78, holding tax upon capital stock of corporation valid, although corporation deals largely in imported goods; United States v. New Bedford Bridge, 1 Wood. & M. 417, 418, 430, 486, Fed. Cas. 15,867, recognizing rule, but holding that Federal courts have not jurisdiction, in absence of express grant by Congress, of indictment for obstructing navigable river by authority of State; Sweatt v. Railroad Co., 5 Bank. Reg. 249, 3 Cliff. 352, Fed. Cas. 13,684, holding railroad chartered by State not an instrument of State government, and affirming power of Congress to provide for transfer of franchises of insolvent companies under national bankrupt law; Ex parte Thornton, 4 Hughes, 228, 12 Fed. 544, 545, and In re Rudolph, 2 Fed. 68, refusing to declare law taxing drummers unconstitutional, in absence of proof of its discriminatory effect; In re Hoover, 30 Fed. 53, holding rule inapplicable under facts; Cotting v. Kansas City etc. Co., 82 Fed. 842, holding stockyards company not such instrument of interstate commerce as to be exempt from regulation of charges by State; Oliver Finney etc. Co. v. Speed, 87 Fed. 413, affirming validity of law taxing stock of merchants without discrimination as to residence; Osborn v. Mobile, 44 Ala. 498, holding valid, a law exacting license from companies doing business in city and whose business extended beyond limits of State; People v. Coleman, 4 Cal. 56, 61, 60 Am. Dec. 590, 593, asserting power of State to lay special tax upon sales of goods brought into State; Sears v. Commissioners, 36 Ind. 271, asserting power of State to demand license tax from peddlers selling foreign merchandise; Cory v. Carter, 48 Ind. 345, 17 Am. Rep. 749, asserting plenary power of State over its own citizens, and holding valid a law providing separate schools for negro children; Western Union Tel. Co. v. Pendleton, 95 Ind. 13, 48 Am. Rep. 693, holding law providing penalty for failure of telegraph com-

pany to transmit messages to points outside of State to be valid as exercise of police power; Santo v. Iowa, 2 Iowa, 196, 197, 63 Am. Dec. 496, 497, asserting power of State to prohibit sales of liquor without discrimination as to place of manufacture; City of Keokuk v. Keokuk etc. Packet Co., 45 Iowa, 208, holding valid an ordinance fixing reasonable rates for use of city wharves; State v. Fields, 98 Iowa, 750, 62 N. W. 654, holding officer of national bank amenable to State law providing penalty for receiving deposits knowing that bank is insolvent; State v. Fullerton, 7 Rob. (La.) 216, holding tax upon passengers carried in vessels, payable by passengers themselves, not a regulation of commerce; Succession of Mager, 12 Rob. (La.) 587, holding tax upon legacies payable to nonresidents not a regulation of commerce; Crow v. Missouri, 14 Mo. 322, 331, 334, 335, 337, 338, holding tax upon merchants generally, applicable to merchants dealing in imported goods; State v. Addington, 12 Mo. App. 225, 226, holding law prohibiting sales of oleomargarine, valid as proper exercise of police power; Territory v. Farnsworth, 5 Mont. 318, 319, 320, 323, 5 Pac. 875, 876, 878, and Ex parte Robinson, 12 Nev. 271, 273, 28 Am. Rep. 798, 799, holding tax upon commercial travelers selling by sample applicable to those dealing solely in imported goods; State v. Delaware etc. R. R. Co., 30 N. J. L. 479, asserting power of State to tax foreign railway companies doing business in State, taking as basis the number of passengers and amount of freight carried (reversed in 31 N. J. L. 540, 86 Am. Dec. 234); State v. Newton, 50 N. J. L. 538, 14 Atl. 606, asserting power of State to regulate traffic in oleomargarine; Benedict v. Columbus Construction Co., 49 N. J. Eq. 41, 23 Atl. 491, to regulate transportation of natural gas in absence of congressional action; Wynehamer v. People, 13 N. Y. 449, to regulate sales of liquor at retail; Western Union etc. Co. v. Mayer, 28 Ohio St. 528, asserting validity of tax upon gross receipts from business done by telegraph company within State; McGuire v. State, 42 Ohio St. 532, holding statute exempting "pure juice of the grape" cultivated within State from operation of law, prohibiting sales of intoxicating liquor, not a regulation of commerce; Commonwealth v. Philadelphia etc. Ry. Co., 62 Pa. St. 296, 297, 1 Am. Rep. 408, 409, affirmed, 15 Wall. 295, 21 L. Ed. 168, asserting power of State to tax property in interstate railroads upon basis of gross amount of business done in State; Insurance Co. of N. A. v. Commonwealth, 87 Pa. St. 181, 183, 30 Am. Rep. 354, 355, to tax insurance companies upon same basis; Rothermel v. Meyerle, 136 Pa. St. 263, 9 L. R. A. 368, 20 Atl. 587, to tax peddlers buying dairy produce in certain county with intent to send it out of county; Albrecht v. State, 8 Tex. App. 226, 227, 34 Am. Rep. 743, 744, sustaining validity of liquor tax levied upon basis of sales regardless of place of manufacture; Eyre v. Jacob, 14 Gratt. 429, 73 Am. Dec. 370, of a tax upon collateral inheritances; dissenting opinions in Pollock v. Farmers' L. & T. Co. 157 U. S. 646, 39 L. Ed. 842, 15 Sup. Ct. 714, and on rehearing, 158 U. S. 665, 691, 39 L. Ed. 1135, 1144, 15 Sup. Ct. 931, 941, majority denying power of Congress to tax instrumentalities of State government; dissenting opinion in Norfolk etc. R. R.

sible to show fraud; United States v. The Isla de Cuba, 2 Cliff. 301, Fed. Cas. 15,447, holding declarations of master, as to his suspicions that purpose of voyage was not legal, admissible in evidence; United States v. Hartwell, 3 Cliff. 228, Fed. Cas. 15,318, holding declarations of public officer that he loaned public funds to others, admissible as evidence against those others indicted with him for misappropriation; Aiken v. Bemis, 3 Wood. & M. 355, Fed. Cas. 109, but case decided upon other grounds, agency not clearly appearing; McPherrin v. Jennings, 66 Iowa, 624, 24 N. W. 242, holding declarations of employee in livery-stable admissible to show negligence whereby plaintiff's horse was killed; State v. Lemon, 92 N. C. 793, holding that, where defendant swore that he sent his wife to borrow money to pay for property alleged to have been stolen, declarations of wife to person of whom money was borrowed were admissible on behalf of State; Western Ins. Co. v. Tobin, 32 Ohio St. 100, holding declarations of master as to matters affecting risk admissible in action against insurance company after loss.

Distinguished in United States v. Gardiner, 25 Fed. Cas. 1253, under facts; Newell v. Roberts, 13 Conn. 71, where admissions not part of res gestae held not admissible against principal; Phelps v. James, 86 Iowa, 402, 41 Am. St. Rep. 499, 53 N. W. 275, holding rule inapplicable where declarations made after termination of employment; Franklin Bank v. Steward, 37 Me. 526, holding declarations of cashier as to past transactions not admissible against bank; Corbin v. Adams, 6 Cush. 97, where agency not clearly shown.

The burden of proof of offenses charged in indictment under Federal law, rests upon United States.

Approved in State v. Shuff, 9 Idaho, 130, 72 Pac. 669, it is error to instruct that to establish defense on ground of insanity it must be clearly proved by defendant by preponderance of evidence given upon trial; Fuller v. State, 12 Ohio St. 434, where accused was indicted under State law prohibiting sales of liquor.

Distinguished in Blann v. Beal, 5 Ala. 360, under construction of statute providing penalty for negligence of public officer.

Preparations for slave voyage, when constitute a fitting out for purpose of such trade.

Cited in The Slavers, 2 Wall. 380, 17 L. Ed. 910, decreeing forfeiture of vessel in absence of evidence to explain suspicious equipment; The Yacht Wanderer, 1 Sprague, 519, Fed. Cas. 17,139, holding vessel liable to forfeiture where illegal intent is shown, although vessel not adapted for purpose of slave trade; Charge to Grand Jury, 30 Fed. Cas. 1027, instructing as to offenses under slave trade act generally.

In an indictment for fitting out vessel for slave trade, it is not necessary to aver the particular acts of preparation.

Approved in Enders v. United States, 187 Fed. 757, 109 C. C. A. 502, applying rule to indictment for defrauding United States of tax on oleomargarine; United States v. Brig Neurea, 19 How. 94, 15 L. Ed. 532, holding that, where indictment charges carrying of more passengers than statute allows, it need not state where they were carried; United States v. Simmons, 96 U. S. 363, 364, 365, 24 L. Ed. 820, 821, holding that indictment for unlawful distilling need not charge that spirits distilled were alcoholic; dissenting opinion in United States v. Reese, 92 U. S. 234, 23 L. Ed. 570, arguendo.

In determining degree of certainty with which offense is to be set out in indictment, courts guided by circumstances of case.

Cited in United States v. Schuler, 6 McLean, 33, Fed. Cas. 16,234, holding it necessary, in indictment for removing timber from public lands, that location of land should be particularly designated; Moffatt v. State, 11 Ark. 172, 178, holding that indictment under law prohibiting gambling, must contain names of players; Commonwealth v. Nax, 13 Gratt. 790, sustaining indictment for violation of license laws.

In general, it is sufficient if the indictment allege the offense in the language of the statute creating it.

Approved in Morris v. United States, 161 Fed. 681, 88 C. C. A. 532, holding indictment under oleomargarine act need not negative exception in statute; United States v. Lake, 129 Fed. 501, upholding sufficiency of indictment against president of bankrupt corporation for making false oath to its schedule; Sims v. United States, 121 Fed. 518, holding in prosecution for aiding and abetting landing of Chinese, prohibited by Act July 5, 1884, indictment was sufficient; In re Bellah, 116 Fed. 72, holding averment in petition in bankruptcy that defendant "has ever since concealed and secreted with intent to hinder, delay, or defraud creditors," is not defective for want of particularity; Ledbetter v. United States, 170 U. S. 612, 42 L. Ed. 1164, 18 Sup. Ct. 776, as to indictment for violation of revenue laws; United States v. Wilson, 1 Bald. 119, Fed. Cas. 16,730, for robbing United States mails; United States v. Hinman, 1 Bald. 294, Fed. Cas. 15,370, for forging orders upon Bank of United States; United States v. Henry, 3 Ben. 31, 33, Fed. Cas. 15,350, for executing fraudulent bond under revenue laws; United States v. Patterson, 6 McLean, 467, Fed. Cas. 16,011, holding that in indictment for embezzlement of letter containing bank note, latter need not be described; United States v. Noelke, 17 Blatchf. 560, 1 Fed. 432, holding that indictment charging the sending of a letter concerning lotteries through the mail need not state that lottery was one "offering prizes"; Marcus v. United States, 16 Fed. Cas. 705, sustaining indictment for violating law regarding gambling; United States v. Ballard, 24 Fed. Cas. 969, 971, sustaining information for violation of revenue laws; United States v. O'Sullivan, 27 Fed. Cas. 369, overruling motion to quash indictment for violation of neutrality; United States v. White, 28 Fed.

Cas. 548, and United States v. Doherty, 25 Fed. 29, holding unnecessary a description of offense in indictment charging violation of election laws; United States v. Scott, 74 Fed. 217, applying rule to indictment for violation of civil service laws; Whiting v. State, 14 Conn. 491, 493, 36 Am. Dec. 500, 502, and Rawson v. State, 19 Conn. 299, holding that information for selling liquor without license need not aver kind nor quantity sold; West v. People, 137 Ill. 197, 27 N. E. 35, sustaining indictment for issuing false certificates of stock; State v. Smith, 46 Iowa, 673, holding that indictment charging offense in language of statute is not open to objection on account of form; Hopkins v. Commonwealth, 3 Met. 465, holding that indictment charging possession of counterfeit, "with intent to pass same," need not allege intent to pass same "as true"; Commonwealth v. Kelly, 12 Gray, 176, sustaining indictment charging the maintaining of a common nuisance; State v. Bennett, 102 Mo. 369, 10 L. R. A. 781, 14 S. W. 868, information for violation of license laws; State v. Trolson, 21 Nev. 422, 32 Pac. 931, and McCann v. United States, 2 Wyo. 290, sustaining indictment for embezzlement; State v. Pierce, 43 N. H. 276, holding, however, that where statute is general in terms, offense must be set out sufficiently to identify acts complained of; dissenting opinion in United States v. Cannon, 4 Utah, 146, 7 Pac. 384, concurring with majority in applying rule in case of indictment for bigamy.

Distinguished in In re Coleman, 15 Blatchf. 417, Fed. Cas. 2980, ordering release on habeas corpus of person detained under affidavit failing to show sufficient cause for issuing warrant; United States v. Ford, 34 Fed. 29, holding that indictment for interfering with revenue officer must state facts sufficient to show indictable offense; United States v. Wardell, 49 Fed. 915, holding rule inapplicable where statute is in more general terms than is allowable in indictment; United States v. Staton, 2 Flipp. 323, Fed. Cas. 16,382, to same effect.

In case of misdemeanor, all persons concerned in aiding or abetting, as well as in perpetrating act, are principals.

Approved in United States v. Martin, 176 Fed. 113, 114, following rule; Davey v. United States, 208 Fed. 243, 125 C. C. A. 437, holding counts in indictment charging aiding and abetting bribery not fatally defective in not charging accused as principal; Kettenbach v. United States, 202 Fed. 381, 120 C. C. A. 505, holding officers of bank subject to conviction for aiding cashier in falsifying reports under Revised Statutes, section 5209; United States v. Young, 170 Fed. 112, 113, holding all persons aiding and abetting bankrupt to conceal his assets punishable under provisions of bankrupt act; Hume v. United States, 118 Fed. 697, holding under Rev. Stats. United States, section 5480 (U. S. Comp. Stats. 1901, p. 3696), making it an offense for any person to place letter in postoffice in furtherance of scheme to defraud, if offense is felony, any person party to scheme is a principal; Bliss v. United States, 105 Fed. 510, holding under Act May 16, 1884, c. 52, § 1 (23 Stat. 22), relating to indictments for

counterfeiting notes of foreign government, it is not necessary to allege principal has been convicted; Maxey v. United States, 30 App. D. C. 75, holding one aiding abortion guilty as principal; United States v. Carroll, 32 Fed. 776, holding that in indictment for aiding and abetting commission of offense by registration officer, specific offense of office should be alleged; Gallott v. United States, 87 Fed. 448, holding that death of principal before indictment constitutes no bar to prosecution of person charged with aiding or abetting commission of offense; Commonwealth v. Brown, 154 Mass. 56, 27 N. E. 777, holding employee of express company liable for forwarding package of liquor with knowledge that such act was illegal.

It is sufficient if indictment for solicitation to commit crime, state act of solicitation, without averment of means of solicitation.

Approved in Coffin v. United States, 156 U. S. 448, 39 L. Ed. 489, 15 Sup. Ct. 400, sustaining indictment for aiding commission of embezzlement by officer of national bank.

In indictment for treason, overt acts must be specially laid, and must be proved as laid.

Cited in United States v. Wilson, 1 Bald. 119, Fed. Cas. 16,730, as stating exception to general rule.

In an indictment for conspiracy, it is not necessary to set forth the overt acts or means.

Cited in United States v. Dustin, 2 Bond, 335, Fed. Cas. 15,011, sustaining indictment for conspiracy to defraud United States of taxes due under revenue laws.

The word "such" used in statute has appropriate meaning, and must be taken to refer to its logical antecedent.

Cited in Evans v. State, 150 Ind. 653, 50 N. E. 820, construing term "such property," as used in information for larceny.

The terms "aid" and "abet," as used in slave-trade act, import assistance, co-operation or encouragement.

Cited in United States v. Kelly, 2 Sprague, 82, 83, Fed. Cas. 15,515, holding that under this construction, aider or abettor need not be present at commission of primary offense.

In indictment for violation of slave-trade act, it is not sufficient to aver "intent that the vessel should be employed"; it must be "with intent to employ."

Cited in United States v. Kelly, 2 Sprague, 80, 81, Fed. Cas. 15,515, holding that indictment for aiding in fitting out vessel for slave trade, it must appear that person aided had intent to employ her himself in that trade; United States v. Naylor, 27 Fed. Cas. 79, arguendo.

Sufficiency of indictment may, in discretion of court, be discussed and decided during trial before jury.

Approved in Estes v. United States, 227 Fed. 819, holding trial court had discretion to entertain motion to quash indictment after swearing witness; United States v. McBride, 7 Mackey (D. C.), 382, holding such objections made during trial properly denied; United States v. Bicksler, 1 Mackey (D. C.), 347, holding sufficiency of indictment could be considered on motion for new trial on exception to rulings at trial; United States v. Shoemaker, 2 McLean, 115, Fed. Cas. 16,279, as instance of practice.

Miscellaneous. Cited in United States v. Wilson, 1 Bald. 116, Fed. Cas. 16,730, to point that court will not pass sentence on prisoner not indicted in manner prescribed by law; erroneously in Ex parte Hull, 12 Fed. Cas. 856; United States v. Fish, 24 Fed. 594, to point that proof of command or procurement to do unlawful act is for jury; Village of Oquawka v. Graves, 82 Fed. 572, 53 U. S. App. 459, but not in point; Green v. Holway, 101 Mass. 245, 3 Am. Rep. 340, to point that in indictment for violation of Federal law, intent must be charged; Betts v. United States, 135 Fed. 231, 65 C. C. A. 452.

12 Wheat. 480–486, 6 L. Ed. 700, UNITED STATES v. MARCHANT AND COLSON.

Upon joint trial each defendant may challenge his full number of peremptories.

Approved in Sawyer v. United States, 202 U. S. 159, 160, 161, 50 L. Ed. 976, 977, 26 Sup. Ct. 575, conditional right of challenge on behalf of government in criminal case, which has effect of setting aside juror until panel is exhausted, without assigning cause, is proper; Betts v. United States, 132 Fed. 236, 65 C. C. A. 452, that number of indictments against same defendant for using mails to defraud are tried together by same jury does not affect right to three peremptory challenges for each indictment; United States v. Shackelford, 18 How. 590, 15 L. Ed. 496, holding, that where this right is expressly recognized by act of Congress, courts cannot abridge it; Lewis v. United States, 146 U. S. 376, 36 L. Ed. 1014, 13 Sup. Ct. 138, reversing judgment in murder case, where challenges by prosecution were not made in presence of prisoner, and included jurors already challenged by him; Barber v. State, 13 Fla. 679, holding it error to refuse to allow peremptory challenge after challenge for cause; Cruce v. State, 59 Ga. 88, 89, 90, denying power of court to oblige persons jointly indicted to join in peremptory challenges in absence of agreement; State v. Durien, 29 Kan. 691, reversing judgment of court where each defendant was not allowed full number of challenges.

Distinguished in United States v. Hall, 44 Fed. 883, 10 L. R. A. 323, under statute, declaring persons indicted for joint felony to be one party for purpose of challenging.

Right of joint defendants in criminal case with respect to peremptory challenges. Note, Ann. Cas. 1914A, 860, 862.

Practice on challenge of juror by prosecution.

Cited in United States v. Wilson, 1 Bald. 82, Fed. Cas. 16,730, following practice and directing juror to be set aside, upon challenge by United States until panel was exhausted; United States v. Douglass, 2 Blatchf. 210, Fed. Cas. 14,989, construing act of Congress and holding that it did not impair this qualified right of challenge (but see dissenting opinion, p. 215, Fed. Cas. 14,989); Mathis v. State, 31 Fla. 317, 12 South. 688, holding it to be error for court without passing on challenge for cause by State to set juror aside upon motion of State, and proceed to organize jury.

Right of accused to full panel. Note, L. R. A. 1916A, 828.

The right of peremptory challenge is not a right to select, but a right to reject jurors.

Approved in United States v. Davis, 103 Fed. 465, holding under Mill & V. Tenn. Code, § 6050, relating to impaneling jury, in capital case State has right to peremptorily challenge jury who has been passed by both sides but not sworn; State v. Deliso, 75 N. J. L. 811, 69 Atl. 219, holding peremptory challenge of juror by State before being sworn not error; State v. Moore, 75 N. J. L. 623, 68 Atl. 167, holding allowance of challenge by one accused against protest of another, without exhausting challenges, not error; Pointer v. United States, 151 U. S. 412, 38 L. Ed. 215, 14 Sup. Ct. 416, holding prisoner not entitled to know what jurors prosecution intends challenging before he exercises his right; State v. Cazeau, 8 La. Ann. 115, State v. Cady, 80 Me. 417, 14 Atl. 941, State v. Doolittle, 58 N. H. 92, and State v. Jacobs, 106 N. C. 697, 10 S. E. 1031, all denying right of one defendant to object to challenges by codefendant; State v. Durr 39 La. Ann. 754, 2 South. 547, asserting right of prosecution to reject juror at any time prior to acceptance by defense; Turpin v. State, 55 Md. 468, holding that defendant cannot object if juror passed by him is challenged by State; Biddle v. State, 67 Md. 306, 10 Atl. 794, and Vojta v. Pelikan, 15 Mo. App. 477, holding that where juror challenged has retired from box, challenge cannot be withdrawn; Copehart v. Stewart, 80 N. C. 102, holding incapacity of certain members of panel not assignable for error, where party has not exhausted his challenges; State v. McQuaige, 5 S. C. 432, holding that exceptions to decision overruling challenge for cause will not be considered where peremptory challenges were not exhausted; likewise in Loggins v. State, 12 Tex. App. 80, but holding that where peremptory challenges have been exhausted, overruling of challenge for cause is ground for reversal; Tombeckbe People v. Ransom, 7 Wend. 428; dissenting opinion in State v. Cardoza, 11 S. C. 249, arguendo.

Where two or more persons are charged in same indictment with capital offense, separate trials are in discretion of court.

Approved in Talbott v. United States, 208 Fed. 145, 125 C. C. A. 360; Heike v. United States, 192 Fed. 100, 112 C. C. A. 615; McDonald v. State, 104 Ark. 319, 149 S. W. 96; Smith v. State, 106 Md. 41, 66 Atl. 679; Commonwealth v. Rosenthal, 211 Mass. 52, **Ann. Cas. 1913A, 1003, 47 L. R. A. (N. S.) 955**, 97 N. E. 610; Commonwealth v. Borasky, 214 Mass. 316, 101 N. E. 379; and Territory v. Clark, 15 N. M. 44, 99 Pac. 700, all following rule; Cochran v. United States, 147 Fed. 207, applying principle to trial in Oklahoma territorial court on indictment against laws of United States; Wolfson v. United States, 101 Fed. 436, holding under Act March 16, 1878 (20 Stat. 30), providing defendant may at his request be competent witness, one of two defendants jointly indicted and tried may be witness for government; Anderson v. State, 8 Okl. Cr. 107, **Ann. Cas. 1914C, 314**, 126 Pac. 847, holding on severance court could direct order of trials; Logan v. United States, 144 U. S. 296, **36 L. Ed.** 441, 12 Sup. Ct. 627, holding that consolidation, under act of Congress, of several indictments against different persons for one conspiracy cannot be objected to after verdict; United States v. Ball, 163 U. S. 672, **41 L. Ed. 303**, 16 Sup. Ct. 1196, refusing to set aside verdict against persons jointly indicted, because one of the accused declared to be material witness in behalf of others; United States v. Wilson, 1 Bald. 81, Fed. Cas. 16,730, allowing separate trials under indictment for robbing mails, in absence of objection by prosecution; United States v. Gibert, 2 Sumn. 63, Fed. Cas. 15,204, holding fact that prisoners desired to use testimony of each other in defense, afforded no reason for allowing separate trials; Ballard v. State, 31 Fla. 276, 277, 278, 12 South. 868, holding that court is not bound to separate causes because one of two parties jointly indicted is not ready for trial; Caldwell v. State, 34 Ga. 17, refusing to review decision of court denying motion to sever causes; Maton v. People, 15 Ill. 537, and Johnson v. People, 22 Ill. 318, holding refusal not to be assignable as error; State v. Leonard, 6 La. Ann. 422, holding that where severance is asked it should appear that there is no evidence against party in whose behalf motion is made; State v. Soper, 16 Me. 295, **33 Am. Dec. 666**, applying rule in case of joint indictment for larceny; State v. Conley, 39 Me. 92, overruling motion for separate trials in murder case; Commonwealth v. Robinson, 1 Gray, 560, holding rule applicable, although by trying defendants together some are unable to introduce certain evidence; Commonwealth v. Powers, 109 Mass. 354, refusing to review decision denying defendants separate counsel where objection not taken at trial; Commonwealth v. Seeley, 167 Mass. 165, 45 N. E. 91, asserting power of court to try together, persons who have been indicted separately for same offense of adultery; State v. Smith, 2 Ired. 404, where facts were similar to those in principal case; State v. Collins, 70 N. C. 244, **16 Am. Rep. 773**, holding that judge may, on joint trial, exercise discretion in separating evidence as to each defendant, and instruct jury accordingly; Anthony v. State, 2 R. I. 308, ruling similarly in action for assault and battery; State v. Wise, 7 Rich. 415, sustaining refusal of lower court in absence of proof that defendants

were prejudiced by joint trial; State v. McGrew, 13 Rich. 320, holding discretion not controlled by fact that wife of one defendant is desired to testify for the other; State v. Fournier, 68 Vt. 266, 35 Atl. 179, holding, however, that evidence should be properly divided for presentation to jury; dissenting opinion in United States v. Jones, 5 Utah, 558, 18 Pac. 236, majority holding otherwise under statute; Jackson v. State, 104 Ala. 3, 16 South. 524; Walston v. Commonwealth, 16 B. Mon. 40; Turpin v. State, 55 Md. 468; People v. Vermilyea, 7 Cow. 383, arguendo.

Modified in State v. Desroche, 47 La. Ann. 655, 17 South. 211, holding that where sufficient cause for severance is shown, refusal of court to allow may be reviewed on appeal.

Distinguished under statute in Kemp v. Commonwealth, 18 Gratt. 981, and Commonwealth v. Lewis, 25 Gratt. 941.

Miscellaneous. Cited in Walston v. Commonwealth, 16 B. Mon. 37, to point that statute giving to State the right of peremptory challenge in prosecutions already commenced is not ex post facto.

12 Wheat. 486-498, 6 L. Ed. 702, UNITED STATES v. THREE HUNDRED AND FIFTY CHESTS OF TEA.

Term "concealed," as used in collection act, construed.

Approved in United States v. Comstock, 161 Fed. 645, holding "conceal," as used in bankruptcy act, excludes unintentional acts; United States v. Twenty-five Cases etc. Crabbe, 380, Fed. Cas. 16,563, charging jury that act was applicable not only to smuggled goods but to all goods on which duties were unpaid; United States v. Cigars, 25 Fed. Cas. 1074, applying rule, and holding that forfeiture does not depend upon knowledge of concealment by owner.

What authorizes seizure of goods under forty-third section of collection act.

Cited in United States v. Halberstadt, 26 Fed. Cas. 73, following rule.

A lien for duties on imported goods cannot be enforced by a libel in rem in admiralty.

Cited in United States v. Pipes, 2 Abb. 501, Fed. Cas. 15,116, holding proceeding to collect duties cognizable only by common-law side of court; The Waterloo, Blatchf. & H. 121, Fed. Cas. 17,257, dismissing libel against vessel brought in by salvors; United States v. The Queen, 4 Ben. 244, Fed. Cas. 16,107, denying jurisdiction of admiralty to enforce penalty against master for importing goods without manifest.

Miscellaneous. Cited also in United States v. Packages, 27 Fed. Cas. 286, but not in point; Our House v. State, 4 G. Greene, 175, as instance where proceedings in rem for forfeiture were sanctioned by Supreme Court.

12 Wheat. 498–505, 6 L. Ed. 706, POTTER v. GARDNER.

Devise of land to A, "he paying all my debts," charges debts on land, and gives other devisees right to sue to have debts paid therefrom.

Cited in Pulliam v. Pulliam, 10 Fed. 45, Fed. Cas. 14, 463a, asserting right of testator to exonerate legacy from payment of debts by charging land; Smith v. McIntire, 83 Fed. 462, holding that such devise confers on devisee power to sell independent of executor; Taft v. Morse, 4 Met. 527, where devise charged land with payment of legacies; Clark v. Hornthal, 47 Miss. 540, holding that such charge on land creates trust in person empowered to sell; Woonsocket Institution v. Ballou, 16 R. I. 353, 354, 1 L. R. A. 559, 560, 16 Atl. 145, 146, holding charge inures to benefit of creditor as well as legatees exonerated, and he may maintain bill to enforce payment.

Purchaser of land charged with testator's debts is not bound to look to application of purchase money.

Approved in Lovewell v. Schoolfield, 217 Fed. 703, 133 C. C. A. 449, holding purchaser of partnership realty from surviving partners with authority to sell not bound to see to application of proceeds; Holden v. Circleville Light & Power Co., 216 Fed. 498, 132 C. C. A. 550, applying rule to bona fide purchaser from trustee with power to sell; Johnson v. Georgia Loan etc. Co., 141 Fed. 597, bona fide purchaser must allege and prove want of notice and actual payment of purchase money independently of recitals in deed; Alther v. Barrol, 22 Md. 510, where sale was by devisee of lands charged with all of testator's debts.

Duty of purchaser from life tenant, trustee or other donee of power to sell, to see to application of purchase money. Note, 4 Ann. Cas. 371.

Purchaser from devisee of lands charged with devisor's debts may be charged for purchase money remaining in his hands.

Approved in Potter v. Gardner, 5 Pet. 718, 8 L. Ed. 285, following rule; Hoxie v. Carr, 1 Sumn. 192, Fed. Cas. 6802, holding purchasers of partnership lands chargeable with debts of partnership; Hughes v. Tabb, 78 Va. 325, 327, affirming decree against purchaser for unpaid balance of purchase money.

Sales and conveyances by trustees. Note, 19 Am. St. Rep. 281, 288.

Testamentary trusts to pay debts. Note, 5 L. R. A. (N. S.) 371.

Miscellaneous. Erroneously cited in Boone v. Chiles, 10 Pet. 212, 9 L. Ed. 400; Byers v. Fowler, 12 Ark. 286, 54 Am. Dec. 288, and Perkins v. Swank, 43 Miss. 358. Cited also in Smith v. Hunter, 23 Ind. 582, to point that heirs are necessary parties to suit to enforce lien against land of testator.

12 Wheat. 505–511, 6 L. Ed. 709, UNITED STATES v. NICHOLL.

Statute requiring settlements by public officers to be made at short periods is merely directory and forms no part of sureties' contract.

Approved in Lake Co. v. Neilon, 44 Or. 20, 74 Pac. 214, failure of tax collector to turn over collections to treasurer as required by law does not raise presumption of conversion; United States v. Boyd, 15 Pet. 208, 10 L. Ed. 713, holding sureties liable for total defalcation of receiver of treasury who had failed to settle monthly, as required by statute; United States v. Potter, 27 Fed. Cas. 604, ruling similarly as to act requiring disbursing agent to pay claims from particular fund; Meads v. United States, 81 Fed. 688, 54 U. S. App. 150, as to act prescribing time when money is due from entryman, and holding surety on receiver's bond accountable for moneys received before due; Detroit v. Weber, 26 Mich. 290, as to act requiring auditor to examine treasurer's accounts monthly and report defalcation to bondsmen; Morris Canal etc. Co. v. Van Vorst, 21 N. J. L. 117, 124, and Richmond etc. R. R. Co. v. Kasey, 30 Gratt. 229, holding that by-laws of corporation are for security of corporation, and do not affect liability of officer's sureties; Albany Church v. Vedder, 14 Wend. 171, holding obligees of bond not bound to demand accounting of officer at stated periods unless requested to do so by sureties; Commonwealth v. Holmes, 25 Gratt. 775, 776, holding surety not discharged by failure of State to demand accounting at time prescribed by statute; Crawn v. Commonwealth, 84 Va. 287, 10 Am. St. Rep. 842, 4 S. E. 724, is to same effect; Morris Canal etc. Co. v. Van Vorst, 21 N. J. L. 117, 124, arguendo.

Distinguished in United States v. De Visser, 10 Fed. 648, under facts.

Sureties on an official bond are accountable only for moneys received by the officer during his term of office.

Cited in Bryan v. United States, 1 Black, 149, 17 L. Ed. 137, holding surety not accountable for sum for which officer drew, but which was not paid until expiration of term; Jackson v. Simonton, 4 Cr. C. C. 261, Fed. Cas. 7147, denying liability of surety for money received before officer lawfully authorized to do so; McDonald v. Bradshaw, 2 Ga. 251, 46 Am. Dec. 388, holding surety not liable for moneys received by sheriff after term, although execution issued previously; People v. Toomey, 122 Ill. 315, 13 N. E. 523, denying liability of surety of county clerk for extra compensation wrongfully received by latter after term; County of Wapello v. Bigham, 10 Iowa, 43, 74 Am. Dec. 372, applying rule where county treasurer held over after term, acting de facto only; Bank of Washington v. Barrington, 2 Penr. & W. 44, holding surety on cashier's bond discharged from future liability by forfeiture of bank charter; State v. Hill, 17 W. Va. 463, arguendo.

Liability of sureties on the bond of an officer after the expiration of his term of office. Note, 103 Am. St. Rep. 933.

Liability of sureties on successive bonds. Note, 10 Am. St. Rep. 855.

Liability of surety for default after expiration of term. Note, **1 Ann. Cas. 383.**

Liability on bond while officer is holding over. Note, **35 L. R. A. 88.**

Sureties on official bond are accountable for moneys received by principal while in office and which he failed to account for afterward.

Cited in Pinney v. Barnes, 17 Conn. 426, holding that administrator removed from office is liable to suit by successor to recover money in his hands, but not yet due legatees; State v. Shacklett, 37 Mo. 285, holding surety liable for wrongful act of sheriff in levying upon property to enforce tax illegally assessed; Tennessee Hospital v. Fuqua, 1 Lea, 609, ruling similarly as to liability of surety on guardian's bond.

An act of Congress requiring officials to furnish new sureties does not discharge sureties on existing bonds.

Cited in Postmaster-general v. Munger, 2 Paine, 197, Fed. Cas. 11,309, holding that taking of new bond did not discharge surety on old bond as to default occurring while old bond in force.

Release of surety by substitution of new bond. Note, **19 Ann. Cas. 419.**

Laches are not imputable to the government.

Approved in United States v. Sisk, 176 Fed. 888, 100 C. C. A. 355, applying rule to negligence of internal revenue officer causing loss of spirits seized for nonpayment of tax by distiller; United States v. Noojin, 155 Fed. 379, holding rule applied to right of United States to cause execution to be issued on judgment; Pond v. United States, 111 Fed. 996, holding under Act August 8, 1888 (25 Stat. 387), relating to sureties on official bonds, the sureties on bond of collector of internal revenue are not released by failure of treasury department to give immediate notice of defalcation; Stoeckle v. Lewis, 8 Del. Ch. 170, 38 Atl. 1064, holding laches of public officer part of risk undertaken on his bond; State v. Jahraus, 117 La. 289, **116 Am. St. Rep. 208**, 41 South. 577, holding State not estopped by act of defaulting officer in recovering moneys disposed of by him; Hart v. United States, 95 U. S. 318, **24 L. Ed. 480**, holding United States not liable for negligent or wrongful act of revenue officer; Minturn v. United States, 106 U. S. 444, **27 L. Ed. 210**, 1 Sup. Ct. 408, holding surety on official bond not released by negligence of principal; United States v. Dallas etc. Road Co., 140 U. S. 632, **35 L. Ed. 571**, 11 Sup. Ct. 998, holding staleness to be no defense to claim of United States; German Bank v. United States, 148 U. S. 579, **37 L. Ed. 569**, 13 Sup. Ct. 705, declaring United States not liable in Court of Claims for bonds wrongfully canceled by register of treasury; United States v. Verdier, 164 U. S. 219, **41 L. Ed. 409**, 17 Sup. Ct. 44, refusing to allow interest prior to judgment to claimants against United States; Postmaster-general v. Reeder, 4 Wash. 686, Fed. Cas. 11,311, holding surety of deputy postmaster not discharged by

failure of government to sue principal; Raymond v. United States, 14 Blatchf. 52, Fed. Cas. 11,596, denying right of surety to plead statute of limitations to action by United States on official bond; United States v. Adams, 54 Fed. 116, holding surety not discharged by failure of United States to present claim against deceased principal's estate; People v. Russell, 4 Wend. 575, ruling similarly where State failed to proceed against principal on bond until after he became insolvent; Looney v. Hughes, 26 N. Y. 519, 522, holding surety not discharged of liability to county by failure of treasurer to issue warrant in time prescribed; Commonwealth v. Brice, 22 Pa. St. 214, 60 Am. Dec. 80, holding rule applicable in case of county.

Distinguished in Boone County v. Burlington etc. R. R. Co., 139 U. S. 693, 35 L. Ed. 323, 11 Sup. Ct. 690, holding rule inapplicable to municipal corporations; State v. Roberts, 68 Mo. 237, 30 Am. Rep. 791, holding State not exempt from operation of rule that extension of time given to principal, without knowledge of surety, discharges latter.

Consideration for agreement extending time of payment. Note, 52 L. R. A. (N. S.) 334.

Miscellaneous. Cited in Dudgeon v. Haggart, 17 Mich. 280, but application not apparent; Hayden v. Agent of Auburn Prison, 1 Sand. Ch. 198, as instance where court declined to express opinion as to effect of agreement to indulge principal on bond; Caldwell v. Wentworth, 14 N. H. 437, on point that where creditor has several claims against debtor, he must apply payment as directed by debtor. The principal case expressed no opinion as to application of credits where new bond is taken, and this fact is noted in United States v. Wardwell, 5 Mason, 91, 93, Fed. Cas. 16,640, and United States v. Linn, 2 McLean, 505, Fed. Cas. 15,606.

12 Wheat. 511-515, 6 L. Ed. 711, McGILL v. BANK OF UNITED STATES.

Resolution to suspend cashier does not remove him from office; and for any defaults by him after resolution and before he is actually removed, his sureties are responsible.

Approved in Lieberman v. First Nat. Bank, 8 Del. Ch. 271, 40 Atl. 382, holding fact that defalcations of paying teller were made possible by his being also bookkeeper did not affect liability on bond.

Removal of officer of private corporation. Note, Ann. Cas. 1913B, 671.

Sureties are discharged from a judgment for the penalty of their bond, only by payment of the principal equitably due, and interest and costs.

Approved in United States v. United States Fidelity & Guaranty Co., 236 U. S. 530, 59 L. Ed. 705, 35 Sup. Ct. 298, holding surety if liable at all for interest, beyond penalty in bond could only be held for interest occurring from unjustly withholding payment after notice of default; United States v. Quinn, 122 Fed. 66, holding surety on bond of contractor for

construction of public work is not in default until notice or demand, and hence interest does not run against him until then; Leggett v. Humphreys, 21 How. 76, 16 L. Ed. 54, holding surety on sheriff's bond liable only to amount of penalty; United States v. Hills, 4 Cliff. 620, Fed. Cas. 15,369, holding surety answerable for penalty and interest thereon from date of notice of principal's default; Lewis v. Dwight, 10 Conn. 103, to same effect.

Whether interest can be recovered on penal bond beyond penalty. Note, 87 Am. Dec. 751.

Liability of surety for interest when effect is to exceed penalty of bond. Note, Ann. Cas. 1914C, 1196, 1197.

Computation of interest in case of partial payments. Note, 13 Ann. Cas. 712.

Interest on unliquidated damages. Note, 28 L. R. A. (N. S.) 11.

Fractions of day in computation of time. Note, 2 Ann. Cas. 136.

Form of judgment on appeal bonds. Note, 62 L. R. A. 447.

Miscellaneous. Cited in Ives v. Merchants' Bank, 12 How. 164, 13 L. Ed. 938, as instance where court departed from usual rule regarding ascertainment of damages upon bonds.

12 Wheat. 515–523, 6 L. Ed. 712, DRUMMOND v. PRESTMAN.

The words of a guaranty are to be taken as strongly against the guarantor as the sense will admit.

Approved in Punta Gorda Bank v. State Bank, 52 Fla. 405, 42 South. 848, holding liberal construction of guaranty should be indulged to determine intent; Carson v. J. E. Hurst & Co., 137 Ga. 642, Ann. Cas. 1913A, 1086, 74 S. E. 53, construing guaranty not to limit credit to be extended by obligee, but only extent of obligor's liability; Douglass v. Reynolds, 7 Pet. 122, 8 L. Ed. 630, where letter, considering its terms and actions of parties, was held continuing guaranty; Bell v. Bruen, 1 How. 183, 185, 11 L. Ed. 95, holding extrinsic evidence admissible to show intention of parties to letter of guarantee; Smeltzer v. White, 92 U. S. 392, 23 L. Ed. 508, holding that guaranty that county warrants are "genuine and regularly issued," imports guaranty that they are valid as to form; Heckscher v. Binney, 3 Wood. & M. 341, Fed. Cas. 6316, holding parol evidence admissible to show transactions of parties to note; Hawkins v. Mitchell, 34 Fla. 420, 16 South. 316, construing statute guaranteeing payment of interest on railroad bonds; Taussig v. Reid, 145 Ill. 497, 36 Am. St. Rep. 512, 32 N. E. 919, Gates v. McKee, 13 N. Y. 235, 64 Am. Dec. 546, Rindge v. Judson, 24 N. Y. 69, and Henry McShane Co., v. Padian, 142 N. Y. 211, 36 N. E. 881, all holding letter guaranteeing any indebtedness, to certain amount, to be continuing guaranty; Hooper v. Hooper, 81 Md 171, 48 Am. St. Rep. 502, 31 Atl. 510, holding payment by principal before action barred by statute fixes new date from which statute runs against guaran-

tor; Standley v. Mills, 36 Miss. 452, holding that in determining meaning of words, reference may be had to acts of parties and circumstances; Fisse v. Einstein, 5 Mo. App. 87, applying principle in holding death of one of two principals under same bond did not affect surety's liability for acts of survivor; Bright v. McKnight, 1 Sneed, 168, holding notice of acceptance by guarantee unnecessary to fix liability of guarantor in case of absolute present guaranty; Smith v. Montgomery, 3 Tex. 204, citing principal case on point that guaranty is to be construed according to apparent intention of parties; Lemp v. Armengal, 86 Tex. 692, 26 S. W. 942, holding delivery and acceptance of guaranty need no proof other than contents of paper itself; Noyes v. Nichols, 28 Vt. 174, holding strict notice of amounts advanced on faith of guaranty unnecessary to fix guarantor's liability; Loomis v. Smith, 17 Conn. 120, arguendo.

Modified in Menard v. Scudder, 7 La. Ann. 387, **56 Am. Dec. 612**, holding true rule of construction to be that according with apparent intent of parties.

Guarantor cannot be bound beyond extent of engagement, which appears from guaranty and nature of transaction.

Approved in Wanack v. People, 187 Ill. 122, 58 N. E. 244, holding declaration against sureties stating that principal obtained dram-shop license and executed bond in accordance with dram-shop act, and that principal sold liquor to plaintiff's husband, that he became intoxicated and was killed, states cause of action; Bissell v. Ames, 17 Conn. 127, holding surety not bound by adjustment of partnership account not contemplated by guaranty.

Distinguished in Switzer v. Henking, 158 Fed. 787, **15 L. R. A. (N. S.) 1153**, 86 C. C. A. 140, holding good faith "representation and warranty" made by one purchaser of timber to copurchaser as to quantity of timber to be cut was not warranty on which claim for loss of copurchasers could be based.

A judgment is always competent evidence to prove the fact of its rendition.

Cited in Bank of Hamburg v. Flynn, 38 Fed. 800, holding judgment of conviction for larceny admissible in action to recover property stolen.

Judgment recovered on an account against principal is evidence of amount due in an action against his guarantor.

Approved in Howgate v. United States, 3 App. D. C. 294, following rule; Smeltzer v. White, 92 U. S. 394, **23 L. Ed. 509**, holding judgment against plaintiff in suit on county warrant conclusive as to liability of guarantor of warrant; Washington Ice Co. v. Webster, 125 U. S. 446, **31 L. Ed. 807**, 8 Sup. Ct. 958, where judgment confessed by principal held admissible to charge guarantor of debt; Moses v. United States, 166 U. S. 600, **41 L. Ed. 1130**, 17 Sup. Ct. 693, where judgment recovered against officer held

conclusive as to amount due on his bond; United States v. Cutter, 2 Curt. 628, Fed. Cas. 14,911, applying principle in holding declarations of principal admissible in action against surety on his bond; Berger v. Williams, 4 McLean, 578, Fed. Cas. 1341, but holding that surety may show fraud or clerical mistake in entering judgment; Agricultural Ins. Co. v. Keeler, 44 Conn. 166, holding offer to confess judgment admissible against surety to show amount due; Taylor v. Johnson, 17 Ga. 537, and Charles v. Haskins, 14 Iowa, 473, 83 Am. Dec. 379, holding judgment against sheriff prima facie evidence against his surety; Iglehart v. Mackubin, 2 Gill & J. 245, holding judgment by confession against executor evidence against surety on bond; Commercial Bank v. Eddy, 7 Met. 184, holding judgment on note admissible as evidence against guarantor of note; State v. Stewart, 36 Miss. 656, where inventory of assets in hands of guardian held admissible in action against surety; State v. Holt, 27 Mo. 341, 72 Am. Dec. 274, ruling similarly as to judgment rendered in Probate Court against administrator; La Fayette Bldg. Assn. v. Kleinhofer, 40 Mo. App. 404, holding judgment against contractor, establishing mechanic's lien, admissible against contractor's surety; Lacock v. Commonweath, 99 Pa. St. 210, where judgment against surety, in joint action against principal and surety, held admissible against principal's estate, he having died before judgment; Seat v. Cannon, 1 Humph. 472, holding judgment against administrator only prima facie evidence against surety; Spencer v. Dearth, 43 Vt. 106, where judgment against one of two joint contractors held admissible against other, in suit involving same matter; Stephens v. Shafer, 48 Wis. 60, 63, 65, 33 Am. Rep. 797, 799, 801, 3 N. W. 838, 840, 842, holding judgment against principal on official bond prima facie evidence of amount due from surety; Bushnell v. Church, 15 Conn. 421, New Haven v. Chidsey, 68 Conn. 400, 36 Atl. 801, Grommes v. St. Paul Trust Co., 147 Ill. 646, 37 Am. St. Rep. 254, 35 N. E. 823, arguendo.

Distinguished in Firemen's Ins. Co. v. McMillan, 29 Ala. 166, 167, holding judgment in assumpsit for amount of defalcation inadmissible in action against surety on penal bond; Griffith v. Turner, 4 Gill, 114, holding declarations of persons purchasing under guaranty inadmissible against guarantor under facts; McClellan v. Kennedy, 8 Md. 252, holding judgment inadmissible where facts rendered surety necessary party to proceeding.

Effect upon surety of judgment against principal. Note, 40 L. R. A. (N. S.) 748.

Effect against surety of judgment against officer. Note, 52 L. R. A. 171.

Miscellaneous. Cited in Johnson v. Charles D. Norton Co., 159 Fed. 365, 86 C. C. A. 361, as instance of contract of guaranty being construed as matter of general law and not according to State decisions; Way v. Arnold, 18 Ga. 189, as ruling that parol evidence is admissible to show debt referred to in guaranty.

12 Wheat. 523–529, 6 L. Ed. 716, HARCOURT v. GAILLARD.

Grant made by British governor of Florida, after Declaration of Independence, is invalid.

Cited in Strother v. Lucas, 12 Pet. 436, 448, 458, 9 L. Ed. 1147, 1152, 1156, denying right of grantee of Spanish crown to maintain ejectment, his grant not having been confirmed according to act of Congress; and Pollard v. Kibbe, 14 Pet. 399, 400, 402, 403, 404, 405, 406, 407, 409, 410, 10 L. Ed. 512, 513, 514, 515, 516, 517, 518, to same effect; Nevitt v. Beaumont, 6 How. (Miss.) 249, holding void a grant by Spanish crown of land north of thirty-first degree, north latitude; Montgomery v. Ives, 13 Smedes & M. 169, 172, 173, 182, where grant in question was similar to that in principal case.

Distinguished in United States v. Arredondo, 6 Pet. 733, 8 L. Ed. 563, as to Spanish grant recorded under confirmatory act of Congress; dissenting opinion in United States v. Castillero, 2 Black, 354, 360, 17 L. Ed. 443, 445, majority holding void an unconfirmed grant, by the President of Mexico, of land in California.

United States acquired no territory by way of cession under treaty of 1789; treaty was merely a recognition of pre-existing rights.

Cited in Seneca Nation v. Christie, 126 N. Y. 137, 27 N. E. 278, denying right of United States to impaired title of States to land within their borders; Rhode Island v. Massachusetts, 12 Pet. 729, 9 L. Ed. 1262, and Dred Scott v. Sandford, 19 How. 502, 15 L. Ed. 741, arguendo.

Miscellaneous. Cited in Kansas v. Colorado, 185 U. S. 144, 46 L. Ed. 845, 22 Sup. Ct. 559, holding Supreme Court has original jurisdiction over controversy between two States where question is whether Colorado has right to deprive Kansas of benefit of water from Arkansas River, which rises in Colorado and flows through Kansas; Rhode Island v. Massachusetts, 12 Pet. 727, 9 L. Ed. 1262, as instance where Supreme Court determined boundary dispute in collateral action; also in s. c., pp. 739, 745, 748, 9 L. Ed. 1266, 1269, 1270, to point that where boundary dispute is settled by treaty, all persons are concluded thereby; Dred Scott v. Sandford, 19 How. 506, 15 L. Ed. 742, as having determined boundary dispute between Georgia and South Carolina.

12 Wheat. 530–545, 6 L. Ed. 718, HENDERSON v. POINDEXTER'S LESSEE.

Grant to land in territory wrongfully occupied by Spain is void unless confirmed according to act of Congress.

Cited in Strother v. Lucas, 12 Pet. 436, 448, 458, 9 L. Ed. 1147, 1152, 1156, and Pollard v. Kibbe, 14 Pet. 400, 403, 405, 407, 410, 415, 10 L. Ed. 513, 514, 515, 516, 518, 520, denying right of grantee of Spanish crown to maintain ejectment, his grant not having been confirmed according to act of Congress; Hickey v. Stewart, 3 How. 761, 762, 11 L. Ed. 819, denying

jurisdiction of State court to confirm such grant, not recorded under act of Congress; La Roche v. Jones, 9 How. 170, 13 L. Ed. 92, affirming right of heirs to take such lands by descent when title properly confirmed; Robinson v. Minor, 10 How. 643, 13 L. Ed. 575, holding valid, a grant recorded under confirmatory act; Coffee v. Groover, 123 U. S. 24, 31, 31 L. Ed. 60, 63, 8 Sup. Ct. 13, 17, reversing s. c., 19 Fla. 80, holding grant by Georgia invalid upon ascertaining land to be, in fact, in Florida; Hall v. Root, 19 Ala. 393, holding that grantee of Spanish crown may assert title against claimant under United States if grant confirmed; Emeric v. Penniman, 26 Cal. 123, affirming judgment of nonsuit in ejectment, plaintiff not having complied with confirmatory act of Congress; Nevitt v. Beaumont, 6 How. (Miss.) 249, where grant in question was similar to that in principal case; Montgomery v. Ives, 13 Smedes & M. 169, 171, denying validity of British grant north of thirty-first degree north latitude; Challefoux v. Ducharme, 4 Wis. 562, as instance where appointment of commission to confirm titles was recognized as valid; Pollard v. Hagan, 3 How. 226, 11 L. Ed. 572, arguendo.

Distinguished in United States v. Arredondo, 6 Pet. 712, 716, 720, 733, 734, 8 L. Ed. 555, 556, 558, 563, where grant was recorded pursuant to act of Congress; dissenting opinion in United States v. Castillero, 2 Black, 366, 17 L. Ed. 447, majority declaring void, an unconfirmed grant of land in California, executed by president of Mexico; Minturn v. Brower, 24 Cal. 663, 665, 671, where confirmation of Mexican grant held unnecessary, property rights having been settled by treaty.

Miscellaneous. Cited in Hickie v. Starke, 1 Pet. 98, 7 L. Ed. 69, to point that term "actual settler" is synonymous with "resident"; dissenting opinion, Livingston v. Story, 11 Pet. 394, 9 L. Ed. 763, but application doubtful; Rhode Island v. Massachusetts, 12 Pet. 725, 745, 9 L. Ed. 1261, 1269, to point that where boundary dispute is settled by treaty all persons are concluded thereby; Bank of United States v. Moss, 6 How. 38, 12 L. Ed. 334, to point that mere error of law in judgment rendered at previous term will not warrant reversal on motion at subsequent term; United States v. Chaves, 159 U. S. 457, 40 L. Ed. 218, 16 Sup. Ct. 59, to point that courts in construing such grants are to be guided by usage of nations in stipulating for property when territory is ceded; Jackson v. Simonton, 4 Cr. C. C. 261, Fed. Cas. 7147, but not in point.

12 Wheat. 546-554, 6 L. Ed. 723, THE ANTELOPE.

Where an item of cost is not regulated by positive law, its amount or allowance rests in sound discretion of court.

Cited in Hathaway v. Roach, 2 Wood. & M. 67, 71, Fed. Cas. 6213, allowing compensation to witnesses for travel and attendance; Jerman v. Stewart, 12 Fed. 275, allowing same fees for taking depositions as is allowed to clerks by Congress.

No decree can be rendered directly against United States for costs and expenses.

Approved in State v. Williams, 101 Md. 534, 109 Am. St. Rep. 583, 1 L. R. A. (N. S.) 254, 61 Atl. 299, no costs against State; Stanley v. Schwalby, 162 U. S. 272, 40 L. Ed. 966, 16 Sup. Ct. 761, holding, where judgment against codefendants included United States, decree for costs was inapplicable to it; United States v. Verdier, 164 U. S. 219, 41 L. Ed. 409, 17 Sup. Ct. 44, holding in actions against United States in Court of Claims interest prior to judgment cannot be allowed to claimants; The Steamboat Planter, Newb. Adm. 264, Fed. Cas. 16,054, an action by informer to recover penalty; Marine v. Lyon, 62 Fed. 154, 8 U. S. App. 573, an appeal from decision of board of general appraisers under revenue laws; Carlisle v. Cooper, 64 Fed. 474, 26 U. S. App. 240, in proceeding for condemnation of land; State v. Taylor, 33 La. Ann. 1272, applying principle in action by State for rescission of contract; State ex rel. v. Lazarus, 40 La. Ann. 585, 5 South. 290, holding State not taxable for taking depositions; United States v. Stevens, 8 Utah, 4, 28 Pac. 870, holding it error to refuse to reinstate cause until costs against United States were paid; Territory v. Doty, 1 Pinn. 405, holding territory not liable for costs incident to motion for new trial; Noyes v. State, 46 Wis. 251, 32 Am. Rep. 711, 1 N. W. 1, applying rule in criminal action instituted by State; Curtis v. Banker, 136 Mass. 360, arguendo.

Distinguished in United States v. Ringgold, 8 Pet. 163, 8 L. Ed. 904, holding, in suit against marshal to recover moneys in his hands, that he could set off poundage fees accruing to him in previous action.

Costs where the United States is a party. Note, 16 Am. Dec. 407.

Liability of State or Federal government for costs. Note, 8 Ann. Cas. 398.

Fees of marshal are to be paid out of treasury upon certificate of amount made by court, or one of judges.

Approved in United States v. Smith, 1 Wood. & M. 189, Fed. Cas. 16,346, holding such certificate prima facie evidence of its legality and of amount due.

12 Wheat. 554–558, 6 L. Ed. 726, McLEMORE v. POWELL.

Mere agreement between holder and drawer of bill, for delay, without consideration, does not discharge indorser.

Approved in Hamiter v. State Nat. Bank, 106 Ark. 160, 153 S. W. 95, holding agreement to take new note in extinguishment of obligation of old note made after latter was due was void for want of consideration; John M. Parker & Co. v. Guillot, 118 La. 227, 42 South. 783, holding sureties not released by indulgence to maker given without consideration; Cook v. Sorrells, 43 Okl. 743, 144 Pac. 347, applying rule to sureties; Sprigg v. Bank, 14 Pet. 207, 10 L. Ed. 422 (affirming s. c., 1 McLean, 180, Fed. Cas.

891), holding surety not discharged by mere delay in enforcing bond; Creath v. Sims, 5 How. 207, 12 L. Ed. 119, holding surety not discharged where creditor voluntarily refrained from pressing suit against debtor; Specht v. Howard, 16 Wall. 566, 21 L. Ed. 349, holding evidence inadmissible to show parol agreement to extend time for payment of note; Ross v. Jones, 22 Wall. 587, 589, 22 L. Ed. 734, holding indorser of promissory note a "person bound as security," within meaning of statute discharging such persons if creditor delays action against debtor; Gordon v. Third National Bank, 144 U. S. 104, 36 L. Ed. 363, 12 Sup. Ct. 659, holding liability of maker of note payable to himself not affected by subsequent indorser's waiver of protest; Postmaster-general v. Reeder, 4 Wash. C. C. 687, Fed. Cas. 11,311, holding surety on postmaster's bond not discharged by mere delay in prosecution; Hazard v. White, 26 Ark. 158, holding surety not discharged in absence of proof that additional security was given in consideration of extension; Winne v. Colorado Springs Co., 3 Colo. 161, holding mere indulgence determinable at will of holder does not discharge surety; Lockwood v. Crawford, 18 Conn. 376, ordering new trial where indorser held discharged by delay of holder to sue maker; Pickering v. Day, 3 Houst. 536, 95 Am. Dec. 308 (affirming s. c., 2 Del. Ch. 377), holding sureties on official bond not discharged because principal allowed to retain office after default; Fridenburg v. Robinson, 14 Fla. 143, where it was not shown that agreement to give time was made by party to bill; Pfeiffer v. Knapp, 17 Fla. 157, holding surety on guardian's bond not discharged by delay to proceed against principal for default; Gardner v. Watson, 13 Ill. 352, ruling similarly where promise to delay was for uncertain period; Cooper v. Fisher, 7 J. J. Marsh. 398, holding surety on executor's bond not discharged by acceptance, by legatee, of executor's note for amount due him; Brinagar v. Phillips, 1 B. Mon. 284, 36 Am. Dec. 576, and Tudor v. Goodloe, 1 B. Mon. 323, 324, where surety on bond held not discharged by agreement to postpone payment of debt; Freeman's Bank v. Rollins, 13 Me. 207, holding receipt of interest in advance not evidence of valid agreement to extend time on note; Planters' Bank v. Sellman, 2 Gill & J. 234, holding it error to instruct jury that indorser was discharged in absence of proof of consideration for agreement to delay; Freanor v. Yingling, 37 Md. 497, where failure of mortgagee to foreclose held not to discharge surety of mortgagor in absence of proof of prejudice; Johnson v. Planters' Bank, 4 Smedes & M. 171, 43 Am. Dec. 481, holding surety on bond not released by failure of creditor to sue estate of deceased principal within time prescribed by statute; Payne v. Commercial Bank, 6 Smedes & M. 37, holding conditional agreement inoperative to discharge indorser; Nichols v. Douglass, 8 Mo. 51, holding surety not discharged by indorsement on bond of extension of time for payment of debt; Pintard v. Davis, 20 N. J. L. 207, where surety held not discharged by failure of creditor to sue during solvency of debtor; Clark v. Niblo, 6 Wend. 247, 258, holding that in order to discharge surety on bail bond, agreement to allow principal to leave State must have been founded on consideration; Sailly

v. Elmore, 2 Paige Ch. 500, holding surety not discharged where creditor granted extension because of debtor's inability to pay; Dye v. Dye, 21 Ohio St. 97, 8 Am. Rep. 44, holding omission to present claim to assignee in insolvency does not discharge surety of debtor; Bank v. Myers, 1 Bail. 418, holding indulgence on part of holder does not discharge indorser in absence of proof of prejudice; Peay v. Poston, 10 Yerg. 113, 114, and Grimes v. Nolen, 3 Humph. 413, holding agreement to stay execution on judgment obtained on note does not discharge surety; Howard v. Brown, 3 Ga. 530, Hunter v. Van Bomhorst, 1 Md. 517, arguendo.

Distinguished in Moulton v. Noble, 1 La. Ann. 193, holding that where auctioneer sells for cash, acceptance by owner of his notes for proceeds discharges sureties on his bond; Wells v. Gant, 4 Yerg. 495, holding sureties of constable discharged by act of execution creditor in voluntarily allowing constable to retain proceeds of execution; Benson v. Phipps, 87 Tex. 581, 47 Am. St. Rep. 130, 29 S. W. 1061, holding that in case of agreement to extend time, consideration is the giving up by debtor of his right to pay before time specified.

Consideration for agreement extending time of payment. Note, 52 L. R. A. (N. S.) 834.

Release of indorser of note by failure to enforce liability of maker. Note, 18 L. R. A. (N. S.) 532.

If holder of bill enters into valid contract with drawer for delay, without consent of indorser, latter is discharged.

Approved in Bank of United States v. Hatch, 6 Pet. 260, 8 L. Ed. 391 (affirming s. c., 1 McLean, 93, Fed. Cas. 918), where consideration for suspension of suit against drawer was release of person held under execution; Varnum v. Milford, 2 McLean, 77, Fed. Cas. 16,890, where holder agreed to extend time on consideration of assignment of judgment in action pending; Dennis v. Rider, 2 McLean, 454, Fed. Cas. 3797, holding surety discharged by binding agreement giving extension to principal debtor; Ellis v. Bibb, 2 Stew. 84, where extension on note given in consideration of additional security; Pike v. Searcy, 4 Port. 61, holding surety discharged by extension given in consideration of agreement to arbitrate claim; Hart v. Stribling, 25 Fla. 451, 6 South. 458, holding surety on guardian's bond discharged by agreement of ward upon attaining majority to postpone settlement secured by note of guardian; Leavitt v. Savage, 16 Me. 73, holding surety discharged by agreement under seal between debtor and creditor; Veazie v. Carr, 3 Allen, 15, holding acceptance of money as consideration for extension discharges indorser; Robinson v. Godfrey, 2 Mich. 411, holding valid agreement to forbear suit bars action until expiration of period; Bell v. Martin, 18 N. J. L. 170, holding surety discharged by agreement founded on additional security; Morris v. Van Vorst, 21 N. J. L. 121, sustaining plea by surety of parol agreement to extend time; Vilas v. Jones, 10 Paige Ch. 80, and Brown v. Fountain, 3 Tex. Civ. App. 231, 22 S. W.

131, holding surety discharged by agreement to extend time on consideration of usurious interest actually paid; Bank of Steubenville v. Leavitt, 5 Ohio, 215, where surety held discharged by agreement to stay execution founded on consideration; Gardner v. Gardner, 23 S. C. 591, holding payment of interest in advance imports valid agreement to delay, and surety discharged; Washington v. Tait, 3 Humph. 546, asserting right of surety to file bill in equity to compel principal debtor to exonerate him in such case.

Distinguished in Tiernan v. Woodruff, 5 McLean, 352, Fed. Cas. 14,028, where, although consideration given, indorser held not prejudiced under facts; Shaw v. Binkard, 10 Ind. 228, holding indorser not discharged by contract to extend time on consideration of usurious interest; Cross v. Rowe, 22 N. H. 83, under facts.

Miscellaneous. Cited in Alling v. Shelton, 16 Conn. 444, to point that error in favor of party constitutes no ground of complaint on his part.

12 Wheat. 559–561, 6 L. Ed. 728, UNITED STATES v. BARKER.

United States, as holder of bill is bound to use same diligence, in order to charge indorser as individual.

Approved in Mountain Copper Co. v. United States, 142 Fed. 629, applying rule in suit to enjoin injuries to timber lands by operation of smelter; Walker v. United States, 139 Fed. 413, 414, limitation in act of 1887, authorizing suits against United States, in case of suit by marshal to recover fees, begins to run as to each item from time service rendered, and not from expiration of plaintiff's term of office; Judson v. United States, 120 Fed. 643, holding United States district attorney has authority to institute and conduct proceedings to condemn land for public buildings, and to submit matter of damages to arbitration; Ehrlich v. Jennings, 78 S. C. 276, 125 Am. St. Rep. 795, 13 Ann. Cas. 1166, 58 S. E. 924, holding bona fide purchaser of State bond which had been redeemed but not canceled, and thereafter stolen, was entitled to have bond redeemed again; United States v. Bank of Metropolis, 15 Pet. 393, 10 L. Ed. 780, holding that officers of postoffice department having accepted draft cannot show want of consideration as against bona fide holder; United States v. State Bank, 96 U. S. 36, 24 L. Ed. 648, holding that United States cannot, as against claim of innocent party, hold money acquired by means of fraud of agent; United States v. Beebe, 4 McCrary, 18, 17 Fed. 41, holding presumption arising from lapse of time may operate against United States; United States v. Barker, 2 Paine, 345, Fed. Cas. 14,518, following rule; Eight Hundred and Fifty-eight Bales of Cotton, Blatchf. Pr. 326, Fed. Cas. 4318, holding property captured as prize, and belonging to government, subject to same liabilities as if owned by individual; United States v. Ames, 1 Wood. & M. 80, Fed. Cas. 14,441, holding rights and remedies of United States as to its land are same as those applicable to individuals; United States v. Wilder, 3 Sumn. 316, Fed. Cas. 16,694, holding United

States bound to contribute toward general average under marine insurance policy; United States v. Ingate, 48 Fed. 253, holding United States subject to general rules of equity in proceeding for discovery; dissenting opinion in United States v. Bank of United States, 5 How. 405, 12 L. Ed. 210, majority holding bill drawn by one government on another not subject to protest and consequential damages; dissenting opinion in Pugh v. Moore, 44 La. Ann. 232, 10 South. 718, majority holding State not liable upon paper issued fraudulently by its treasurer; Cooke v. United States, 12 Blatchf. 59, Fed. Cas. 3178, dissenting opinion in Rose v. Buckland, 17 Ill. 318, Montague v. Boston etc. R. R. Co., 124 Mass. 247, arguendo.

Distinguished in Pond v. United States, 111 Fed. 995, holding Code Civ. Proc. Cal., § 1502, providing for presentation of claims against estates of decedents, does not apply to money due the United States on account of defalcation of collector of internal revenue; Cooke v. United States, 91 U. S. 398, 23 L. Ed. 243, where acts of treasury officers requisite to charge United States had not been done; United States v. Nashville etc. Ry. Co., 118 U. S. 125, 30 L. Ed. 83, 6 Sup. Ct. 1008, holding that where United States buys negotiable paper before action barred by statute, statute will not run against it; United States v. Campbell, 10 Fed. 821, under facts.

Limited in State v. Snyder, 66 Tex. 700, 18 S. W. 110, holding that courts are not bound to furnish same remedy in suit by State as might be given to individuals.

The maxim "Nullum tempus occurrit regi." Note, 101 Am. St. Rep. 151.

Miscellaneous. Cited in Sanderson v. Sanderson, 20 Fla. 304, to point that notice of dishonor of bill should be mailed not later than day after last day of grace; so also in Sewell v. Russell, 3 Wend. 277.

12 Wheat. 561-565, 6 L. Ed. 729, PARKER v. JUDGES OF CIRCUIT COURT.

Circuit Court may issue injunction to stay proceedings on judgment at law in that court, notwithstanding pendency of writ of error in Supreme Court.

Cited in Johnson v. St. Louis etc. Ry. Co., 141 U. S. 610, 35 L. Ed. 877, 12 Sup. Ct. 127, affirming decree enjoining execution on judgment in forcible entry and detainer; Noyes v. Willard, 1 Woods, 192, Fed. Cas. 10,374, enjoining execution of fraudulent judgment obtained by assignee of bankrupt; Sterling v. Barnwell, 12 Fed. 324, applying principle in holding that pendency of suit will not interrupt statute of limitations, and render it pleadable in subsequent action for same cause; Industrial etc. Co. v. Electrical etc. Co., 58 Fed. 737, 16 U. S. App. 196, refusing to dissolve injunction restraining enforcement of mechanic's lien; Platt v. Threadgill, 80 Fed. 195, enjoining execution of judgment vitiated by misconduct of jury.

Distinguished in Wyman v. Hardwick, 52 Mo. App. 625, refusing to enjoin execution of judgment, where record showed that judgment could be reversed by bringing writ of error.

Power of equity to enjoin judgment in action at law in order to retain status quo pending appeal. Note, **25 L. R. A. (N. S.) 828.**

Practice and procedure governing transfer of causes to Federal Supreme Court for review. Note, **66 L. R. A. 863.**

Bill to restrain proceedings at law may be brought before commencement of suit, pending such suit, or after its decision by highest law court.

Approved in Chapman v. American Surety Co., 261 Ill. 601, 104 N. E. 250, holding rule applied to bill to retain action at law; Grand View Bldg. Assn. v. Northern Assur. Co., 73 Neb. 155, 102 N. W. 248, holding suit in equity to reform fire policy could be maintained after failure to recover at law on unreformed contract; Bassett v. Henry, 34 Mo. App. 558, enjoining proceeding on judgment; Erie Ry. Co. v. Ramsey, 45 N. Y. 650, holding that proceeding in court of equity may be enjoined by same court sitting in another district; Jenkins v. Harrison, 66 Ala. 352, arguendo.

12 Wheat. 565–567, 6 L. Ed. 730, THOMPSON v. PETER.

Declarations of administrator by way of acknowledgment of debt cannot take promise of decedent out of statute of limitations.

Approved in Washington Market Co. v. Beckley, 4 Mackey (D. C.), 165, holding limitations not tolled by proving and passing claim in Orphans' Court and retention of funds to pay it by administrator; Findley v. Cunningham, 53 W. Va. 4, 23, 24, 44 S. E. 473, 481, 482, holding executor or administrator cannot make new promise to pay debt of decedent either before or after debt has been barred; Peck v. Botsford, 7 Conn. 180, **18 Am. Dec. 98**, holding acknowledgment by personal representative that debt is due will not revive it; Isaacs v. Stevens, 13 Conn. 506, holding that listing of debt in administration account does not remove bar; Patterson v. Cobb, 4 Fla. 487, ruling similarly as to absolute promise to pay, made by executor; Hanson v. Towle, 19 Kan. 282, where acknowledgment of debt was in writing; Head v. Manners, 5 J. J. Marsh. 263, reversing judgment based upon promise of executor; Oakes v. Mitchell, 15 Me. 362, ruling similarly where executor expressed intention to pay; Henderson v. Ilsley, 11 Smedes & M. 19, **49 Am. Dec. 44**, holding rule applicable although bar not complete at time of debtor's death; Huntington v. Bobbitt, 46 Miss. 535, holding that promise made before bar complete will not fix new date from which statute runs; Mayberry v. Willoughby, 5 Neb. 373, **25 Am. Rep. 494**, and Shoemaker v. Benedict, 11 N. Y. 184, **62 Am. Dec. 97**, holding that promise by one joint debtor will not remove bar as to others; Bloodgood v. Bruen, 8 N. Y. 370, holding that surviving partner, as executor, cannot revive firm debt against separate estate of decedent; McLaren v. McMartin, 36 N. Y. 91, holding partial payment of barred claim does not remove it from statute; Schutz v. Morette, 146 N. Y. 143, 40 N. E. 782, holding executor bound to plead statute in defense to barred claim; Fritz v. Thomas, 1 Whart. 71, **29 Am. Dec. 42**, holding statute pleadable although administrator had previously promised to pay; Seig v. Acord, 21 Gratt.

371, 8 Am. Rep. 608, holding debt not revived by promise of one of two joint administrators; Duval v. McLaskey, 1 Ala. 742, Riser v. Snoddy, 7 Ind. 445, 65 Am. Dec. 743, Cayuga County Bank v. Bennett, 5 Hill, 240, arguendo.

Distinguished in Allen v. Allen, 26 Mo. 331, holding rule inapplicable where executor is also distributee of estate; Stark v. Hunton, 3 N. J. Eq. 311, holding otherwise where claim not barred at time of debtor's death.

Criticised in Hodgdon v. White, 11 N. H. 210, and Braxton v. Harrison, 11 Gratt. 56, holding executor not bound to plead statute of limitations in bar of just demand.

Liabilities of estates of decedents upon contracts, and for torts of executors and administrators. Note, 52 Am. St. Rep. 123.

Waiver of statute of limitations by personal representative. Note, Ann. Cas. 1912A, 716.

Waiver or tolling of statute of limitations or nonclaim by personal representative as to indebtedness of estate. Note, L. R. A. 1915B, 1025.

Devise in trust to pay debts as revival of debt barred by limitations. Note, 2 E. R. C. 165.

12 Wheat. 568–570, 6 L. Ed. 731, WILLIAMSON v. DANIEL.

Absolute bequest of personalty with limitation over if either of testator's grandchildren should die without lawful issue.

Cited in Moody v. Walker, 3 Ark. 197, following rule.

Distinguished in Russ v. Russ, 9 Fla. 146, where will was construed as restraining the dying without issue to the time of legatee's death; Richardson v. Paige, 54 Vt. 379, where will held not to give absolute estate to legatee.

Rule of partus sequitur ventrem as to slaves is followed unless instrument disposes of mother, separating issue from her.

Cited in Alberty v. United States, 162 U. S. 501, 40 L. Ed. 1053, 16 Sup. Ct. 865, holding illegitimate child of Choctaw Indian by a negro mother to be a negro citizen for purposes of jurisdiction; Buckley v. Buckley, 12 Nev. 432, holding increase of ewe sheep a proper subject of replevin.

12 Wheat. 570–574, 6 L. Ed. 732, NEWMAN v. JACKSON.

No particular form of notice of sale under trust deed is necessary if description of land is sufficiently certain.

Approved in Beacon Hill Land Co. v. Bowen, 33 R. I. 411, 82 Atl. 84, holding adjournment of sale to another place to secure higher bid did not vitiate sale, when sale was made for highest bid at original place; Loveland v. Clark, 11 Colo. 272, 18 Pac. 548, holding sufficient, description by metes and bounds and location in subdivision of section; Noland v. Bank,

129 Mo. 61, 31 S. W. 342, where reference was made in notice to recorded plat.

What is proper and sufficient notice of sale under trust deeds. Note, 75 Am. Dec. 705.

Distinction between trust deed and power of sale mortgage of realty. Note, Ann. Cas. 1913A, 1049.

Miscellaneous. Cited erroneously in Buckley v. Buckley, 12 Nev. 432; Wade v. Gould, 8 Okl. 695, 59 Pac. 12, issue of animals follows mother.

12 Wheat. 574–581, 6 L. Ed. 733, DUNLAP v. DUNLAP.

Rule that where land is sold as definite quantity equity will relieve if quantity be deficient does not apply to land in unsettled country.

Cited in Moore v. Vick, 2 How. (Miss.) 750, 32 Am. Dec. 304, where specification of amount of land held merely descriptive of original certificate, and vendor not bound for deficiency.

Miscellaneous. Erroneously cited in Post v. Pearsall, 22 Wend. 474.

12 Wheat. 582–586, 6 L. Ed. 735, McCONNELL v. TOWN OF LEXINGTON.

Evidence of reservation of public spring for public use.

Approved in Patrick v. Young Men's Christian Assn., 120 Mich. 190, 79 N. W. 210, holding deed to land "with exception of streets and squares" does not include square appropriated to religious uses; Hough v. Porter, 51 Or. 397, 98 Pac. 1094, holding provision of desert land act of 1877 holding water free for appropriation constituted reservation and dedication to public of all water right then held by United States; City of Cincinnati v. White, 6 Pet. 438, 8 L. Ed. 456, and City of Macon v. Franklin, 12 Ga. 244, 248, holding all that is necessary to complete dedication is assent of owner of land and use by public for purpose contemplated; Kennedy v. Jones, 11 Ala. 83, holding dedication of street presumable from ancient documents referring to it as then existing; Harding v. Jasper, 14 Cal. 649, Rowan v. Portland, 8 B. Mon. 248, and Carter v. Portland, 4 Or. 347, holding intention to dedicate inferred from throwing land open to public travel, and designating street on plat; Hart v. Burnett, 15 Cal. 548, holding extent of public right in lands determinable from character of ownership and dedication and circumstances of use; Warren v. Jacksonville, 15 Ill. 240, 58 Am. Dec. 614, holding acceptance and use by public conclusive on owner and privies; Williams v. Wiley, 16 Ind. 363, holding that dedication of street may be implied from acts of owner; Hunter v. Trustees of Sandy Hill, 6 Hill, 411, holding deed unnecessary to validity of dedication of public burying ground; Brown v. Manning, 6 Ohio, 303, 27 Am. Dec. 256, holding dedication in specific terms on recorded plat cannot be affected by parol proof of intention of donors; Remington v. Millerd, 1 R. I. 97, construing statute relating to dedicating of highways; dissenting opinion in Post v. Pearsall, 22 Wend. 452, 455, majority holding that public cannot acquire

right to use individual's soil as landing place from navigable river by continual user; Magill v. Brown, 16 Fed. Cas. 414, Christian Church v. Scholte, 2 Iowa, 30, Price v. Methodist Church, 4 Ohio, 544, Gardiner v. Tisdale, 2 Wis. 191, 60 Am. Dec. 416, arguendo.

Distinguished in United States v. Chicago, 7 How. 195, 12 L. Ed. 665, and Irwin v. Dixon, 9 How. 30, 31, 13 L. Ed. 34, under facts showing no intention of owner to dedicate to public use; Cobb v. Davenport, 33 N. J. L. 227, 97 Am. Dec. 721, holding right to take fish in private waters cannot be acquired by public by dedication; Post v. Pearsall, 22 Wend. 474, 479 (affirming s. c., 20 Wend. 120), holding that public acquires no right to use soil of an individual as landing place from navigable river, although user has continued for twenty years.

Dedication. Note, 27 Am. Dec. 562, 567.

Prescriptive right of public to use well or spring. Note, Ann. Cas. 1914B, 725.

Miscellaneous. Cited in Franklin v. City of Macon, 12 Ga. 261, as instance of practice in allowing introduction of evidence to show public use.

12 Wheat. 586–590, 6 L. Ed. 737, CHOTARD v. POPE.

Entry is act by which individual acquires inceptive right to unappropriated soil of country by filing his claim.

Approved in United States v. Buchanan, 232 U. S. 76, 58 L. Ed. 514, 34 Sup. Ct. 237, holding possessory right of entryman entitled to protection as private property, and Federal statute prohibiting interference with possession of public lands did not apply; United States v. Northern Pac. Ry. Co., 204 Fed. 487, 488, holding selections of lieu lands under railroad grant mere "entries"; McCune v. Essig, 118 Fed. 279, holding patent issued to widow of homestead settler upon her making final proof in accordance with provisions of homestead law conveys land to her absolutely; King v. M'Andrews, 104 Fed. 432, holding term "mineral lands" as understood by Congress at time of grant to Northern Pacific Railroad Company, July 2, 1864, did not include lands chiefly valuable for building stone; Donohue v. St. Paul M. & M. Ry. Co., 101 Minn. 252, 112 N. W. 418, holding acts necessary to constitute entry were completed; Enid etc. Ry. Co. v. Kephart, 19 Okl. 12, 91 Pac. 1053, holding homestead entry precluded land from subsequent appropriation for railroad right of way; McCord v. Hill, 111 Wis. 528, 87 N. W. 484, holding the allowance of thirty days by Laws of 1880, c. 89, § 2 (21 Stat. 140), to one who has secured cancellation of any pre-emption in which time he may enter the lands, is privilege to enter and not an entry; Sturr v. Beck, 133 U. S. 549, 33 L. Ed. 764, 10 Sup. Ct. 353, and McGuire v. Brown, 106 Cal. 666, 30 L. R. A. 387, 39 Pac. 1062, holding filing of homestead entry on tract upon which is stream, confers right to have stream continue without diversion; Denny v. Dodson, 32 Fed. 910, holding land reserved for railroad right of way not subject to

private entry; Northern Pacific Ry. Co. v. Sanders, 47 Fed. 607, holding that until line of railway fixed according to terms of grant, land is subject to subsequent entry; United States v. Whisky, 90 Fed. 723, holding right to enter on mineral lands on reservation implied right to prospect; Lockwitz v. Larson, 16 Utah, 278, 52 Pac. 281, applying principle in determining validity of entry and settlement of land as town site; Collins v. Bubb, 73 Fed. 739, arguendo.

Term "entry" is confined to appropriation, at private sale, of lands previously offered for sale at auction and remaining unsold.

Cited in Eldred v. Sexton, 19 Wall. 196, 22 L. Ed. 147, holding act of Congress fixing price per acre does not give right to enter until land offered at public sale.

Authority "to enter" certain quantity of land does not authorize location on lands previously appropriated or withdrawn.

Approved in McMichael v. Murphy, 12 Okl. 160, 70 Pac. 191, following rule; Northern Pacific Ry. Co. v. Peronto, 3 Dak. Ter. 231, 14 N. W. 106, holding settler acquired no right to land granted to railway, until United States enforced forfeiture for breach of conditions.

Distinguished in Hutton v. Frisbie, 37 Cal. 485, 489, where acts of Congress described specific tract of land on which purchaser was entitled to enter; Surget v. Little, 24 Miss. 126, where lands not shown to have been reserved from sale.

Discovery of mineral in mining claims and rights of locators prior thereto. Note, 139 Am. St. Rep. 191.

Miscellaneous. Cited in State v. Stringfellow, 2 Kan. 320, and Baker v. Newland, 25 Kan. 30, on point that particular words are not necessary to validity of grant for public uses; also in De Armas v. New Orleans, 5 La. 180.

12 Wheat. 590–594, 6 L. Ed. 738, MASON v. MATILDA.

Not cited.

12 Wheat. 594–598, 6 L. Ed. 740, LIDDERDALE'S EXRS. v. ROBINSON.

Surety who discharges debt of his principal succeeds to all the rights of the creditor.

Approved in National Surety Co. v. State Savings Bank, 156 Fed. 27, 13 Ann. Cas. 421, 14 L. R. A. (N. S.) 155, 84 C. C. A. 187, holding surety on auditor's bond who paid defalcations was subrogated to rights of county against bank which bought forged orders and collected same from county; In re Nickerson, 116 Fed. 1007, holding under law of Massachusetts, wife who signed joint note with husband, but as surety, and paid the same, may prove the notes against her husband in bankruptcy; Bank v. Opera House Co., 23 Mont. 38, 75 Am. St. Rep. 502, 57 Pac. 446, holding

surety who has paid judgment against principal and himself and other sureties may take an assignment of judgment and enforce contribution; Pease v. Syler, 78 Wash. 29, 138 Pac. 311, holding accommodation maker paying note could recover of comaker in action on note attorneys' fees stipulated for therein which original payee could have recovered; dissenting opinion in Liverman v. Cahoon, 156 N. C. 198, 200, 72 S. E. 331, 332, majority holding where one of two joint makers paid note at maturity and took indorsement without recourse, he could recover against comaker only on implied promise; The Tangier, 2 Low. 12, Fed. Cas. 13,744, holding that person who advances money in good faith to enable master to pay customs charges and wages of crew has privilege against vessel therefor; Schindelholz v. Cullum, 55 Fed. 891, 12 U. S. App. 242, holding assignee of judgment and lien succeeds to rights of enforcement belonging to original owner; Lumpkin v. Mills, 4 Ga. 348, 355, asserting right of surety to be substituted for creditor in distribution of assets of insolvent principal; Rooker v. Benson, 83 Ind. 255, and Murray v. Catlett, 4 G. Greene, 110, holding surety entitled to foreclosure of mortgage given as security for note paid by him; Braught v. Griffith, 16 Iowa, 32, holding acts done by creditor, necessary to charge estate of deceased debtor, inure to benefit of surety upon payment of debt; Orem v. Wrightson, 51 Md. 43, 45, 34 Am. Rep. 288, 289, holding surety paying debt due State, entitled to State's right of priority; Taylor v. Wilcox, 167 Mass. 575, 46 N. E. 116, holding vendee of land paying tax assured to him by vendor, entitled to right of town to prove tax in insolvency as privileged claim; Staples v. Fox, 45 Miss. 680, holding where sheriff satisfies execution, to avoid suit against himself, he is entitled to be subrogated to rights of judgment creditor; Furnold v. Bank, 44 Mo. 339, holding right extends even to securities given without surety's knowledge; Powell v. White, 11 Leigh, 316, holding surety on bond who satisfies it after principal's death is entitled to rank as specialty creditor of estate; dissenting opinion, Zook v. Clemmer, 44 Ind. 26, majority holding where personal judgment has been obtained against maker of note secured by mortgage, and judgment is replevied, replevin bail after satisfying judgment is not entitled to foreclosure.

Modified in McLean v. Lafayette Bank, 3 McLean, 605, Fed. Cas. 8888, holding that, while surety is entitled to collaterals, he cannot claim assignment of instrument which is evidence of debt.

Distinguished in Patterson v. Pope, 5 Dana, 243, holding note inapplicable to defeat interest acquired by third person previous to undertaking of surety.

Where one of two joint sureties pays principal's debt, he may enter judgment in creditor's name and have execution against his cosurety.

Approved in Jackson v. Davis, 4 Mackey (D. C.), 201, holding where one of two sureties on bond to United States paid debt, he was entitled to be subrogated to claim of United States over other creditors of cosurety; Nelson v. Webster, 72 Neb. 338, 117 Am. St. Rep. 799, 68 L. R. A. (N. S.)

513, 100 N. W. 414, holding surety on note who paid judgment rendered thereon which adjudged him to be surety and took assignment of judgment could levy execution against principal; Reber v. Gundy, 13 Fed. 57, holding that one of two executors paying legacy is entitled to be subrogated to lien against the other, acquired by legatee; Smith v. Rumsey, 33 Mich. 196; Bowen v. Hoskins, 45 Miss. 186, 7 Am. Rep. 729, holding that equity will at instance of one surety set aside conveyance made by cosurety in fraud of execution levied against them jointly; Felton v. Bissell, 25 Minn. 20, holding right of contribution, in case surety pays before debt is due, becomes perfect when debt becomes due; Robertson v. Trigg, 32 Gratt. 86, holding surety paying debt due United States is entitled to United States' right of priority as against insolvent cosurety; German etc. Bank v. Fritz, 68 Wis. 398, 32 N. W. 127, holding payment of debt by one surety does not cancel obligation of others, and court may award execution against them.

Modified in New Bedford Institution etc. v. Hathaway, 134 Mass. 73, 45 Am. Rep. 292, holding surety entitled to prove only one-half of amount paid, as contribution from insolvent cosurety, although by proving all he would receive but one-half.

Rights of surety as against insolvent cosurety. Note, 45 Am. Rep. 296.

Extinction of judgments against principals by sureties' payment. Note, 68 L. R. A. 540, 541, 543, 549, 556, 573.

Surety's right to enforce judgment for his own reimbursement. Note, 16 L. R. A. 117.

Coexecutor's liability for default of one permitted to manage estate. Note, 11 L. R. A. (N. S.) 306.

12 Wheat. 599–603, 6 L. Ed. 741, DE LA CROIX v. CHAMBERLAIN.

Question of disputed boundary, between two nations, is more properly subject for diplomatic discussion and of treaty, than of judicial investigation.

Approved in Barker v. Harvey, 181 U. S. 487, 45 L. Ed. 966, 21 Sup. Ct. 692, Mission Indians claiming right of permanent occupancy of land in California under Mexican grant are within provision of act of Congress March 3, 1851 (9 Stats. at Large, 631, c. 41, § 8), requiring every person in California claiming under Mexican or Spanish grant to present same to commissioners; Ainsa v. New Mexico etc. R. R., 175 U. S. 79, 44 L. Ed. 80, 20 Sup. Ct. 29, holding when no proceedings for confirmation are pending before Congress, a grant of land in New Mexico, complete and perfect before cession of New Mexico to United States, may be asserted against any adverse private claimant in local courts; Crittenden Cattle Co. v. Ainsa, 14 Ariz. 309, 127 Pac. 734, holding Congress could confer on court of private land claims power to determine private rights upon cession of territory to United States; Ainsa v. New Mexico etc. R. R. Co., 4 Ariz. 239, 36 Pac. 214, territorial court cannot recognize unconfirmed Mexican grant

as to which no proceedings are pending before Congress, surveyor-general, nor private land court, as against pre-emption and homestead claims filed under United States laws; Astiazaran v. Santa Rita etc. Co., 148 U. S. 82, 37 L. Ed. 377, 13 Sup. Ct. 457, holding private claim to land in Arizona, under Mexican grant, not contestable in courts until Congress had acted upon report of surveyor-general; Stoneroad v. Stoneroad, 158 U. S. 248, 39 L. Ed. 969, 15 Sup. Ct. 825, is to same effect; Challefoux v. Ducharme, 4 Wis. 562, arguendo.

Mere order of survey of lands made by Spanish authorities at Mobile, in 1806, did not convey complete legal title.

Cited in Strother v. Lucas, 6 Pet. 769, **8 L. Ed. 576**, denying right of elder grantee of Spanish crown to maintain ejectment against junior grantee, his grant not having been confirmed according to act of Congress; and see s. c., 12 Pet. 448, **9 L. Ed. 1152**; Pollard v. Kibbe, 14 Pet. 365, 378, 385, 404, 405, 407, 416, 420, **10 L. Ed. 496, 502, 506, 515, 516, 521, 522**, ruling similarly where Spanish grant not recorded, as required by confirming act; Muse v. Arlington Hotel Co., 68 Fed. 642, where facts were similar to those in principal case; Hallet v. Eslava's Heirs, 3 Stew. & P. 120, holding that certificate of confirmation, issued upon claim under French patent, which was not produced, was not sufficient to warrant recovery in ejectment; Ryder v. Innerarity, 4 Stew. & P. 31, asserting jurisdiction of courts to declare unconfirmed grants invalid; Bullock v. Wilson, 2 Port. 442, but holding duplicate receipt for payment on entry of public lands is, before issue of patent, sufficient evidence to maintain trespass to try title; Abbott v. Kennedy, 5 Ala. 395, a case involving land embraced in same Spanish grant; Rhode Island v. Massachusetts, 12 Pet. 745, 749, **9 L. Ed. 1269, 1270**, Hallett v. Eslava, 2 Stew. 118, Lewis v. Goguette, 3 Stew. & P. 197, arguendo.

Miscellaneous. Referred to in Coffee v. Groover, 123 U. S. 8, 30, 31, **31 L. Ed. 55, 63**, 8 Sup. Ct. 5, 16, 17, as having been erroneously cited in s. c., 20 Fla. 81, to point that grants by de facto government are valid against State having the right.

12 Wheat. 604, 6 L. Ed. 743, DAVIDSON v. TAYLOR.

Bail is fixed by death of principal after return of ca. sa. and before return of scire facias; bail is not entitled to exoneretur.

Cited in United States v. Eldredge, 5 Utah, 195, 14 Pac. 46, holding that if defendant fails to appear, surety cannot show that defendant could have been convicted upon but one of two charges; dissenting opinion in Beers v. Haughton, 9 Pet. 369, 370, **9 L. Ed. 160, 161**, arguendo.

12 Wheat. 605–611, 6 L. Ed. 744, SCOTT v. SHREEVE.

Assignee of bonds given for indemnity of obligee as indorser of notes drawn by obligor takes them subject to equities.

Cited in Shannon v. Marselis, 1 N. J. Eq. 425, applying principle in case of assignment of bond and mortgage.

Equity will relieve against judgment at law bonds for indemnity of obligee as indorser of notes of obligor, where obligee has been indemnified.

Approved in Swamp Land Reclamation Dist. No. 341 v. Blumenberg, 156 Cal. 537, 106 Pac. 391, holding willful refusal of reclamation district, without cause, to pump lands during cropping season was defense to action to foreclose lien of assessment for pumping during that season; Dubreuil v. Gaither, 98 Md. 545, 56 Atl. 966, though in action against receiver of insolvent bank for balance of deposit to credit of one as trustee, receiver not allowed setoff of balance due on note of insolvent partnership, he may seek setoff in suit against partners who are real owners of deposit.

Distinguished and explained in McPhee v. Reclamation Dist. No. 765, 161 Cal. 571, 119 Pac. 1079, judgment foreclosing reclamation district assessment lien may be enjoined where defense exists which cannot be interposed in foreclosure suit.

Equitable jurisdiction as to injunctions against judgments. Note, 32 L. R. A. 324.

Injunction against judgments for defenses existing prior to rendition. Note, 31 L. R. A. 748, 768.

12 Wheat. 611–643, 6 L. Ed. 746, RAMSAY v. ALLEGRE.

Suit in personam against owner of vessel, for supplies in home port cannot be maintained in admiralty, owner having given a note.

Approved in The Underwriter, 119 Fed. 743, 744, holding where charter provided that charterer shall pay for all coal used and that master shall be under orders of charterer, no lien exists for coal supplied in foreign port, across river from home port; Leland v. The Medora, 2 Wood. & M. 97, 100, 101, Fed. Cas. 8237, holding lien for repairs waived by acceptance of bill of exchange and allowing ship to leave port; The Brig Ann C. Pratt, 1 Curt. 348, Fed. Cas. 409, holding lien for repairs waived by taking bottomry bond, and if bond void for fraud, no recovery can be had on implied contract; Reppert v. Robinson, Taney, 495, Fed. Cas. 11,703, holding surrender of note cannot restore admiralty jurisdiction; The Eclipse, 3 Biss. 102, Fed. Cas. 4268, holding, although lien not waived by acceptance of note, it must be tendered at hearing; The Schooner Active, Olc. 288, Fed. Cas. 34, holding surrender of note taken for supplies furnished gives right to proceed in admiralty; Harris v. The Kensington, 11 Fed. Cas. 631, holding lien extinguished by acceptance of note in payment; Marshall v. Bazin, 16 Fed. Cas. 837, entertaining suit in personam to recover passage money, note given as security having been tendered; Moir v. Dubuque, 17 Fed. Cas. 571, to point that claim for repairs is enforceable in admiralty; Fox v. Patton, 22 Fed. 747, denying jurisdiction to enforce personal contract of agents to pay for supplies furnished vessel; Sheafe v. Kimball, 21 Fed.

Cas. 1209, holding where note is surrendered into court, recovery is limited to amount of note; Case v. Woolley, 6 Dana, 23, 32 Am. Dec. 59, and In re The Josephine, 39 N. Y. 27, as having inferentially asserted jurisdiction of admiralty in personam; Boylan v. The Victory, 40 Mo. 253, asserting jurisdiction of State court to enforce contract for supplies furnished; The Sue, 137 Fed. 135, and Bowler v. Eldridge, 18 Conn. 8, both arguendo.

Explained in Andrews v. Wall, 3 How. 573, 11 L. Ed. 731, and held not to be authority for holding that admiralty could not enforce maritime contracts in personam; so also in dissenting opinion in Thomas v. Osborn, 19 How. 38, 15 L. Ed. 541.

Distinguished in The St. Lawrence, 1 Black, 532, 17 L. Ed. 184, where lien for supplies held not waived by acceptance of notes with understanding that lien should continue; The Brig Nestor, 1 Sumn. 86, 87, Fed. Cas. 10,126, holding giving credit for fixed time does not extinguish lien for supplies; Raymond v. The Ellen Stewart, 5 McLean, 270, Fed. Cas. 11,594, and The Napoleon, 7 Biss. 395, Fed. Cas. 10,011, asserting jurisdiction where note tendered in action on lien; The Theodore Perry, 23 Fed. Cas. 912, where mortgage given as security held not to waive lien.

Questioned in Nebraska, 69 Fed. 1013, 34 U. S. App. arguing against necessity for surrender of note taken merely as security.

Admiralty courts have not jurisdiction over actions in personam for enforcement of contracts for supplies.

Cited in New Jersey etc. Co. v. Merchants' Bank, 6 How. 420, 422, 12 L. Ed. 498, 499, arguing against jurisdiction in suit upon contract of carriage; Cunningham v. Hall, 1 Cliff. 55, Fed. Cas. 3481, denying jurisdiction of District Court in suit in personam, upon contract against builder of vessel; Bains v. The James and Catherine, 1 Bald. 547, 549, Fed. Cas. 756, holding account for provisions furnished not within jurisdiction of District Court as offset to libel for seamen's wages; Levering v. Bank of Columbia, 1 Cr. C. C. 209, Fed. Cas. 8287, holding wages of seaman hired to care for vessel in port not lien on vessel; Merritt v. Sackett, 17 Fed. Cas. 141, applying rule of court to same effect; The Centurion, 1 Ware, 479, Fed. Cas. 2554, Haslett v. The Enterprise, 11 Fed. Cas. 785, Lowry v. The E. Benjamin, 15 Fed. Cas. 1051, Marsh v. The Minnie, 16 Fed. Cas. 811, arguendo.

Criticised in Schultz v. Bosman, 5 Hughes, 100, 101, Fed. Cas. 12,488, asserting jurisdiction in such case.

Distinguished in The Stephen Allen, Blatchf. & H. 181, Fed. Cas. 13,361, asserting right of seaman to maintain suit in personam for wages; Drinkwater v. Freight etc. of Brig Spartan, 1 Ware, 152, Fed. Cas. 4085, entertaining libel on charter-party for freight due.

Denied in Edeuer v. Gregs, 3 Fed. 412, upholding admiralty jurisdiction over suit in personam for repairs to domestic vessel.

What contracts will support maritime lien. Note, 70 L. R. A. 399.
Admiralty jurisdiction of contracts. Note, 66 L. R. A. 198.

Admiralty law, as enforced in this country, is the admiralty law of England, as it existed at the time of the Revolution.

Approved in following cases, discussing subject of admiralty jurisdiction generally; United States v. New Bedford Bridge, 1 Wood. & M. 459, 464, 468, 476, 478, 483, Fed. Cas. 15,867; The Wave, Blatchf. & H. 249, Fed. Cas. 17,297; Chase v. American Steamboat Co., 9 R. I. 426, 11 Am. Rep. 276.

Miscellaneous. Cited as instance where court was not unanimous as to whether maritime contract was enforceable in personam, in Proceeds etc. of The Waubashene, 23 Blatchf. 295, 24 Fed. 559; Mutual etc. Ins. Co. v. Cargo of The George, Olc. 97, Fed. Cas. 9981, but not in point; The Fanny, 8 Fed. Cas. 992, following practice in refusing to discuss jurisdiction when not necessary to decision; Steamboat Belfast v. Boon, 41 Ala. 63, as showing conflict of authority upon question of admiralty jurisdiction; Connelly v. The Bee, 40 Mo. 264, to point that admiralty alone can enforce contract for supplies furnished beyond limits of State. Erroneously cited in Claiborne v. Birge, 42 Tex. 102. The separate opinion of Johnson, J., is cited in dissenting opinion in Waring v. Clarke, 5 How. 473, 481, 482, 490, 12 L. Ed. 241, 245, 246, 249, but application not apparent; also in Leland v. Ship Medora, 2 Wood. & M. 114, Fed. Cas. 8237, but without particular application.